THE ALL ENGLAND LAW REPORTS 1997

Volume 4

Editor
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London
BUTTERWORTHS

UNITED KINGDOM	Butterworths a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, **London** WC2A 1EL and 4 Hill Street, **Edinburgh** EH2 3JZ
AUSTRALIA	Butterworths, **Sydney, Melbourne, Brisbane, Adelaide, Perth, Canberra** and **Hobart**
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SINGAPORE	Reed Elsevier (Singapore) Pte Ltd, **Singapore**
SOUTH AFRICA	Butterworths Publishers (Pty) Ltd, **Durban**
USA	Michie, **Charlottesville**, Virginia

ISBN for the complete set of volumes: 0 406 85159 X
for this volume: 0 406 894167

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CITATION

These reports are cited thus:

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The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

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——Rights of custody – Illegitimate child removed from jurisdiction by relatives on mother's death – Father subsequently granted interim care and control of child by English court – Whether retention of child thereafter wrongful

Re S (a minor) (custody: habitual residence) .. .. **HL** **251**

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National Trust for Places of Historic Interest or Natural Beauty v Ashbrook **Lindsay J** **76**

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R v Chief Constable of the North Wales Police, ex p AB .. .. **QBD DC** **691**

PRACTICE – Parties – Second defendant joined as party to proceedings outside three-year limitation period – Master dismissing second defendant's application to be removed from proceedings – Whether judge right in refusing to grant second defendant extension of time for appealing master's decision on grounds of inexcusable delay only

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——Stay of proceedings – Foreign causes of action – Appropriate forum – Relevance of availability of legal aid

Connelly v RTZ Corp plc, Connelly v RTZ Corp plc .. .. **HL** **335**

RENT RESTRICTION – Death of tenant – Whether homosexual partner entitled to succeed to tenancy

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——Rent – Determination of fair rent – Whether rent assessment committee entitled to have regard to registered fair rent comparables in determining a fair rent where close market rent comparables available

Curtis v London Rent Assessment Committee .. .. **CA** **842**

SALE OF GOODS – Payment – Fob contract – Whether buyers entitled to require sellers to present 'freight pre-paid' bills of lading in order to obtain payment

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SHIPPING – Carriage by sea – Damages for breach of contract – Loss of or damage to goods – Limitation of liability – Application of Hague Rules

Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd, The River Gurara .. .. **CA** **498**

SOCIAL SECURITY – Income support – Entitlement – Whether claimant at material time 'student' for purposes of income support

Chief Adjudication Officer v Webber .. .. **CA** **274**

SOLICITOR – Access to – Right of person in custody to have solicitor present during interview

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——Duty – Breach of duty – Solicitors acting for both building society and lender in mortgage transactions

Bristol and West Building Society v Fancy & Jackson (a firm) .. .. .. **Chadwick J** **582**

STATEMENT OF CLAIM – Striking out – Private law action – Public law defence

Trustees of the Dennis Rye Pension Fund v Sheffield City Council .. .. **CA** **747**

TORT – Concurrent tortfeasors – Discharge – Deceased before his death agreeing to accept sum in 'full and final settlement and satisfaction' of personal injury claim – Whether agreement barring dependency claim against concurrent tortfeasor

Jameson and anor (exors of Jameson (decd)) v Central Electricity Generating Board (Babcock Energy Ltd, third party) .. .. **CA** **38**

UNFAIR DISMISSAL – Compensation – Calculation of award – Reduction where employee's conduct or action contributed to dismissal – Whether participation in strike or other industrial action amounting to 'conduct' or 'action' capable of reducing compensation

Tracey v Crosville Wales Ltd .. .. **HL** **449**

House of Lords petitions

This list, which covers the period 1 July to 15 December 1997, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Hunter v Skingley [1997] 3 All ER 568, CA. Leave to appeal refused 24 November 1997 (Lord Lloyd of Berwick, Lord Nolan and Lord Clyde)

R v Rasool [1997] 4 All ER 439, CA. Leave to appeal refused 1 July 1997 (Lord Slynn of Hadley, Lord Steyn and Lord Clyde)

Rosgill Group Ltd v Customs and Excise Comrs [1997] 3 All ER 1012, CA. Leave to appeal refused 15 December 1997 (Lord Slynn of Hadley, Lord Nolan and Lord Hope of Craighead)

State Bank of India v Sood [1997] 1 All ER 169, CA. Leave to appeal refused 19 November 1997 (Lord Slynn of Hadley, Lord Hoffmann and Lord Clyde)

Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1997] 4 All ER 747, CA. Leave to appeal refused 9 December 1997 (Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde)

R v Arnold

COURT OF APPEAL, CRIMINAL DIVISION

POTTER LJ, OWEN J AND JUDGE MARTIN TUCKER QC

21 FEBRUARY, 27 JUNE 1997

Criminal law – Theft – Property belonging to another – Accused expanding business by means of franchising to agents – Agents depositing bills of exchange with accused for 180 days – Agreement that bills would be held as security and after 180-day period presented for payment and proceeds immediately repaid or recredited to agents – Accused discounting bills within 180-day period and agents losing their money – Whether bills of exchange belonging to accused or agents – Whether accused having intention to permanently deprive agents – Theft Act 1968, ss 5(3), 6(1).

The appellant was the sole proprietor of a business, AFF, which supplied sandwiches to shops and garages. In 1993 he decided to expand AFF further by means of franchising to agents. Under the franchise plan, prospective agents were required to deposit with AFF a 180-day 'avalized' bill of exchange (ie one guaranteed by the bank of the agent, the bank's signature rendering it liable on the bill as a primary party), the documents being supplied by AFF. Two such agents each signed and handed over a bill for £5,000 and £8,000 respectively, believing, on the basis of what the appellant had informed them, that the bills would be retained by AFF as security until the 180-day maturity date whereupon they would be presented for payment and the proceeds immediately repaid or recredited to them against their delivery of another such bill. However, on receipt of the completed bills, AFF discounted them in breach of the previous agreement and understanding. As a result, at the end of the 180-day period, AFF did not present or receive the proceeds of the bills and was unable to transfer such proceeds to the agents either against another bill or at all and the agents subsequently lost their money. The appellant was charged with, inter alia, two counts of theft of a valuable security (ie the bills of exchange) contrary to s 1(1)[a] of the Theft Act 1968. At the trial, the recorder directed the jury that it was open to them to find that the bills constituted 'property belonging to another' for the purposes of s 1(1) by virtue of s 5(3)[b] of the 1968 Act. The appellant was convicted and sentenced to eight months' imprisonment on each count concurrent. He appealed against his conviction contending (i) that s 5(3) did not apply where the person receiving the property was throughout the owner of it (which AFF was in relation to the paper constituting the bill), and (ii) that if the agents were the owners of the bills under s 5(3), the recorder should have directed the jury that he lacked the intention of permanently depriving them of the bills because he intended that the bills would be returned to them when they were

a Section 1(1) provides: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ...'

b Section 5(3) is set out at p 5 *h*, post

presented to, and paid by, their respective banks; the fact that by the time of their return they would have lost their value and essential identity as valuable securities was not sufficient to sustain a charge of theft.

Held – (1) Section 5(3) of the 1968 Act covered property received from another under an obligation short of actual trusteeship. Accordingly, provided that the obligation was one which clearly required the recipient to retain and deal with that property or its proceeds in a particular way, there was no good reason to introduce words of limitation in relation to the interest of the transferor, save that at the time of the handing over of the property he had lawful possession of it in circumstances which gave him a legal right vis-à-vis the recipient to require that it be retained or dealt with in a particular way for his benefit. Furthermore, the position was no different where the recipient was throughout the 'true owner', if by agreement (whether made earlier or at the time) he had recognised a legal obligation to retain or deal with the property in the interest and/or for the benefit of the transferor, but subsequently, in knowing breach of that obligation, misappropriated it to his own unfettered use (see p 9 *f* to p 10 *a*, post).

(2) Where a defendant had appropriated a valuable security handed over on the basis of an obligation that he would retain or deal with it for the benefit of the transferor, s 6(1)[c] of the 1968 Act applied if the intention of the transferee at the time of the appropriation was that the document should find its way back to the transferor only after all the benefit to the transferor had been lost or removed as a result of its use in breach of such obligation. Since, in the instant case, the agents were to be regarded as the owners of the bills pursuant to s 5(3), as the appellant had agreed to hold them by way of security to the agents' accounts, it followed that he had intended to treat the bills as his own or to dispose of them regardless of the agents' rights within the meaning of s 6(1), and so had the necessary intention of permanently depriving them of the bills. The appeal would therefore be dismissed (see p 14 *b c* and p 15 *a* to *d*, post); *R v Danger* (1857) 7 Cox CC 303 distinguished.

Notes

For the meaning of property belonging to another and the intention to deprive the owner permanently, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 548–549, and for cases on the subject, see 14(2) *Digest* (2nd reissue) 246–252, 267–268, *7672–7704, 7847–7852*.

For the Theft Act 1968, ss 1, 5, 6, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 489, 493, 494.

Cases referred to in judgment

A-G's Reference (No 1 of 1985) [1986] 2 All ER 219, [1986] QB 491, [1986] 2 WLR 733, CA.

DPP v Huskinson [1988] Crim LR 620, DC.

New London Credit Syndicate Ltd v Neale [1898] 2 QB 487, CA.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R v Cahill [1993] Crim LR 141, CA.

R v Danger (1857) 7 Cox CC 303, CCR.

R v Downes (1983) 77 Cr App R 260, CA.

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c Section 6(1) is set out at p 12 *g h*, post

R v Dubar [1995] 1 All ER 781, [1994] 1 WLR 1484, C-MAC.
R v Duru [1973] 3 All ER 715, [1974] 1 WLR 2, CA.
R v Fernandes [1996] 1 Cr App R 175, CA.
R v Ghosh [1982] 2 All ER 689, [1982] QB 1053, [1982] 3 WLR 110, CA.
R v Governor of Brixton Prison, ex p Stallmann [1912] 3 KB 424, [1911–13] All ER Rep 385, DC.
R v Grubb (1915) 11 Cr App R 153, [1914–15] All ER Rep 667, CCA.
R v Hall [1972] 2 All ER 1009, [1973] QB 126, [1972] 3 WLR 381, CA.
R v Lloyd, R v Bhuee, R v Ali (1985) 81 Cr App R 182, CA.
R v Mainwaring, R v Madders (1981) 74 Cr App R 99, CA.
R v Preddy, R v Slade, R v Dhillon [1996] 3 All ER 481, [1996] AC 815, [1996] 3 WLR 255, HL.
R v Smith [1924] 2 KB 194, CA.
R v Warner (1970) 55 Cr App R 93, CA.
Wakeman v Farrar [1974] Crim LR 136, DC.

Cases also cited or referred to in skeleton arguments

Heilbut Symons & Co v Buckleton [1913] AC 30, [1911–13] All ER Rep 83, HL.
Maillard v Page (1870) LR 5 Exch 312.
New London Credit Syndicate Ltd v Neale [1898] 2 QB 487, CA.
R v Brewster (1979) 69 Cr App R 375, CA.
R v Hayes (1976) 64 Cr App R 82, CA.
R v McHugh (1993) 97 Cr App R 335, CA.
R v Robertson [1977] Crim LR 629.
R v Wain [1995] 2 Cr App R 660, CA.
R v Wills (1990) 92 Cr App R 297, CA.

Appeal against conviction and sentence

The appellant, Lyndon Ewart Arnold, appealed with leave against conviction and sentence in the Crown Court at Truro before Mr Recorder Dunkels QC and a jury on 24 May 1996 on two counts of theft of a valuable security, namely two bills of exchange for £5,000 and £8,000 respectively. He was sentenced to concurrent terms of eight months' imprisonment. The facts are set out in the judgment of the court.

Michael Cousens (assigned by the *Registrar of Criminal Appeals*) for the appellant.
Brian Lett (instructed by the *Crown Prosecution Service*, Truro) for the Crown.

Cur adv vult

27 June 1997. The following judgment of the court was delivered.

POTTER LJ. On 24 May 1996 in the Crown Court at Truro before Mr Recorder Dunkels QC and a jury, the appellant, Lyndon Ewart Arnold, was convicted following a retrial on indictment of two counts (1 and 5) each alleging theft of a valuable security, namely a bill of exchange, for £5,000 and £8,000 respectively. He was acquitted on count 2, which alleged theft of a further bill and count 3 was left on the file on the usual terms. A not guilty verdict was entered on count 4, which had charged an obtaining of property by a deception.

The appellant was indicted on counts 1–4 with a co-defendant, Stephen Williams, who had pleaded guilty to those counts.

On 2 July 1996 the appellant was sentenced to eight months' imprisonment on each of counts 1 and 5 concurrent.

He appeals against conviction and sentence by leave of the single judge.

The appellant was the sole proprietor of Arnold's Fresh Foods (AFF), a business which supplied sandwiches to shops and garages. By October 1993 the turnover of the business was almost £1m. It was undercapitalised and under pressure from its bankers. In 1993 the appellant took on Stephen Williams as a self-employed consultant. It was decided between them to expand the business further by means of franchising to agents. Under the franchise plan, the prospective agents would be required to deposit with AFF a six month 'avalized' bill of exchange (ie one guaranteed by the bank of the agent, the bank's signature rendering it liable on the bill as a primary party) to the value of £5,000. Two agents, Mr Jones and Mr Humphreys, gave evidence that they each signed and handed over a 180-day bill in the sum of £5,000 and £8,000 respectively, on the terms of a letter (in the case of Mr Jones signed by the appellant) describing the obligations of the parties in relation to the security afforded by the bills, the effect of which was later confirmed to them by the appellant when they asked questions about it.

The relevant terms of the letter were as follows:

> 'Re: Bank Guarantee An "Avalised" bill of exchange is required ... due to the size of investment made by Arnold's ... in respect to launching the successful applicant ... and to protect Arnold's from any fraudulent activity that may result in a financial loss. Due to the low value of the bank guarantee requested by Arnold's "£5,000" the maximum maturity date allowed by the main clearing banks is 180 days from issue. Therefore the bill of exchange will have to be rolled every 6 months or 180 days from issue. Should the Agent breach any of the terms and conditions of the Agency agreement then he/she will automatically forfeit the said bank guarantee. The bank guarantee will always be held in place by Arnold's as security against their sizeable collateral investment in launching the Agent in starting his business free of charge ... When the bill of exchange matures the funds will be transferred to Arnold's and will immediately be transferred back to the client on receipt, subject to receiving a renewel [sic] of the said bank guarantee.'

Mr Jones' and Mr Humphreys' evidence was to the effect that, on the basis of what they were informed by the appellant, they understood and intended that the bills would be retained by AFF as security until the 180-day maturity date, when they would be presented for payment and the proceeds immediately repaid or recredited to the agent against his delivery of another such bill.

The process by which the bills of exchange were created appears to have been as follows.

In negotiating the agency, a good deal of documentation was supplied by AFF to the agents, including pro forma bills which, once agreement had been reached, would be required to be completed. On the pro forma bills, AFF was shown as drawer in the sum of the amount of the proposed security payable to the order of AFF, on a date 180 days after the date of the bill, at the bank of the agents. The agent was shown as the drawee and acceptor with a space for his signature in that capacity. The name of the agent's bank was also inserted 'Pour Aval' for the account of the drawee/acceptor. Once the agreement was completed, AFF sent to each of the agents a form of bill typed in accordance with the pro forma under

the letterhead of AFF and signed for AFF as drawer, with a request to the agent to sign it as drawee and acceptor, and to procure the signature of the agent's bank by way of Aval and to return it to AFF. This was duly done by each agent.

Following receipt of the completed bills, AFF, in breach of the previous agreement and understanding that it would hold the bills only as security for the 180-day period prior to presentation at the agent's bank, discounted them pursuant to arrangements with a discount house already made for the purpose of financing AFF's business to ease its cash flow difficulties. As a result, at the end of the 180-day period, AFF did not itself present or receive the proceeds of the bills and was unable to transfer such proceeds to the agents either against another bill or at all. Instead the factors, as holders in due course, duly presented the bills without obligation of any kind to reimburse the agents, who lost their money.

When giving evidence, the appellant disputed that the agents had been told that the bills were a form of security. However, he agreed at interview that the agents were never told the bills would be discounted. It is plain that the jury were satisfied that, at the time of discounting, the appellant was well aware that it was done contrary to the arrangement contained in the letter quoted above and the confirmation of that arrangement which the agents said they had received orally. It is clear also that the jury rejected the appellant's assertion that he believed that, in any event, he was entitled to discount the bills at the time he did so. However, the argument in this case has not principally turned on the question of whether or not the appellant acted honestly, assuming the other ingredients of the charge of theft are established, but whether or not the circumstances of the case justify a charge of theft at all.

At the close of the prosecution case, counsel for the appellant submitted that there was no case to answer on counts 1 and 5 because the owner of each of the bills was at all material times AFF. He pointed out that the form of the bill was created by AFF and sent to the agents on a piece of AFF's own writing paper for the specific purpose of the agents adding their signature, procuring the signature of their banks and returning the completed bills to AFF. In those circumstances, it was submitted that the basic definition of theft in s 1(1) of the Theft Act 1968, which requires appropriation of 'property belonging to another', was not fulfilled because the piece of paper which was the bill remained the property of AFF throughout, the agent merely having temporary possession of it for the limited purpose of dealing with it as previously arranged. The recorder ruled against that submission on the basis that it was open to the jury to find that the terms of s 5(3) of the 1968 Act were satisfied.

Section 5(3) provides:

> 'Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.'

In making his ruling, the recorder said:

> '... in my judgment there is no precondition of ownership by the person who delivers the property. For there to be theft, assuming that all other ingredients of the offence are satisfied, the property concerned has to belong to another, and s 5(3) determines in this situation whether the property belongs to another as between the deliverer and the recipient of the property, if the circumstances give rise to an obligation to retain or deal with

that property in a particular way. And, in my judgment, here there is evidence from which a jury could conclude that each of the bills of exchange belonged to the acceptor when they returned them to Arnold's, having signed them and had them avalized by their bank. That is, belong, in the sense defined in s 5 of the Act.'

In dealing with the ingredients of the charge of theft for the purposes of the indictment, the recorder directed the jury in accordance with that ruling. Ground (a) of the grounds of appeal avers that he was wrong to do so.

Counsel also submitted to the recorder that, even if the defendant could be guilty of theft on the basis of the recorder's ruling, the agents' 'extrinsic evidence' (as counsel put it) as to AFF's obligation not to negotiate the bill within the 180-day period was inadmissible and the jury should be directed to ignore it. Counsel relied on the rule that the negotiable nature of a bill of exchange cannot be lost by reference to outside circumstances where no limitation or qualification appears on the face of the bill. He submitted, on the basis of *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, that the bills spoke for themselves and, without an indorsement restricting their use, were negotiable instruments which the drawer was entitled to use as he wished. That submission has been repeated as ground (b) of the grounds of appeal.

Suffice it to say, such a submission seems to us, as it seemed to the recorder, misconceived. The rule of civil evidence that no oral evidence is admissible to contradict, vary, or subtract from an agreement in writing does not affect the question of whether negotiation, as opposed to retention, by the drawer of a bill of exchange amounts to breach of some parallel contractual or fiduciary obligation between himself and the drawer as to how the bills would be dealt with. In any event, as between immediate parties, delivery of a bill may be shown to be conditional (see s 21(2) of Bills of Exchange Act 1881). We say no more on that aspect.

There are additional grounds of appeal as follows: (c) that the recorder misdirected the jury by stating in the course of his summing up that there was no dispute that the bills of exchange had been appropriated at the time they were discounted; (d) that the recorder misdirected the jury in failing to give the defence an opportunity to address the jury on the particular basis of dishonesty which he left to them in the summing up; (e) that the recorder misdirected the jury when he directed them that the bill would be kept so that it was available to provide funds at the end of six months to repay the agent; (f) the recorder misdirected the jury by failing to deal adequately and fairly with the overall state of the business at the time it was alleged that the appropriations had taken place.

In the course of argument during the appeal a further ground was raised, which we permitted to be argued, namely: (g) that the recorder was wrong in failing to treat separately the requirement that the defendant must be shown both to have acted 'dishonestly' and that he must have had 'the intention of permanently depriving' the agents of the bills (see s 1 of the 1968 Act). Had he done so, it is submitted that the jury would have held, or been likely to hold, that no such intention existed.

We turn to those grounds of appeal in order.

As developed before us, the arguments of Mr Cousens, for the appellant, have been as follows:(a) He concedes that, taken simply at face value, the words of s 5(3) are apt to cover any situation where a person, A, has received property (in the sense of a physical transfer of its possession or custody) from B, under an

accompanying obligation to B to retain and deal with it or its proceeds in a particular way. However, he submits that its wording cannot have been intended, and should not be interpreted, to include a situation where A is throughout the owner of the property concerned, which has only temporarily been in B's possession, being returned in circumstances where B acquires and/or retains no proprietary right to it whilst in his hands. It is Mr Cousens' submission that a mere contractual obligation that A will retain or otherwise deal with his own property in a particular way for the benefit of B is insufficient to ground a charge of theft.

For this proposition, he relies on a number of authorities which are not directly in point, but which he suggests give more than a fair wind to his argument. That argument is to the following effect.

Mr Cousens submits that, in the context of the history and development of the law of theft, the operation of s 5(3) of the 1968 Act is limited, or intended to be limited, to situations which had previously been the subject of piecemeal addition to the corpus of law prior to the passing of the 1968 Act. Such additions were aimed at rendering criminal dishonest appropriations for their own benefit by persons, such as agents, brokers and solicitors, frequently entrusted with the money or other property of clients on terms that it would be applied or dealt with in a particular manner. Since, in the nineteenth century, the common law of theft was essentially an offence against possession (the physical asportation of an item of moveable property), it did not recognise equitable interests as the proper subject matter of theft. Thus it was necessary, by a combination of judicial development in certain cases and statutory intervention in others, to extend the law to cover misappropriations by various classes of fiduciary. The history of this development is helpfully and succinctly summarised in an article by Sir John Smith 'Obtaining cheques by deception or theft' [1997] Crim LR 396 at 397–398.

Against this background, Mr Cousens submits that the wording of s 5, including sub-s (3), should be read as no more than a codification of the previous law designed to rationalise by restatement the previous case law and statutory provisions as to what, for the purposes of the law of theft, should be regarded as 'property belonging to another', and not to extend the law beyond its previous confines.

In support of that submission he has relied on a number of argumentative and speculative passages by distinguished academic writers in textbooks and journals as to the intended ambit of s 5(3), as well as a number of dicta in decided cases which do not purport to be definitive but which, in the context of various situations under examination, refer back to the previous law in terms which Mr Cousens argues show a restrictive approach. By way of example, he referred us to *A-G's Reference (No 1 of 1985)* [1986] 2 All ER 219, [1986] QB 491. In that case, the court considered the position of the employee of a publican receiving money from customers for goods which he had himself secretly obtained and sold to them for his own profit from his employer's premises. The question was whether the moneys were received subject to a constructive trust in favour of the employer and, if so, whether the constructive trust gave the employer a proprietary right or interest in the secret profit within the ambit of s 5(1) of the 1968 Act.

It was held that any argument based on s 5(3) was misconceived because it could not be said that the moneys received were ever received 'on account of the employer', whose remedy was for no more than the secret profit made by the

employee from his unauthorised venture. In the course of his judgment, Lord Lane CJ said ([1986] 2 All ER 219 at 222, [1986] QB 491 at 501): a

> 'It seems to us that s 5(3) was designed to replace the old provisions relating to larceny by a servant and embezzlement by the simpler and all embracing words of s 5(3), namely "who receives property from or on account of another ..." Section 17 of the 1916 Act was in almost identical terms to s 68 of the Larceny Act 1861.' b

In relation to the argument based on s 5(1), it was held that if (which the court did not accept) the duty to account for the secret profit gave rise to a trust properly so-called, it was not such a trust as fell within the ambit of s 5(1), the position being 'so far from the understanding of ordinary people as to what constitutes stealing [that] it should not amount to stealing'. Mr Cousens recognises that the passage which describes larceny by a servant and embezzlement as covered by the 'all embracing words' of s 5(3) was not intended to be definitive of their ambit. Indeed, it is part of his submission (as we accept) that the subsection is plainly designed also to include the ground covered by s 20(iv) of the Larceny Act 1916 and its predecessor, s 1 of the Larceny Act 1901 (see e g *R v Grubb* (1915) 11 Cr App R 153, [1914–15] All ER Rep 667 and *R v Smith* [1924] 2 KB 194. See also the report of the Criminal Law Revision Committee on *Theft and Related Offences* (Cmnd 2977 (1966)) para 35). c d

Mr Cousens also relies on observations in *Blackstone's Criminal Practice* (6th edn, 1996) at B4.21 to the effect that it is doubtful whether, in view of the substantial overlap between s 1 and s 5(3), the latter was a necessary provision, because the 'owner' of property who hands it over will usually have retained an equitable interest which is a proprietary interest sufficient to satisfy the requirement in s 5(1) that the property belongs to another. e

Mr Cousens has referred us also to the statement in the report (p 127): f

> '*Subsection (3)* provides for the special case where property is transferred to a person to retain and deal with for a particular purpose and he misapplies it or its proceeds. An example would be the treasurer of a holiday fund. The person in question is in law the owner of the property; but the subsection treats the property, as against him, as belonging to the persons to whom he owes the duty to retain and deal with the property as agreed. He will therefore be guilty of stealing from them if he misapplies the property or its proceeds.' g

He has also sought to rely on the principle stated in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 in order to refer us to a passage in 289 HL Official Report (5th series) cols 211–223 at cols 212–213 in which Lord Stonham, the minister presenting the Bill to the House of Lords, stated that the structure of the Bill was 'in all essentials the draft Bill which the Criminal Law Revision Committee annexed to their Report'. Assuming (which in our view is not the case) that the wording of s 5(3) of the 1968 Act is ambiguous or obscure or that its literal meaning would tend to obscurity, we do not consider that the observations and introductory comments of Lord Stonham, which were made in the most general terms and include no specific reference to s 5(3), are of substantial assistance in this case. We note in passing that Lord Stonham also said (col 215): h j

> 'The idea of dishonest appropriation, which underlies the new offence of theft, corresponds to the idea of "fraudulent conversion" in s 20 of the

> Larceny Act 1916 ... It is as if fraudulent conversion were widened to include the whole of larceny and embezzlement under the umbrella of theft; *but the new offence will also include as theft conduct which may not be criminal under the present law ...*' (Our emphasis.)

Similarly, we do not think that the short passage we have quoted from the report is in terms which assist on the question of whether or not the person to whom the obligation is owed must be a person who, immediately prior to the transfer, himself had a proprietary interest in the property transferred.

Finally, we reject Mr Cousens' submission that the 1968 Act was intended or should be construed as a codifying statute. Indeed its long title and radically restated text suggest the reverse. The former commences: 'An Act to revise the Law of England and Wales as to theft and similar or associated offences'.

So far as concerns the question of overlap between the provisions of s 5(3) and other parts of s 5, (particularly sub-s (1)), there is no doubt that such overlap exists to a very substantial extent. None the less, it seems to us clear that the structure of s 5 is essentially intended to be cumulative in effect. In this respect we have found assistance from the commentary on s 5 contained in Parry *Offences against Property* (1989) paras 1.21–1.40. In broad terms, the structure of s 5 is as follows.

Section 5(1) provides for the most obvious example of property belonging to another, namely property in which that other has a proprietary interest. It is plain from the wording that an equitable proprietary interest will suffice, so that beneficiaries of a trust, properly so-called, are protected, albeit the question of whether particular property is indeed the subject of such a trust may not be straightforward (see *A-G's Reference (No 1 of 1985)*). Section 5(1) also provides that 'property shall be regarded as belonging to any person having possession or control of it' thereby confirming much of the old basis of the law of theft.

Section 5(2) specifically makes provision in respect of property subject to a trust. It largely overlaps with s 5(1), but is also apt to cover the position of a charitable trust without identifiable beneficiaries.

Section 5(3) is in terms which cover property received from another under an obligation short of actual trusteeship. If it were not intended to go wider than what has gone before, its provisions would be otiose. As previously indicated, it is apparently intended to cover the former offences of embezzlement, larceny by a servant and fraudulent conversion, but there seems to us no good reason so to limit it in the light of the clear and widely framed terms of the subsection.

So far as its limits are concerned, it is of course well-established that the obligation of the recipient must be a legal as opposed to a moral or social obligation (see *R v Hall* [1972] 2 All ER 1009, [1973] QB 126, *Wakeman v Farrar* [1974] Crim LR 136 and *DPP v Huskinson* [1988] Crim LR 620). However, provided the obligation is one which clearly requires the recipient of the property to retain and deal with that property or its proceeds in a particular way for the benefit of the transferor, we see no good reason to introduce words of limitation in relation to the interest of the transferor, save that at the time of handing over the property to the recipient he should lawfully be in possession of it in circumstances which give him a legal right vis-à-vis the recipient to require that the property be retained or dealt with in a particular way for the benefit of the transferor.

Nor do we consider that the position must be different where the recipient is throughout the 'true owner' if by agreement (whether made earlier or at the time) he recognises a legal obligation to retain or deal with the property in the

interest and/or for the benefit of the transferor, but subsequently, in knowing breach of that obligation, misappropriates it to his own unfettered use. That is particularly so in a case such as this, where the value and, indeed, the very character of the property as a 'valuable security' derives from an act of the transferor performed in consideration of the obligation recognised by the owner.

Given: (1) that the law of theft has long recognised that the true owner may steal his own property in circumstances where the person from whom he steals it has a right to its immediate possession; (2) the continuing development of the law of theft away from its restrictive ambit as an offence against possession; and (3) the statutory intention of the 1968 Act to revise and clarify the law of theft, it does not seem to us that it is either right or desirable to do other than take and apply the words of s 5(3) as they stand. We therefore reject the criticism made of the recorder's ruling.

We would only add by way of postscript under ground (a) that, in so far as the words quoted from the recorder's ruling may suggest that the question of whether or not, following completion and return to AFF, the bills 'belonged' to the agents for the purpose of s 5(3) was a jury matter, they are misleading. The functions of judge and jury with regard to s 5(3) have been explained by this court in *R v Mainwaring, R v Madders* (1981) 74 Cr App R 99 at 107 (approved in *R v Dubar* [1995] 1 All ER 781, [1994] 1 WLR 1484):

> 'Whether or not an obligation arises is a matter of law, because an obligation must be a legal obligation. But a legal obligation arises only in certain circumstances, and in many cases the circumstances cannot be known until the facts have been established. It is for the jury, not the judge, to establish the facts, if they are in dispute. What, in our judgment, a judge ought to do is this: If the facts relied upon by the prosecution are in dispute he should direct the jury to make their findings on the facts, and then say to them: "if you find the facts to be such-and-such, then I direct you as matter of law that a legal obligation arose to which s 5(3) applies."'

In fact, when it came to his summing up, the recorder dealt with the issues faithfully in accordance with *R v Mainwaring*.

Ground (c)

When directing the jury on the ingredients of the offence, having dealt correctly with the question of whether or not, (according to their findings of fact) the bills of exchange could properly be said to belong to the agents, the recorder said:

> 'I now move on to deal briefly with the two elements of theft that are not in dispute. "Appropriation" of that property—in other words, the taking of it. If you find that the bill of exchange belongs to the agent in the way I have described, then it was an appropriation or taking of it by the defendant to discount it or sell it. It was given to the person to whom it is sold and that amounts to an appropriation or taking of it as against the agent, if you find it belongs to the agent.'

Objection is taken by Mr Cousens that, in directing the jury that there was no dispute about the question of appropriation, the recorder was in error. We do not accept that objection. It disregards the context of the recorder's remarks, namely his exposition of the legal ingredients of the offence. At that stage, he was not dealing with appropriation in the sense of whether or not such appropriation

was wrongful; later in his summing up when dealing with 'dishonesty' and the effect of the evidence overall, he made quite clear that it was the case of the appellant that he considered the bills to be his own property, to deal with as he pleased. In the passage above quoted, the recorder was referring to whether or not there was any dispute that, if the bill was, under s 5(3), to be regarded as belonging to the agent under the agreement as to security, the discounting of it by the appellant amounted to an appropriation vis-à-vis the agent. That was a matter of law, on which there had been no dispute in the recorder's discussions with counsel.

None the less, whatever the position in that respect, the direction of the recorder was right as a matter of law. 'Appropriation' in this context means use by the defendant as his own and for his own purposes in circumstances where, at the time of appropriation, the property properly 'belongs' to another for the purposes of s 5(3). There is therefore nothing in this ground of appeal.

Ground (d)

In relation to the question of dishonesty, the recorder first gave to the jury a classic direction in the terms of *R v Ghosh* [1982] 2 All ER 689, [1982] QB 1053. He went on:

> 'The defendant has said that he believed he had the right to sell the bills of exchange. I direct you, as a matter of law, if he had that belief or may have had that belief that he had the right to sell them, then even if he was mistaken in it, then he was not acting dishonestly, and so would not be guilty of theft. Now, in deciding the issue of dishonesty you consider all the evidence in the case. For example, what you find the defendant said to the agents. The relevance of what he may have said or what may have gone unsaid about the state of the business. What you find to have been the defendant's intention with the money from the bills of exchange—all the evidence. It was suggested by Mr Cousens, on behalf of the defendant, that the prosecution would have to prove that when the defendant discounted the bills of exchange and put the proceeds into the business bank account the business was in irreversible terminal decline and that the prosecution would have to prove that before you could find that the defendant was acting dishonestly. But, as I have said, dishonesty is for you and you may wish to consider whether it would be dishonest if, having led an agent to believe that the bill of exchange would be kept so that it is available to provide funds at the end of six months to repay the agent, then straight away sell it and put the proceeds into an overdrawn account that is at or beyond its permitted limit, in order to help meet cheques that are otherwise not being met by the bank? These are all questions for you to decide.'

Under this head, the recorder is criticised for failing to give the defence an opportunity to address the jury on the particular basis of dishonesty which he left to them; however, little was said on the appeal to support such criticism. Since it is plain that the question of discounting in the face of the alleged agreement to retain the bills as security was the foundation of the prosecution case, it is difficult to see how it could be said that the defence had no opportunity to address the jury about it. Whether or not that is so, we consider that the direction on the question of honesty, in the context of the real issues, as clearly raised and explored in the evidence, was unimpeachable.

Ground (e)

It is complained it was a misdirection for the recorder, in the passage above quoted, to speak of the defendant leading an agent to believe that the bill would be kept, so that it was available to provide funds at the end of six months to repay the agent. However, the recorder was dealing with the issue of dishonesty in the context of the manner in which the prosecution case was put. Bearing in mind the passage from the letter to agents recited at the outset of this judgment (supported by the evidence of Mr Jones and Mr Humphreys), the summing up does not merit any such complaint.

Ground (f)

The criticism that the recorder dealt inadequately with the overall state of AFF's business at the time the alleged appropriations took place was but lightly pursued on the appeal. That evidence came principally from the appellant. However his bank manager also gave evidence and there was substantial documentation available as to the state of the bank accounts and the running position of AFF with the debt factors to whom the appellant had turned. We have been told of nothing to show that the evidence was other than fairly summarised by the recorder in his summing up. Further, it is apparent that Mr Cousens, on the day before, had ample opportunity (which he had exercised) to address the jury on the various documents and to make his submissions as to the state of the business and the knowledge and honesty of the appellant. There is nothing in this ground of appeal.

Ground (g)

The reason why the judge failed to treat the requirement that the appellant must be shown to have had the intention of permanently depriving the agents of the bills separately from the requirement that the defendant must be shown to have acted 'dishonestly', was because it had been expressly conceded that there was no separate issue as to the intention permanently to deprive. It seems clear that, at trial, Mr Cousens accepted that, if the agents had sufficient interest in the bills to be regarded as their owner for the purposes of the indictment, then there was certainly an intention permanently to deprive them of the bills in the sense defined in s 6(1) of the 1968 Act, which provides:

> 'A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights ...'

Mr Cousens said as follows in the course of submissions to the recorder prior to his summing up:

> 'In a sense, on the defendant's own evidence, he intended to permanently deprive the agents of the bill of exchange as soon as he took possession of it. There was no suggestion that he was going to return that bill at any stage ... As far as the jury are concerned in deciding whether or not there was an intention permanently to deprive they could, in effect, be directed that there is no issue about that but ... in this sort of case the intention permanently to deprive is so closely linked up with the issue of dishonesty that I was proposing to say to the jury that in considering whether or not the defendant

was dishonest they are entitled to look at the reality of the situation which is the £5,000 rather than the actual bill itself.'

The following exchange then took place:

> 'The Recorder. Well I was indeed proposing to say to the jury that there did not appear to be an issue over appropriation at the point of sale, and an intention to permanently deprive the owner, if they find that the owner, in the terms of the Theft Act was still the agent at that time. Dishonesty—there are all sorts of points that can be relied on ... But that does not detract from the fact that intention to permanently deprive is not really in issue? *Mr Cousens.* Well I do not think it is, on the evidence ...
>
> *The Recorder.* ... What this case is about is, who owned that piece of paper at the time it was sold, within the terms of the Theft Act, and whether Mr Arnold was dishonest in what he did ... What the intentions by people may have been in relation to where the money ended up, clearly, is relevant to the question of dishonesty. *Mr Cousens.* Yes, well I am grateful, that is really for my purposes all I need, thank you.'

On this appeal, Mr Cousens has sought to reopen the matter on the basis of an argument which he accepts has been triggered by the recent decision of the House of Lords in *R v Preddy, R v Slade, R v Dhillon* [1996] 3 All ER 481, [1996] AC 815 in which it overruled *R v Duru* [1973] 3 All ER 715, [1974] 1 WLR 2 and approved the long overlooked case of *R v Danger* (1857) 7 Cox CC 303. In *R v Danger* the defendant was charged with obtaining a valuable security by false pretences, having produced to his victim a bill of exchange signed by himself as drawer and payable to himself and, by a false pretence, having induced the victim to sign the bill as acceptor. The court held that, in order to be the subject of a charge of obtaining the property (namely a valuable security) by false pretences, the property obtained must be that of someone other than the defendant. As the victim had no property in the document and the chose in action belonged to the defendant, there was no intention permanently to deprive the owner of anything. (The decision in *R v Danger* had not been cited in *R v Duru*).

Under this ground of appeal, Mr Cousens abandons his argument that, for the purposes of the law of theft AFF/the appellant was throughout the owner of the bill and therefore could not steal its/his own property and accepts the position that under s 5(3), at the time of appropriation, the agents were owners of the bills. On that basis, he submits, the recorder should have ruled and directed the jury that the appellant lacked the intention permanently to deprive the owners of the bills because he was content (and should be taken as having intended) that the bills would be returned to, or to the account of, the agents when they were presented to, and paid by, their respective banks. Mr Cousens submits that it is not sufficient to sustain the charge of theft that, by the time of the return of the bills to the agents, they would have lost their value and essential identity as valuable securities, because those are intangible qualities relating to their value as choses in action in respect of which the agents enjoyed no rights, such rights being in AFF as drawer and/or in any subsequent holders in due course, following negotiation of the bills.

Despite the ingenuity of the argument, it does not seem to us that the effect of the decisions in *R v Danger* or *R v Preddy* is such as to render invalid the direction of the recorder or the conviction of the appellant on the particular facts of this case. The decision in *R v Danger* turned on the fact that the bill was at all times

the property of the defendant and that all he obtained was the signature of the victim who acquired no right, retained no interest, and enjoyed no protection in respect of the bill of a kind recognised by the law of theft. However, at the time of that decision, there was no equivalent to s 5(3) of the 1968 Act; nor, on the facts, was there any bargain between the parties limiting the use or purpose to which the defendant could put the bill of exchange. In this case, as we have already held above, as between the appellant and the agents who were his victims, the latter were to be regarded as the owners of the bills pursuant to s 5(3), on the basis that the appellant had agreed to hold them by way of security to the account of the agents, a position not considered in *R v Preddy*.

On that basis the appellant, at the time of his appropriation of the bills, plainly intended in the words of s 6(1) 'to treat the [bills] as his own or to dispose of [them] regardless of the [agents'] rights'.

Mr Cousens has again sought to avoid the application of those words to the position of the appellant by reliance on various published criticisms of the form of s 6(1); see for instance J R Spencer 'The Metamorphosis of section 6 of the Theft Act' [1977] Crim LR 653 and the commentary of Sir John Smith on *R v Cahill* [1993] Crim LR 141 at 142–143. See also the remarks of Edmund Davies LJ in *R v Warner* (1970) 55 Cr App R 93 at 97 to the effect that it is a misconception to interpret s 6 as watering down s 1 of the 1968 Act. Again, also, Mr Cousens has sought to refer us to various passages in *Hansard* in which Lord Stonham spoke to the intention behind the use of the words 'permanently' in cl 1(1) of the Theft Bill and its relationship with the proposed cl 6. Again, we are unable to derive useful assistance from those references.

It seems to us clear that the approach in *Warner*'s case referred to above has not always been strictly followed since by this court. In *R v Downes* (1983) 77 Cr App R 260 it was held that the defendant committed theft when he sold vouchers which belonged to the Inland Revenue and were made out in his name to third parties in circumstances in which he knew that they would be submitted, and thereby returned, to the revenue so as to obtain tax advantages. The court held (at 266) that the wording of the first part of s 6(1) 'seems quite literally and clearly to cover the admitted facts of the present case'.

Further, although in *R v Lloyd, R v Bhuee, R v Ali* (1985) 81 Cr App R 182 at 188 Lord Lane CJ observed:

> 'Bearing in mind the observations of Edmund Davies L.J. in WARNER ((1970) 55 Cr App R 93), we would try to interpret the section in such a way as to ensure that nothing is construed as an intention permanently to deprive which would not prior to the 1968 Act have been so construed ...'

in *R v Fernandes* [1996] 1 Cr App R 175 at 188, when reviewing, inter alia, the dicta in *R v Warner* and *R v Lloyd*, Auld LJ observed:

> 'In our view, section 6(1), which is expressed in general terms, is not limited in its application to the illustrations given by Lord Lane C.J. in *Lloyd* ((1985) 81 Cr App R 182). Nor, in saying that in most cases it would be unnecessary to refer to the provision, did Lord Lane suggest that it should be so limited. The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights". The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion.'

a It seems to us that, in a case where a defendant has appropriated a valuable security handed over on the basis of an obligation that he will retain or deal with it for the benefit or to the account of the transferor, there is good reason for the application of s 6(1) if the intention of the transferee at the time of the appropriation is that the document should find its way back to the transferor only after all benefit to the transferor has been lost or removed as a result of its use in b breach of such obligation.

It also seems to us, in such a case, that there is good reason for restricting the effect of *R v Danger* to factual situations in which the application of its logic is unavoidable (see the comment on it by Phillimore J in *R v Governor of Brixton Prison, ex p Stallmann* [1912] 3 KB 424, [1911–13] All ER Rep 385 and the discussion by Sir John Smith at [1997] Crim LR 403–404), just as there is good reason, where c the factual situation permits, to give effect to the rationale behind *R v Duru* that the 'substance' of a cheque or valuable security lies in the right to present it and obtain the benefit of its proceeds, rather than in its character as a mere piece of paper with a message on it.

Accordingly, ground (g) also fails.

d The appeal is dismissed.

Appeal dismissed.

N P Metcalfe Esq Barrister.

Mainwaring and another v Goldtech Investments Ltd (No 2)

CHANCERY DIVISION
ROBERT WALKER J SITTING WITH TAXING MASTER ELLIS AND MR ANTHONY COWEN AS ASSESSORS
3 FEBRUARY, 26 MARCH 1997

Costs – Taxation – Review of taxation – Co-defendants jointly and severally liable for order of costs when taxed – Bills of costs not served on one defendant and taxation proceedings continuing in his absence for over three years – Whether taxing master entitled to make order intended to have rerun of taxation – RSC Ord 62, r 30(5).

The plaintiffs, who were litigants in person and shared the same address, commenced proceedings against the defendant claiming unpaid salary and expenses. In 1989, in the course of the proceedings, two orders for costs were made against the plaintiffs jointly and severally. On 30 May 1990 the defendant sought to initiate taxation proceedings pursuant to RSC Ord 62, r 30(3)[a] and served copies of the bills of costs on the first plaintiff. On 18 September 1992, on an application by the defendant for taxation certificates against the second plaintiff, the Chief Taxing Master held that the defendant had failed to comply with the requirements of r 30(3) as copies of the bills had not been served on the plaintiff. Nevertheless, on 6 September 1994 the defendant obtained the certificates, signed on behalf of the Chief Taxing Master, and on 9 September 1994 served them on the second plaintiff. On 11 March 1996 the second plaintiff issued and served a summons for disallowance of all the costs and on 29 March the defendant sent him copies of the bills, as taxed. On 23 May the Chief Taxing Master in the exercise of his discretion under Ord 62, r 30(5)[b] ordered: (i) that copies of the bills sent to the second plaintiff on 29 March 1996 should stand as good service as of 23 May 1996 and (ii) that a sum equivalent to the interest accrued from 1 March 1990 until 23 May 1996 should be deducted from the bills of costs, the final figure to be decided by the taxing master at the end of the taxation. The second plaintiff applied to the judge for a review of the master's decision.

Held – Where, following the making of an order for costs, one of several paying parties was not furnished with a copy of the bill of costs as required by Ord 62, r 30(3) and the taxation proceeded in his absence, by virtue of Ord 60, r 30(4)[c] the taxation was not a nullity but merely irregular, and the taxing master had power under Ord 60, r 30(5) to set aside the taxation either wholly or in part or make such order as he thought fit. That power included, in an appropriate case, the power to set aside the taxation permanently. The order made by the Chief Taxing Master on 23 May, however, which was intended to have a rerun of the taxation of the bills of costs, was not one that could be made under r 30(5), nor

a Rule 30(3), so far as material, provides: 'A party whose costs are to be taxed ... must within 7 days after beginning the proceedings for taxation ... send a copy of his bill of costs to every other party entitled to be heard on the taxation ...'

b Rule 30(5) is set out at p 19 *h*, post

c Rule 30(4) is set out at p 19 *g*, post

was it a reasonable exercise of the master's discretion. Accordingly, having regard to the fact that more than six years had passed since the orders for costs had been made, that the defendant had been on notice of the failure to serve the second plaintiff for three and a half years and that many hours had already been expended by the Chief Taxation Master in the process, it was in the interest of the parties and in the public interest to make an end of the matter and bring the taxation to an end (see p 19 *g h*, p 22 *c d f* and p 24 *f* to *h*, post).

Notes

For taxation of costs generally, see 37 *Halsbury's Laws* (4th edn) para 726–743.

Cases referred to in judgment

Bromsgrove Medical Products Ltd v Edgar Vaughan & Co Ltd [1997] 2 All ER 56.

Hunt v R M Douglas (Roofing) Ltd [1988] 3 All ER 823, [1990] 1 AC 398, [1988] 3 WLR 975, HL.

Macro (Ipswich), Re, Re Earliba Finance Co Ltd [1996] 1 All ER 814, [1996] 1 WLR 145.

K, Re [1989] CA Transcript 1198.

Royal Bank of Scotland v Allianz International Insurance (17 June 1994, unreported), QBD.

Waterson Hicks v Eliopolous (1996) 140 SJ 149, [1996] CA Transcript 1394.

Case also cited or referred to in skeleton argument

Pauls Agriculture Ltd v Smith [1993] 3 All ER 122.

Review of taxation

The second plaintiff, Robert Lisle, applied for a review of the decision of the Chief Taxing Master on 31 May 1996, whereby on Mr Lisle's summons to disallow all costs on two bills of costs served on him by the defendant's solicitors, Messrs Lipkin Gorman, on 29 March 1996, he ordered that (i) the bill of costs (as taxed) sent on that date should stand as good service as of 23 May 1996 and (ii) a sum equivalent to interest accrued should be deducted from that bill. The matter was heard in chambers but judgment was given by Robert Walker J in open court. The facts are set out in the judgment.

The first plaintiff, Zipporah Mainwaring, appeared as Mackenzie friend for Mr Lisle and on her own behalf.

Peter Sheridan QC (instructed by *S J Berwin*) for Lipkin Gorman.

Cur adv vult

26 March 1997. The following judgment was delivered.

ROBERT WALKER J.

BACKGROUND

This judgment gives my decision on some points of principle raised at a hearing on 3 February 1997. It does not, unfortunately, dispose of all the points raised. The hearing on 3 February was a sequel to a two-day hearing on 30 and 31 July 1996, after which I gave a reserved judgment in open court on 11 October 1996 ([1997] 1 All ER 467). Then as now I sat with assessors, Taxing Master Ellis and Mr Anthony Cowen. The earlier judgment sets out the background to the

matter at some length, and I do not propose to repeat it now (see [1997] 1 All ER 467). It is sufficient to say that the earlier judgment was on two reviews under RSC Ord 62, r 35 of two decisions of Chief Taxing Master Hurst. The taxations followed hard-fought litigation in consolidated proceedings in which Zipporah Mainwaring and Robert Lisle were the plaintiffs in the original action, and a company called Goldtech Investments Ltd (Goldtech) was the defendant. Their positions were reversed in a second action ordered to stand as a counterclaim. There was fierce interlocutory skirmishing and the matter twice went to the Court of Appeal.

The first of the reviews heard last year was concerned with the taxation of four bills of costs in respect of which Miss Mainwaring was in the position of paying party. The bills were for convenience designated (A), (B), (C) and (D), as follows: (A) costs under an order dated 13 November 1989 of Hoffmann J (declining to order Messrs Lipkin Gorman, as Goldtech's solicitors, to pay the costs of the consolidated proceedings, in which Miss Mainwaring and Mr Lisle were wholly successful, but against an hopelessly insolvent company); (B) costs under an order dated 24 January 1991 of the Court of Appeal (on appeal from the above order of Hoffmann J); (C) costs (to the extent of half) under an order dated 4 December 1989 of Hoffmann J (restraining Miss Mainwaring from using certain documents which had been handed to her by Master Gowers); (D) costs under an order dated 2 October 1991 of Hoffmann J (refusing Miss Mainwaring's renewed application for leave to make use of those documents).

The first review was concerned with five specific objections to the Chief Taxing Master's rulings of those bills (and especially on bill (A)). The second review was concerned with a taxation in respect of which Miss Mainwaring was the receiving party, under an order which the Chief Taxing Master made against Lipkin Gorman on 20 September 1991. I am not concerned with that now.

What I am concerned with is a reference back to me by the Chief Taxing Master of some questions arising out of the first review, and also an application to me (by way of appeal or review) by Mr Lisle. In my judgment on the first review, I remarked parenthetically (at 471):

> 'Most of the orders for costs were made against Mr Lisle also, but apparently the bills were not served on him until long after their service on Miss Mainwaring.'

I did not on that occasion go further into Mr Lisle's position, and I certainly decided nothing about it. On this occasion, however, I must do so. As I have said, Mr Lisle was Miss Mainwaring's co-plaintiff in the original action forming part of the consolidated proceedings, and her co-defendant in the other action, and the orders for costs that led to bill (A) and bill (C) were made against him as well, so that he and Miss Mainwaring were in principle jointly and severally liable for the costs when taxed.

Part V of Ord 62 deals with procedure on taxation. By r 29 the receiving party must within three months of the order which establishes his entitlement to costs initiate the taxation by producing the requisite document (identified in App I to Ord 62) to the appropriate office—in this case by producing the order to the Supreme Court Taxing Office. The party who initiates the taxation must also lodge his bill of costs, a statement of the parties, and other supporting documents as specified in r 29(7).

By Ord 62, r 30(3) a party whose costs are to be taxed must within seven days after commencing the taxation process send a copy of his bill of costs to every

other party entitled to be heard on the taxation. As might be expected, that includes any party to the proceedings who has taken any part in the proceedings and is directly liable under a costs order made against him (see r 29(8)(a)). So Mr Lisle was, in relation to bill (A) and bill (C), a party entitled to be heard, and Lipkin Gorman should have served a copy of bill (A) and bill (C) on him within a maximum of three months and one week from the date of the orders awarding costs against Mr Lisle (see rr 29(1) and 30(3)).

However that did not occur. What happened was that on 30 May 1990 copies of bill (A) and bill (C) were served, late, on Miss Mainwaring alone. Miss Mainwaring and Mr Lisle have for some time shared the same address—40 Yeomans Row, London SW3 2AH—and it may be conjectured that the service of the bills on Miss Mainwaring would have brought the bills to the notice of Mr Lisle also. But at a hearing before the Chief Taxing Master on 18 September 1992 Lipkin Gorman (acting, apparently, as agents for S J Berwin who were in turn acting for Lipkin Gorman) applied for taxation certificates against Mr Lisle alone. They made that application, as I understand it, because Miss Mainwaring had objected to the bills but Mr Lisle had not. Miss Mainwaring took the point, on Mr Lisle's behalf, that the bills had not been served on him. After some discussion—indeed, it seems, after something of an altercation—the Chief Taxing Master concluded that 'if Mr Lisle had not been served, he had not been served'. This was, as I understand it, a ruling that Lipkin Gorman had not complied with Ord 62, r 30(3) because a copy of the bill had not been served on Mr Lisle, a party entitled to be heard on the taxation. This was done two and a half years after service on Mr Lisle should have taken place.

It might have been expected that some step would then have been taken in order to resolve, one way or another, the irregularity which was clearly identified on 18 September 1992. The taxation had then been proceeding, in Mr Lisle's absence, for over two years (during part of which Mr Lisle had, it seems, been seriously ill). Where there is a departure from the proper course of the taxation the position is dealt with by Ord 62, r 30(4) and (5), which are in the following terms:

> '(4) Where, in beginning or purporting to begin any taxation proceedings or at any stage in the course of or in connection with those proceedings, there has been a failure to comply with the requirements of this Order, whether in respect of time or in any other respect, the failure shall be treated as an irregularity and shall not nullify the taxation proceedings or any step taken in those proceedings.
>
> (5) The taxing officer may, on the ground that there has been such a failure as is mentioned in paragraph (4), and on such terms as he thinks just, set aside either wholly or in part the taxation proceedings or exercise his powers under this Order to make such order (if any) dealing with the taxation proceedings generally as he thinks fit.'

I shall consider below what range of choice was properly open to the Chief Taxing Master once the failure to serve Mr Lisle had been established. What actually occurred, surprising as it may be, was that the failure to send a copy of the bill of costs to Mr Lisle was left entirely in the air. On 8 March 1993—three years on from when the taxation should have commenced—there was a further hearing of Miss Mainwaring's objections. On 6 September 1994 the solicitors obtained taxation certificates from the Supreme Court Taxing Office, signed by Taxing Master Wright on behalf of the Chief Taxing Master, relating to bill (A)

and bill (C) (there was also a certificate dated 9 August 1994, incorrectly dated 9 August 1992, relating to bill (D), but I need not go into that). The certificates dated 6 September 1994 certified Lipkin Gorman's bill (A) at £78,892, and Lipkin Gorman's bill (C) at £2,353·64 (of which half was payable under the costs order). Each certificate ended with the formula 'objections to the taxation having been lodged by the plaintiff [in the singular] which I have duly considered and allowed in part' (in bill (A)) or 'dismissed' (in bill (C)). The reference to the plaintiff was plainly to Miss Mainwaring. The certificates do not in any way address the position of Mr Lisle, in respect of whom there was (to the solicitors' knowledge) non-compliance with r 30(3) which had by then been continuing for about four and a half years.

On 9 September 1994 S J Berwin served four taxation certificates on Miss Mainwaring and the same four certificates, separately, on Mr Lisle. On the following day Mr Lisle rejected them (two related to costs orders—on bill (B) and bill (D)—not made against Mr Lisle). S J Berwin did not respond to Mr Lisle then, and the matter went into abeyance again for a further year and a half, until March 1996. On 11 March 1996 Mr Lisle issued and served a summons for disallowance of all the costs. A hearing was fixed for 28 March. On 25 March Mr Lisle swore an affidavit. The hearing on 28 March was adjourned. On 29 March S J Berwin sent copies of bills (A) and (C), as taxed, to Mr Lisle. Further affidavit evidence was sworn on behalf of both sides during April and May.

THE ISSUES TO BE DECIDED

That was the background to Mr Lisle's summons which was heard by the Chief Taxing Master on 23 May 1996, more than six years after copies of bills (A) and (C) should have been sent to him. At the end of the hearing the Chief Taxing Master ordered: (i) that the copy bills of costs (as taxed) sent to Mr Lisle on 29 March 1996 should stand as good service as of 23 May 1996; and (ii) that a sum equivalent to the interest accrued from 1 March 1990 until 23 May 1996 should be deducted from the bills of costs, the final figure to be decided by the taxing master at the end of the taxation. Mr Lisle was awarded the costs of the summons.

The effect of this order seems to have been intended to set in motion a new process of taxation by which Mr Lisle was bound, but on the basis that Mr Lisle obtained the benefit of all the reductions which Miss Mainwaring had achieved at the numerous hearings on her points in issue and objections which took place during 1992 and 1993. The Chief Taxing Master seems to have concluded that Mr Lisle had not suffered any great prejudice because he had in that way obtained the benefits achieved by Miss Mainwaring's skill and assiduity.

However Mr Lisle would have obtained that advantage if he had been duly given notice at the outset, and had been bound by the taxation from the outset. Six years had gone by since that should have happened, and for over three and a half years of that period S J Berwin had, as the Chief Taxing Master observed, been clearly on notice. All that seems to have been offered by way of excuse, at the hearing on 23 May 1996, was that Miss Mainwaring had been authorised to represent Mr Lisle in the litigation. But the Chief Taxing Master seems to have rejected that argument, as he had rejected a similar argument when the point first emerged on 18 September 1992.

Having brought the narrative more or less down to date, (or at any rate down to the stage at which I and my assessors became concerned in the matter on the reviews initiated by Miss Mainwaring) I think that I should pause in order to

identify what are the issues before me. That has not been entirely easy but the issues on which I have now heard argument are (in ascending order of complexity and importance) as follows.

(i) The Chief Taxing Master on 20 November 1996 referred back to me the first review under Ord 62, r 35 (that on which Miss Mainwaring is a paying party) on which I had given judgment on 11 October 1996. The point involved here is, I believe, little more than a procedural misunderstanding.

(ii) There is an issue as to how to give effect to the Chief Taxing Master's order, given at the hearing on 23 May 1996, as to the adjustment in respect of disallowed interest. The law has got into something of an unnatural tangle about interest on costs, as I shall have to recount. This point may be thought premature (because the Chief Taxing Master directed the adjustment to be made at the end of the taxation of Mr Lisle's costs). But Miss Mainwaring raised the point at the hearing on 20 November 1996 and there was argument about it. Moreover, it is raised in para 2 of Mr Lisle's notice of appeal and application dated 26 November 1996. That notice, and the reference back of the first review, are the matters formally before me.

(iii) The reference to the taxation of Mr Lisle's costs leads to what is the most important issue before me. It appears that it may have been the intention of the order of 23 May 1996 to direct what I might call a rerun of the taxation of bills of costs (A) and (C), with Mr Lisle getting the benefit of reductions already secured by Miss Mainwaring but also having the right to put forward new points in issue of his own. If that was indeed the intention, and if that order stands, then Mr Lisle's application for a review of the Chief Taxing Master's decision on 20 November 1996 (dismissing Mr Lisle's objections to the amount allowed in respect of counsel's fees) will have to proceed. I and my assessors have not yet heard any submissions about that part of the matter. But Mr Lisle seeks leave to appeal out of time against the Chief Taxing Master's order of 23 May 1996, and so the order is challenged. Even if it were not challenged on appeal, it would be necessary to consider any possible irregularity apparent on its face.

Having identified these points in ascending order of importance, I propose to deal with them in descending order of importance. The issue of separate taxations does, it seems to me, go to the most basic principles underlying the rules and practice as to taxation of costs. Basic principles can sometimes be overlooked in the heat of controversy.

Order 62, Pts IV and V

The solicitors for a receiving party prepare and lodge a bill of costs. In the simplest case (a single plaintiff wholly successful against a single defendant, and no interlocutory orders for costs to be taxed and paid forthwith), there will be one or more orders for costs (since even in the simplest case, there will usually be some interlocutory orders for costs, though not requiring immediate taxation) but a single bill of costs to be prepared and lodged, and to be copied to the defendant as paying party.

If (by way of variation on the above example), the plaintiff succeeds against several defendants with different interests, there may well be several orders for costs which affect the defendants in different ways (for instance one defendant may have failed in resisting an injunction which other defendants submitted to, or another defendant may have been unsuccessful in applications for particulars or discovery which other defendants were not involved in). Nevertheless, there will in the end normally be only one bill of costs. The defendants may not each

be liable for every item, but each is a party entitled to be heard on the taxation of the costs with which that party is concerned and each should receive a copy of the relevant bill of costs, under provisions in Pt V of Ord 62 which I have already referred to.

It seems to me reasonably clear from the general scheme of Ord 62, Pts IV and V that one of the basic principles (underlying the detailed provisions that I have already referred to) is that normally there should be a single process of taxation of the costs of proceedings, culminating in a single final certificate issued by the taxing officer under Ord 62, r 22. That final certificate will show what amount is receivable by each receiving party and what amount is payable by each paying party. This analysis is supported by what Ferris J said in *Re Macro (Ipswich), Re Earliba Finance Co Ltd* [1996] 1 All ER 814 at 818, [1996] 1 WLR 145 at 149.

What then is to happen if, for whatever reason, one of several paying parties is not furnished with a copy of a bill of costs, and the taxation proceeds in his absence? The starting point must be Ord 62, r 30(4) and (5), the terms of which I have already set out. A taxation that has proceeded in a paying party's absence is not a nullity, but it is irregular, and the taxing officer has a wide discretion whether to set aside the taxation proceedings permanently, or to set them aside and start again, or to take some less drastic action to deal fairly with the irregularity.

On this point, Miss Mainwaring (making submissions both on her own behalf and on behalf of Mr Lisle as the two paying parties) referred to the decision of the Court of Appeal in *Waterson Hicks v Eliopolous* (1996) 140 SJ 149, where it is noted rather than reported. The case ultimately turned on the ostensible authority of a costs draftsman, and on ratification. I cannot get any help from the note as to the width of a taxing officer's discretion under Ord 62, r 30(5) in a situation where one or some of the paying parties have not had notice of the taxation.

On its face, r 30(5) is expressed in wide terms. Taxation proceedings may be set aside 'either wholly or in part'. I see no reason in principle why that should not include, in an appropriate case, permanently setting aside taxation proceedings as against one or some only of the paying parties. After such an order there would still be a single process of taxation, but the paying parties would have been reduced in number. Were the taxing officer's powers more restricted, absurd results might follow. Imagine the case of an action brought by 100 plaintiffs (not now such an unusual event) who fail in the action and all become jointly and severally liable under an order for costs in favour of a single defendant. The defendant wishes to proceed to taxation and (having lost track of one single plaintiff, through no fault of that plaintiff) decides to proceed against the 99 who can be served, consciously not giving notice to the hundredth, who is thought not to be worth pursuing. Three years later, just before the end of the taxation, the hundredth plaintiff reappears, having inherited a fortune or won a lottery. Fairness and common sense suggest to me that it would be absurd for the receiving party to be able to bring the hundredth plaintiff into the taxation at that stage, especially if the consequence was that the whole process had to be rerun in order to hear new objections from a single paying party. But it would also be absurd if the 99 plaintiffs who had had notice of the taxation, and had taken part in it over three years, could receive a windfall benefit, possibly by having the whole taxation proceedings set aside.

When this point was put to Miss Mainwaring in the course of her submissions she pointed out that she and Mr Lisle are jointly and severally liable under the costs orders (in relation to bill (A) and bill (C)) and that the setting aside of the

taxation proceedings as against Mr Lisle only would not necessarily release him from all liability, because he might face a claim from her for contribution. I have not heard full adversarial argument as to whether the Civil Liability (Contribution) Act 1978 applies as between litigants who are jointly liable under an order for costs made against them. I will assume for present purposes that it does. On that assumption, the permanent setting aside of taxation proceedings against one or some only of several paying parties might leave outstanding claims for contribution, so that the setting aside of the taxation proceedings did not wholly release from all liability the paying party or parties apparently benefited by the order to set aside. That might sometimes add greatly to the taxing officer's problems in deciding what was the fair order to make under r 30(5). It is a matter of conjecture whether Miss Mainwaring (if she ends up as effectively the only paying party) would decide to pursue any right of contribution that she may have against Mr Lisle. What is not a matter of conjecture—since the solicitors' action in pursuing taxation against Mr Lisle indicates their views on the matter—is that the receiving party would prefer to have a certificate directly enforceable against both Miss Mainwaring and Mr Lisle.

I summarise, therefore, what I take to be the relevant principles relevant here. There is to be a single process of taxation, culminating in one final certificate under r 22. But a taxing officer may (at any rate before a final certificate is issued) set aside the taxation proceedings under r 30(5), and may in appropriate circumstances (which will be exceptional) do so in relation to one or some only of several paying parties. I should for completeness add that a taxing officer has power, under Ord 62, r 22(1)(e), to set aside a taxation *certificate* in order to extend time under r 33(2); but that power is not in point here.

The order of 23 May 1996

I must now go back to the order which the Chief Taxing Master made on 23 May 1996. That was one of a very small number of hearings attended by Mr Lisle without the support of Miss Mainwaring. The solicitors appeared by leading counsel. There seems to be no note (agreed or otherwise) of the hearing. The actual terms of the substantive order were—

> '(1) that the copy bills of costs (as so far taxed) sent to Robert Lisle on 29 March 1996 stand as good service as of the 23 May 1996 (2) that a sum equivalent to the interest accrued from 1 March 1990 until 23 May 1996 be deducted from the bills of costs, the final figure to be decided by the Taxing Master at the end of the of the taxation.'

So the first paragraph of the order does not spell out that the intention was to have a 'rerun' of the taxation of bill (A) and bill (C), with Mr Lisle alone having the opportunity to raise further objections and if he thought fit to go to a further review under Pt VI of Ord 62. But it seems to be common ground that that was the intention, and that is confirmed by the course of subsequent events, including Mr Lisle's notice of appeal and application seeking reductions in the amount allowed for counsel's fees. Nor does the second paragraph of the order spell out whether it was intended to operate for the benefit of Mr Lisle alone; that is not common ground, but it seems to me likely that that was the intention, since a certificate as to Miss Mainwaring's costs had been issued on 6 September 1994 (but was subject to review under r 35).

The situation facing the Chief Taxing Master on 23 May last was a very unusual and contentious one. He had (depending on the view which he took of the facts)

a wide range of choice open for the exercise of his discretion. At one extreme (had he accepted the failure to give notice to Mr Lisle as the merest formality in view of the paying parties' shared address), he might have waived the irregularity on the ground that no injustice had been occasioned. But the Chief Taxing Master did not take that view of the facts, and I am not asked to differ from him on that.

Towards the other extreme, the Chief Taxing Master could (if I am right in my view of r 30(5) and subject to the question of jurisdiction) have permanently and entirely set aside the taxation proceedings as against Mr Lisle, leaving the completed process of taxation and the certificates of 6 September 1994 intact as against Miss Mainwaring. The most extreme course of all (and to my mind probably outside the range of reasonable choice) would have been to set aside the taxation permanently and entirely as against both paying parties. The only justification for an order in those terms would have been a conviction that that was the only way of doing justice to Mr Lisle (because of likely contribution claims against him); and in the circumstances of this case, that seems to me to be a very steep and high hill to climb.

I have referred above to the question of jurisdiction. It is arguable (but was not argued before me) that after Taxing Master Wright had signed final certificates in September 1994, the taxing officer had fully discharged his function, and that subject to any correction under the slip rule, the Chief Taxing Master had no power to make any further order in the matter. It seems unlikely that r 30(5) confers a free-standing jurisdiction (after an irregularity has occurred) regardless of whether or not a final taxation certificate has been issued. Moreover, the decision of Chadwick J in *Bromsgrove Medical Products Ltd v Edgar Vaughan & Co Ltd* [1997] 2 All ER 56, although decided on r 33 rather than r 30(5), supports the finality of a certificate. But I need not decide the point and as I have not heard full argument on it I shall not do so.

The first difficulty about the order that was actually made is, as I have said, in being sure what its effect was intended to be. But on my understanding of it, and for reasons which I have already set out, I consider that it was not an order that could be made under r 30(5), wide though that paragraph is. Moreover (if I am wrong on that), I consider that it was, with all respect to the Chief Taxing Master, not a reasonable exercise of his discretion. More than six years had passed since the orders for costs had been made. For three and a half years the solicitors had been on notice of the failure to serve Mr Lisle. Dozens of hours of the Chief Taxing Master's time had already been taken up in the taxation process. In the interests of the parties and in the public interest, it was time to make an end of the matter.

It seems to me that I can and must regard the order of 23 May 1996 (assuming it to have been made with jurisdiction) as open for reconsideration. I propose to exercise my own discretion as to what order should be made instead, rather than remitting the matter to the Chief Taxing Master. I have already given an indication of the way in which I am disposed to exercise my discretion. But at the hearing on 3 February 1997, when time ran out, I said that I would give the parties an opportunity of addressing me further as to the exercise of my discretion, if that issue arose after my ruling on jurisdiction; and so I shall hear further submissions if both or either of the parties should wish to make them.

Interest

As I am reconsidering the Chief Taxing Master's order I need not reach a final view as to the precise extent and effect of his order as to interest. But I have heard submissions and I should briefly express my view.

Under ss 17 and 18 of the Judgments Act 1838 as construed by the House of Lords in *Hunt v R M Douglas (Roofing) Ltd* [1988] 3 All ER 823, [1990] 1 AC 398, an order for costs carries interest at the judgment rate (in this case, 15%) from the date of the order (not merely from the completion of the taxation). So as Garland J said in *Royal Bank of Scotland v Allianz International Insurance* (17 June 1994, unreported):

> 'The 1838 Act is an admirable incentive to the early payment of judgment debts but tends to be a disincentive to the early completion of taxation because the rate of interest exceeds commercial rates. The receiving party may have nothing to lose and something to gain by leisurely progress. Interest under the statute cannot be disallowed or the rate reduced: a result has to be achieved by reducing the capital sum to such a figure that when interest is added back, the sum of the two, when subtracted from the original combined figure for costs plus interest, equals the deduction sought to be made.'

Garland J then went on to consider what adjustment should be made for the paying party having the use of the money during the period of delay. Such an adjustment was no doubt appropriate in the case before him, which was between a bank and an insurance company. It may not be appropriate in every case, especially as the disallowance of interest may have a penal element and does not depend of proof of prejudice to the paying party (see *Re K* [1989] CA Transcript 1198).

Garland J's explanation can be put algebraically. If B is the amount of the taxed bill, the entitlement to interest will be (at a level 15% rate of simple interest)—

$$B \times \frac{15N}{100}$$

where N is the number of years between the costs order and final payment. So the sum finally payable, if no interest is disallowed, will be—

$$B \times \left(1 + \frac{15N}{100}\right)$$

In order effectively to disallow all interest and arrive at B as the sum finally payable, it is necessary to calculate the amount of the bill to be allowed at a figure A such that—

$$A \times \left(1 + \frac{15N}{100}\right) = B$$

Miss Mainwaring put forward an alternative formula (though she did not express it algebraically) that is—

$$A = B \times \left(1 - \frac{15N}{100}\right)$$

Under the first formula A is half B after six and two-thirds years; under the second formula, A is zero after six and two-thirds years.

The first formula is in line with the judgment of Garland J and was probably what the Chief Taxing Master intended. But it is clear from the authorities as a whole that the exercise of this disciplinary jurisdiction in cases of culpable delay is not solely or even primarily a matter of applying a formula. The process embodied in the formula provides a guide (though views will differ as to whether it is helpful to express it algebraically). The guide may be useful for a delay of less than a year (as in the case before Garland J) where the intention is simply to disallow interest. For a period not exceeding two years the disparity between the results produced by the two formulae is fairly small: Miss Mainwaring's formula produces a figure for A of 85 (against about 87) after one year and 70 (against about 77) after two years. Any longer delay will in most cases be wholly inexcusable and deserving of more drastic action than a mere disallowance of interest, so that Miss Mainwaring's formula would then be more appropriate if it were a choice between formulae (but as I have said, it is not).

The previous review

In my judgment last year I thought I had made it clear that I was not remitting to the Chief Taxing Master the matter of assistant solicitors' and articled clerks' hours (see [1997] 1 All ER 467 at 474). However at the hearing on 20 November 1996 it seems to have been supposed that I had done so, and the Chief Taxing Master has now referred the matter back to me. I shall therefore now make it abundantly clear that I order the certificate issued on 6 September 1994 in relation to bill (A) (which remains in force in relation to Miss Mainwaring) to be amended by the deduction from the preparation item (ie part A of the bill) of an amount representing the hours of assistant solicitors' and articled clerks' time which I disallowed multiplied by the appropriate expense rates as allowed (including the appropriate uplift as allowed for care and conduct). If there is any dispute as to that amount, each side should produce to the court a calculation showing how its figure has been arrived at.

CONCLUSION

I think it extremely unlikely that I shall be persuaded, at any future hearing, to entertain the points which Mr Lisle now seeks to raise in relation to the quantum of counsel's fees in 1989, or to disturb the past orders as to the costs of the taxation proceedings. The taxation must now be brought to an end. But I will if either party wishes hear further submissions either as to the exercise of discretion on the application heard on 23 May 1996, or as to the amount to be deducted from the sum certified in respect of bill (A) in consequence of the previous review. Any application for a further hearing should be made within 14 days of receipt of this judgment. If any application is made, the amendment of bill (A) will be deferred until the application has been disposed of.

I regret that it has taken some time to prepare this judgment. The process of consultation with assessors necessarily takes time. In this case I have received invaluable assistance from my assessors which I gratefully acknowledge, although the responsibility for the judgment is mine.

Order accordingly.

Celia Fox Barrister.

T v Child Support Agency and another

FAMILY DIVISION
CAZALET J
14 APRIL, 22 MAY 1997

Paternity – Declaration of paternity – Appeal against declaration – Family proceedings court making declaration that appellant was father of child – Subsequent medical evidence confirming that appellant could not be father of child – Whether appellant able to appeal to High Court against declaration – Child Support Act 1991, s 27.

The High Court does not have power to entertain an appeal from a declaration of paternity made by the family proceedings court under s 27[a] of the Child Support Act 1991, since no right of appeal is conferred by that Act either expressly or pursuant to powers delegated to the Lord Chancellor under s 45(1)(b)[b]. However, if following a s 27 declaration medical evidence establishes conclusively that a person cannot be the father of a child, the court can, in the absence of any other available relief, make a declaration to that effect under RSC Ord 15, r 16[c] (see p 31 *h j*, p 32 *b*, p 35 *d e* and p 36 *j*, post).

Re J S (a minor) [1980] 1 All ER 1061 distinguished.

Notes

For appeals from magistrates' courts to the High Court generally, see 29 *Halsbury's Laws* (4th edn) para 473.

For the Child Support Act 1991, ss 27, 45, see 6 *Halsbury's Statutes* (1992 reissue) 665, 679.

Cases referred to in judgment

E (a minor) (child support: blood test), Re [1994] 2 FLR 548, CA.
Hager v Osborne [1992] 2 All ER 494, [1992] Fam 94, [1992] 2 WLR 610.
J S (a minor), Re [1980] 1 All ER 1061, [1981] Fam 22, [1980] 3 WLR 984, CA.
P v P (periodical payment: appeal) [1995] 1 FLR 563.
R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd [1973] 3 All ER 289, [1974] QB 24, [1973] 3 WLR 149, CA.

Appeal

T appealed from the decision of the Teesside Family Proceedings Court on 7 August 1996 declaring pursuant to s 27 of the Child Support Act 1991 that he was the father of the child, H, and, further or in the alternative, applied for a declaration pursuant to RSC Ord 15 that he could not be the father of H by reason of DNA tests carried out on 3 March 1997. The respondents were: the Child Support Agency and the mother of H. The facts are set out in the judgment.

Valerie McMinn (instructed by *Punch Robson*, Middlesbrough) for the appellant.
Christine Harmer (instructed by *Askews*, Middlesbrough) for the Child Support Agency.
Andrew McFarlane (instructed by the *Official Solicitor*) as amicus curiae.
The mother did not appear.

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a Section 27, so far as material, is set out at p 29 *g* to *j*, post
b Section 45 is set out at p 30 *b* to *g*, post
c Rule 16 is set out at p 35 *e f*, post

CAZALET J. This is an appeal against a declaration of paternity in regard to a child, H, who was born on 7 December 1994 and is now aged about two and a half years. The appellant is T and the first respondent is L, who is the mother of H. The second respondent is the Child Support Agency. Following an invitation made by the court on 14 April 1997 the Official Solicitor appears as amicus curiae.

The appellant appeals against the declaration made by the Teesside Family Proceedings Court on 7 August 1996 that he is the father of H. He further, and in the alternative, asks that this court make a declaration pursuant to RSC Ord 15 that he cannot be the father of H by reason of DNA tests carried out by Cellmark Diagnostics on 3 March 1997.

For reasons which will become apparent in the course of this judgment the parties are now agreed as to the manner in which this appeal and the application for a declaration from this court should proceed. They, with the support of the Official Solicitor as amicus, ask the court to order by consent as follows: (1) that this appeal is dismissed on the ground that there is no statutory provision which allows the High Court to entertain an appeal from a decision of the family proceedings court under s 27 of the Child Support Act 1991; and (2) that there be a declaratory judgment under Ord 15, r 16 to the effect that H cannot be the father of H in view of the DNA tests carried out by Cellmark Diagnostics on 3 March 1997.

Because the very unusual circumstances of this case have highlighted the fact that there appears to be no right of appeal against a declaration of paternity made by the family proceedings court under s 27 of the 1991 Act I have thought it appropriate to state my reasons both for making the order proposed by the parties dismissing the appeal, and for making the declaration as sought.

History

It is not in dispute that the mother and the appellant had a relationship from 1992 until April/March 1994. The mother said in evidence before the justices that shortly after she and the appellant had broken off relations, her relationship with another man began. She discovered that she was pregnant about six weeks into this new relationship. At the time she was told by her midwife that her pregnancy was nine weeks advanced. This latter statement, the mother said, made it clear to her that the appellant must be the father of H.

Following the birth of H, the child support officer, after the appellant had denied paternity, interviewed the mother. The mother said that she was willing to undergo a DNA test. On 6 April 1995 the appellant was interviewed by the child support officer. The appellant agreed that he could be the father of H; he asked for there to be DNA tests as there was an absence of clarity about the relevant dates. He was aware that the mother had started a new relationship shortly after his relationship with her had come to an end.

On a further interview by the child support officer on 13 April 1995 the mother stated that she was now certain that the appellant was the father. She raised the question of a private DNA test for speed and economy. The Child Support Agency subsequently wrote to the appellant explaining the possibility of a cheap form of DNA testing. The appellant did not follow this proposal through. Accordingly, on 13 May 1996 the Child Support Agency made an application to the Teesside Magistrates' Court for a declaration of paternity under s 27 of the 1991 Act.

The appellant was properly served with notice of that hearing. On 7 August 1996 the mother's application for the declaration came on for hearing. The

appellant failed to attend the hearing and, as he had been duly served, the court, as it was entitled so to do, proceeded with the case and heard the mother's evidence. She recited the factual position, as I have indicated she understood it to be. She said that she had no doubt that the appellant was the father of H. Consequent on hearing her uncontested evidence the justices found the appellant to be the father of H and made the declaration in such terms.

Notice of appeal having been lodged, the appeal, on 28 October 1996, came before Bennett J, sitting in the Family Division of the High Court in Newcastle. At that hearing both parties agreed to invite the court to adjourn the appeal with a direction for blood tests to be taken and for the DNA report to be filed. The court made the order as sought. The appropriate samples from the appellant, the mother and the child were taken. On 3 March 1997 Cellmark Diagnostics made their report. This was to the effect that the appellant could not be the father of H.

On 14 April 1997 a direction was made that the Official Solicitor be invited to act as amicus curiae. The Official Solicitor helpfully accepted that invitation and so the appeal and application now come before me. I consider, first, the appeal.

The appeal

It has been long established that the right to appeal from justices to the High Court can only exist if created by statute (Ord 55, r 1); an appeal (using the term broadly) by way of case stated can be made pursuant to s 111 of the Magistrates' Courts Act 1980 and ss 28 and 28A of the Supreme Court Act 1981. The appeal here has not been brought by way of case stated, although for the reasons later given in this judgment, I consider that any such appeal would have failed.

Miss McMinn, on behalf of the appellant, has at the outset of this hearing properly conceded that, on the law as it currently stands, no right of appeal against the declaration made by the family proceedings court in this case is available to the appellant. Both the Child Support Agency and the Official Solicitor support that view.

Section 27(1) to (4) of the Act, under which the declaration was made, provides as follows:

> '(1) Where—(a) a child support officer is considering whether to make a maintenance assessment with respect to a person who is alleged to be a parent of the child, or one of the children, in question ("the alleged parent"); (b) the alleged parent denies that he is one of the child's parents; and (c) the child support officer is not satisfied that the case falls within one of those set out in section 26(2), the Secretary of State or the person with care may apply to the court for a declaration as to whether or not the alleged parent is one of the child's parents.
>
> (2) If, on hearing any application under subsection (1), the court is satisfied that the alleged parent is, or is not, a parent of the child in question it shall make a declaration to that effect.
>
> (3) A declaration under this section shall have effect only for the purposes of this Act.
>
> (4) In this section "court" means, subject to any provision made under Schedule 11 to the Children Act 1989 (jurisdiction of courts with respect to certain proceedings relating to children) the High Court, a county court or a magistrates' court.'

The declaration made by the justices was made pursuant to s 27(2) of the Act. Accordingly, since the declaration was not made under the Children Act 1989, no

right of appeal to this court arises pursuant to s 94(1) of the 1989 Act since this latter section, which gives a right of appeal from justices, is expressly confined to appeals in respect of orders, or refusals to make orders, under that Act. Indeed, the supplementary notice of application for leave to appeal in this case is headed, 'In the Matter of Appeal under Section 45 of the Child Support Act 1991'.

I turn now to s 45 of the Act upon which section the appellant initially based his appeal. Section 45 provides as follows:

> '(1) The Lord Chancellor or, in relation to Scotland, the Lord Advocate may by order make such provision as he considers necessary to secure that appeals, or such class of appeals as may be specified in the order—(a) shall be made to a court instead of being made to a child support appeal tribunal; or (b) shall be so made in such circumstances as may be so specified.
>
> (2) In subsection (1), "court" means—(a) in relation to England and Wales and subject to any provision made under Schedule 11 to the Children Act 1989 (jurisdiction of courts with respect to certain proceedings relating to children) the High Court, a county court or a magistrates' court ...
>
> (3) Schedule 11 to the Act of 1989 shall be amended in accordance with subsections (4) and (5).
>
> (4) The following sub-paragraph shall be inserted in paragraph 1, after sub-paragraph (2)—"(2A) Sub-paragraphs (1) and (2) shall also apply in relation to proceedings—(a) under section 27 of the Child Support Act 1991 (reference to court for declaration of parentage); or (b) which are to be dealt with in accordance with an order under section 45 of that Act (jurisdiction of courts in certain proceedings under that Act)".
>
> (5) In paragraphs 1(3) and 2(3), the following shall be inserted after "Act 1976"—"(bb) section 20 (appeals) or 27 (reference to court for declaration of parentage) of the Child Support Act 1991;".
>
> (6) Where the effect of any order under subsection (1) is that there are no longer any appeals which fall to be dealt with by child support appeal tribunals, the Lord Chancellor, after consultation with the Lord Advocate may by order provide for the abolition of those tribunals.
>
> (7) Any order under subsection (1) or (6) may make—(a) such modifications of any provision of this Act or of any other enactment; and (b) such transitional provision, as the Minister making the order considers appropriate in consequence of any provision made by the order.'

The review or appeal process under the Act works as follows. Section 18 of the Act permits a person aggrieved by a maintenance assessment made by a child support officer to seek a review. Section 20 of the Act deals with the route which such a review will take and provides:

> '(1) Any person who is aggrieved by the decision of a child support officer—(a) on a review under section 18; (b) to refuse an application for such a review, may appeal to a child support appeal tribunal against that decision.
>
> (2) Except with leave of the chairman of a child support appeal tribunal no appeal under this section shall be brought after the end of the period of 28 days beginning with the date on which notification was given of the decision in question.
>
> (3) Where an appeal under this section is allowed, the tribunal shall remit the case to the Secretary of State, who shall arrange for it to be dealt with by a child support officer.

(4) The tribunal may, in remitting any case under this section, give such directions as it considers appropriate.'

Returning to the provisions of s 45(1)(a) it is clear, in my view, that the purpose of that subsection is to allow the Lord Chancellor, by the appropriate order, to substitute a court—that is to say, the High Court, county court or magistrates' court—for the child support appeal tribunal in cases specified by him. Subsection (1)(b), to which I will return in a moment, may give the Lord Chancellor additional and wider powers than this.

As to s 45(1)(a) all parties before me have maintained that its provisions relate to internal appeals against findings made by child support officers. In my view that must clearly be so, those internal appeals being appeals arising under s 20 of the Act. Under the Child Support Appeals (Jurisdiction of Courts) Order 1993, SI 1993/961, the court and not the child support appeal tribunal is directed to be the appellate tribunal for the hearing of appeals against determinations of parentage by a child support officer. Under art 3(1)(s) of the Children (Allocation of Proceedings) Order 1991, SI 1991/1677, any such appeal must be begun in the magistrates' court. Appeals against the child support officer in regard to other matters of assessment must go to the child support appeal tribunal as provided for by s 20 of the Act.

It is apparent that s 45(1)(a) is directed towards permitting by order an appeal under s 20 of the Act from a child support order to lie to a court, rather than to the child support appeal tribunal. The appeal with which the subsection is concerned is against the officer's decision, and not a declaration of the court.

In this case, the child support officer did not decide the issue of paternity, but referred it, as he was entitled, to the court for resolution. Accordingly, as the appeal sought here is from a decision of the court and not from the officer it does not come within the ambit of s 45(1)(a).

Although the wording of s 45(1)(b) of the Act is not wholly clear in regard to the extent of the Lord Chancellor's powers under it, in the context of s 45(1), read as a whole, the consensus of those appearing before me is that the subsection should be broadly construed and that the powers that it confers on the Lord Chancellor are not limited to the circumstances arising under s 45(1)(a). But, as they have indicated, that construction has its difficulties.

Furthermore, as can be seen, sub-ss (3), (4) and (5) of s 45 enable the Lord Chancellor to allocate the commencement of proceedings under the Act between different courts, with consequential amendments being made to Sch 11 to the Children Act 1989, that Schedule being concerned with the jurisdiction of courts in regard to proceedings relating to children.

However, reverting to s 45(1)(b) of the Act, I am told that no specific order has been made by the Lord Chancellor, pursuant to any such powers as he may have arising under the subsection ordering that there shall be a right of appeal, or process of appeal, from a declaration of paternity such as has been made in the instant case by the family proceedings court. In passing I would point out that, following s 27(4) an application for a s 27 declaration could have been brought pursuant to the provisions of Sch 11 to the Children Act 1989 in the High Court, county court or magistrates' court. If, as in this case, such an application is started in the family proceedings court then a transfer up from the family proceedings court to a county court, and then on to the High Court, if appropriate, is a course which is available in the appropriate case (see the 1991 order, arts 7 and 12).

In contrast to the position before the magistrates, if such an application is determined by a county court judge, or a High Court judge, there is a right of appeal to the Court of Appeal (see s 77 of the County Courts Act 1984 and s 16 of the Supreme Court Act 1981).

However, because, as I have indicated, there is, in respect of a declaration of paternity made by magistrates pursuant to s 27 of the Act, no statutory right of appeal which has been granted either expressly or pursuant to any powers delegated under s 45(1)(b) of the Act, I am satisfied that this appeal by the appellant against the declaration of paternity made by the family proceedings court must be dismissed.

Before turning to the application for a declaration, it is clearly appropriate to consider whether there is any alternative route by which the justices' declaration could be directly challenged.

Case stated

Proceedings under s 27 of the Act are made 'family proceedings' pursuant to s 35(1) of the 1980 Act. In the absence of any statutory right of appeal against a declaration of parentage made under s 27 of the Act it must follow that such a declaration is an 'order, determination or other proceeding of the court' within the meaning of s 111 of the Magistrates' Courts Act 1980.

Section 111 provides, inter alia, that any person 'who was a party to any proceedings before a magistrates' court or is aggrieved' by the order may question that order, determination or other proceeding on the ground that it is wrong in law or in excess of jurisdiction. Such a challenge must be made by way of case stated and not by way of an appeal as in the present case. These two separate appellate avenues are entirely different and are not interchangeable (see *P v P (periodical payments: appeal)* [1995] 1 FLR 563 per Bracewell J). There are strict procedural requirements in regard to the obtaining of a case stated (see Ord 56, r 5(8)). None of these procedural steps have been complied with in the present case. Indeed, fundamental to such an application is the requirement to apply for a case to be stated within 21 days of the decision. This is the time limit set by s 111(2) of the 1980 Act and it is a period which cannot be extended (Ord 56, r 5(3)). So, if any attempt were now to be made to proceed by way of case stated, it would be doomed to failure through being out of time. Furthermore, even if the case stated were to be properly constituted procedurally before the court today there could not, in my view, be shown to have been an error of law or an act in excess of jurisdiction for the following reasons:

(1) The justices were fully entitled to proceed in the absence of the appellant who had been given proper notice of the hearing date, and who had neither requested an adjournment nor supplied any acceptable basis for the granting of an adjournment.

(2) Having received the sworn and unchallenged evidence of the mother the justices were quite entitled on that evidence to make the findings of fact which they did. Any question as to a request by the appellant for DNA tests, or as to any other factual matter as has been raised in the notice of appeal, should have been raised at that hearing. No such matters were raised. Furthermore, the justices were not obliged to order blood tests. Although s 20 of the Family Law Reform Act 1969 confers a discretion upon the court to order such testing, the statute makes it clear that the court may so order only upon an application by a party, and not of its own motion. No such application was made to the justices and on

the evidence put before them they were, in my view, fully entitled to regard such as unnecessary, given the mother's unchallenged testimony.

(3) In the circumstances, it cannot be shown that the justices either reached a conclusion on the facts for which there was no proper evidential support, or otherwise made a determination which no reasonable tribunal could have reached. This is of significance since an error of law does include the making of decisions of fact which have no evidential basis or which no reasonable bench could have reached (see *The Supreme Court Practice 1997* para 56/5/11).

It follows from the above that no error of law or act in excess of jurisdiction could have been shown in this case such as to have permitted a case to have been stated on the appellant's behalf.

Judicial review

In *R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd* [1973] 3 All ER 289, [1974] QB 24 the Court of Appeal was concerned with a planning appeal. An application was made to admit fresh evidence which had been discovered after the hearing had been completed. I need not go further into the facts. I read from the headnote ([1973] 3 All ER 289):

> '... certiorari would not lie to quash a decision of an inferior tribunal merely on the grounds that fresh evidence, relevant to the issue in a case, had been discovered after trial; the limits of certiorari were well established; they did not extend beyond defects or irregularities at the trial; in the appellants' case there was no defect or irregularity in the proceedings before quarter sessions.'

Then, giving one of the two majority judgments, Orr LJ said ([1973] 3 All ER 289 at 299, [1974] QB 24 at 39–40):

> 'Whenever, as in the present case, a new legal process is introduced, it is for Parliament to decide whether there shall be a full right of appeal or only the supervisory relief afforded by certiorari, which may be combined, as it has been in the present case, with a limited right of appeal by way of case stated, and thus to lay down when and in what respect finality is to be imposed on the proceedings. If experience shows that, in proceedings comparable to those with which we are now concerned, the relief provided is sufficient to do justice, the remedy in my judgment is not to transform the character of certiorari but to grant a full right of appeal. I would add, however, that the present case does not, in my judgment, demonstrate the need for any such reform.'

In the light of the dicta in that case and because the magistrates, in the instant case, cannot be criticised for the way in which they conducted the matter before them I do not consider that any proceeding by way of judicial review could have been raised successfully against the decision of the justices in this case.

Other possible ways of attacking the declaration

It must be a matter of real concern that an appellant can find himself in a situation whereby after a declaration has been made by the justices that he is the father of a particular child there is no way in which he can challenge this declaration when subsequently it is conclusively demonstrated that he is not the father of that child.

The Official Solicitor has made reference to s 44(1) of the Act, which reads as follows:

> 'A child support officer shall have jurisdiction to make a maintenance assessment with respect to a person who is—(a) a person with care; (b) an absent parent; or (c) a qualifying child, only if that person is habitually resident in the United Kingdom.'

In regard to para (b), the Official Solicitor contends that being 'an absent parent' is a precedent fact which must be established before an assessment can be made. A 'parent' is defined by s 54 of the Act as meaning 'any person who is in law the mother or father of the child'. The words 'absent parent' have the meaning given to them by s 3(2) of the Act which refers to the 'parents of any child'. Accordingly, the Official Solicitor asserts that, notwithstanding the s 27 declaration made on 7 August 1996, it must, as a result of the subsequent DNA tests, be accepted by any child support officer who further considers this matter for the purpose of an assessment, as a matter of fact and, therefore, law, that the appellant is not the father of H. In the circumstances, that alleged parent cannot be regarded as an absent parent in respect of H, so the child support officer would not for this reason have jurisdiction to make a maintenance assessment against the appellant.

The Official Solicitor goes on to point out that where there is a dispute concerning the paternity, the Act establishes a scheme under which a child support officer is prevented from making a maintenance assessment in respect of the alleged parent unless the case falls into one of the cases set out under s 26(2) of the Act. The s 26(2) cases all relate to court declarations, or orders, which establish paternity. Where there is no such declaration or order, and paternity is disputed, the child support officer may refer the matter to the court under s 27. In the case of the court then making a declaration under s 27 the effect is to bring the parent in on Case D of s 26(2). Coming within Case D means that the embargo upon making a maintenance assessment created by s 26(1) is removed. It does not mean, contends the Official Solicitor, that the child support officer is bound to go on to make a maintenance assessment. If by the time the child support officer comes to consider making such assessment it is clear that the alleged parent is not in fact the parent, he, having regard to s 44(1) and the meaning of 'absent parent', would not have jurisdiction to proceed, notwithstanding the s 27 declaration.

I have serious doubts as to whether that submission is properly made. The Child Support Agency contend that whilst it may be sound common sense the difficulty arises in the wording of s 54 of the Act in which 'parent', in relation to any child, means 'any person who is in law the mother or father of the child'. Here there is a declaration by the court that the appellant is the father of this child. It seems to me that that then is likely to be regarded as conclusive in regard to paternity being established under the Act.

Counsel on behalf of the Child Support Agency has none the less gone on to point out that even if the child support officer does have power to make such an assessment notwithstanding the fact that the DNA results are before him, it might well be that the Child Support Agency would be fully prepared to assist the appellant by taking the somewhat artificial route of making an assessment, thereby enabling the appellant, if he were so minded, to seek a review of that assessment under s 18 of the Act and then, following the outcome of that, to appeal, in any event, pursuant to s 20. That would lead to the appeal being heard

before the justices and when the matter came back before the justices then that court would have before it the results of the DNA test, would reach the conclusion that the appellant was not the father of the child concerned, and make the appropriate orders, in effect discharging the declaration of paternity currently in being. In fact, there may be some jurisdictional difficulty in enabling the magistrates' court in those proceedings to discharge the earlier order of its fellow justices. This point has not been developed before me, but in any event the finding of the lower court would be in clear conflict with the earlier declaration and to that extent would reduce the impact of that earlier declaration. Even so it could be that the earlier and conflicting declaration would still stand and would inevitably so stand unless the Child Support Agency was prepared to co-operate in following this somewhat contrived course. Furthermore, even if the Child Support Agency did not pursue an assessment against the appellant in the light of the later DNA test the stigma of the earlier declaration would still stand against the appellant; furthermore, other redress sought against the true father might be inhibited.

Declaration

I turn now to the application for a declaration. It is clear that it is not open to a person in the appellant's situation to seek a declaration under Pt III of the Family Law Act 1986, to the effect that he is *not* the father of H. However, all parties contend that this court does have jurisdiction under Ord 15, r 16 to make the declaration sought. Order 15, r 16, states as follows:

> 'No action or other proceeding should be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

The court has a discretionary power as to whether to make a declaration. Under the notes to that order reference is made to the circumstances in which the court has seen fit so to exercise its discretion; I go to *The Supreme Court Practice 1997* vol 1, para 15/16/3, which states:

> '... In wardship proceedings the Court has no jurisdiction either under its inherent powers or otherwise, to grant a bare declaration of paternity, for such a declaration is not directly relevant to the issues normally dealt with in such proceedings, and even if it did have a discretionary jurisdiction to make a declaration of paternity, the Court ought not to exercise such discretion to make such a declaration, since to do so might adversely affect the child's interests, and in any event, the evidence of paternity would have to be conclusive or very nearly so (*Re J. S. (a minor)* ([1980] 1 All ER 1061, [1981] Fam 22).)'

In my view, as all parties agree, this case is readily distinguishable from the decision in *Re J S*. Here the essential issue is as to paternity and although the declaration could adversely affect the child's interests I bear in mind that the evidence which is now before the court is conclusive in establishing that the appellant is not the father. Indeed, that strong weight of the evidence must be a vital criterion in any application for a declaration in such a case as this. Furthermore, if in fact some other avenue were to be open to an applicant entitling him to some other form of redress, this court would then be extremely slow in permitting the recourse to the obtaining of a declaration.

I go further to *The Supreme Court Practice 1997* vol 1 para 15/16/4. It is there provided that a declaration of legitimacy cannot be made under the rules; it can only be made on petition under s 45 of the Matrimonial Causes Act 1973. In fact, that is an erroneous reference to s 45 of the Magistrates' Courts Act 1973 because that section was repealed in April 1988 and replaced by s 56 of the Family Law Act 1986. It is clear, on analysis, that the appellant in this case does not come within the class of individuals who are permitted to apply under that particular section. The appellant's position can be further distinguished on the ground that he seeks a declaration to the effect that he is *not* the father of the child, in contrast to the declarations there referred to, namely those sought as to paternity. Although the text in Rayden *Divorce and Family Matters* (16th edn, 1991) para 26(16), does not refer specifically to declarations as to paternity provision is there made that where the declaration sought is not within Pt III of the Family Law Act 1986—which, as I have indicated, is the case here—then an application may be made for such by way of originating summons. I should also make the point that, in my view, res judicata does not here apply. In *Hager v Osborne* [1992] 2 All ER 494, [1992] Fam 94 it was held that res judicata does not apply to paternity issues.

In this case, the appellant can be said to have been fortunate to have had the benefit of a court-directed DNA test following a s 27 declaration. In other comparable cases it could well be that a person who is the subject of a s 27 declaration would not be in this position and would become the subject of a maintenance assessment, despite his continued denial of paternity and without any DNA testing being permitted or ordered. Although under s 18 of the Act that alleged parent could then seek a review of the maintenance assessment and, if the assessment remained in force, seek to appeal under s 20 of the Act to the family proceedings court on the issue of paternity pursuant to the 1993 order, there is, as the Official Solicitor has pointed out, inherent danger in the use of such a route by way of challenge to an earlier s 27 declaration since that appeal is likely to come back before the same family proceedings court who, having made the earlier declaration, could well require some very powerful persuasion to induce it to reopen the matter and allow a DNA test.

In *Re E (a minor) (child support: blood test)* [1994] 2 FLR 548 the Court of Appeal upheld the decision of Stuart-White J in which he held that proceedings under s 27 amounted to civil proceedings for the purposes of s 20(1) of the Family Law Reform Act 1969, thereby empowering the court to direct scientific tests for the purposes of determining paternity. Although it could be argued that the fact there has already been a declaration by the same court can provide grounds for transferring the case up to the county court nevertheless such grounds do not easily fit into the list of factors supporting such transfer as appear in art 7 of the 1991 order.

One further point should be made. Under s 27(3) of the Act, as amended by s 20 of the Child Support Act 1995, the declaration of parentage made in this case by the justices is a declaration only for the purposes of that Act. It is not a declaration to the world in general. Of course, any declaration this court might be minded to make would be a full declaration and not so confined.

In my view, and bearing in mind the absence of other available relief to the appellant, I consider that this court should exercise its discretion to make the declaration as sought by the appellant and I accordingly propose to make that declaration.

Possible redress in a similar future case

Should there be a right of appeal from a s 27 declaration made by a family proceedings court? The absence of such a right of appeal would seem on the face of it to constitute a lacuna under the Act. Although the wording of s 45(1)(b) is not wholly clear as to how wide the Lord Chancellor's powers are under it, the consensus of those before me is that it is broadly based in its meaning and is not limited to applications only within the provision of s 45(1)(a). Whilst it may be that after due deliberation the Lord Chancellor has decided not to exercise such powers as he may have under s 45(1)(b) and make provision for appeals of the nature of the one that has been put before this court, I consider it to be appropriate for this court to draw attention to the absence of a right to appeal from a declaration of paternity made pursuant to s 27 of the Act by the family proceedings court so that this matter may be considered by the Lord Chancellor or, if need be, Parliament in the light of the facts of this particular case.

It is also worth bearing in mind that in the present case the High Court, by consent on a directions hearing, made the vital direction for DNA tests in the seemingly erroneous belief that the High Court had jurisdiction to entertain the appellant's appeal. If that direction for blood testing had not been made then the appellant would have been saddled with the existing s 27 declaration and no effective route to challenge that decision. In the absence of DNA tests being ordered and of the mother consenting thereto no other direction could have taken the matter further.

Appeal dismissed. Declaration granted.

Carolyn Toulmin Barrister.

Jameson and another (executors of Jameson (decd)) v Central Electricity Generating Board (Babcock Energy Ltd, third party)

COURT OF APPEAL, CIVIL DIVISION

NOURSE, AULD LJJ AND SIR PATRICK RUSSELL

14, 15, 16 OCTOBER 1996, 13 FEBRUARY 1997

Tort – Concurrent tortfeasors – Discharge – Deceased before his death agreeing to accept sum in 'full and final settlement and satisfaction' of personal injury claim – Sum accepted less than full value of claim – Executors bringing dependency claim against concurrent tortfeasor under Fatal Accidents Act 1976 – Whether payment made in full satisfaction of claim – Whether action against concurrent tortfeasor barred.

Contribution – Third party proceedings – Claim 'in respect of the same damage' – Employee contracting fatal disease from exposure to asbestos at place of work – Executors bringing dependency claim under Fatal Accidents Act 1976 against occupier of building for negligence and breach of statutory duty – Defendant occupier joining employer as third party – Whether third party liable in respect of same damage as defendant – Whether 'same damage' under dependency claim meaning damage causing fatal disease or damages recoverable by former dependants – Civil Liability (Contribution) Act 1978, s 1(1).

In 1988, shortly before his death from malignant mesothelioma, J agreed to accept £80,000 from his former employer, BE, in 'full and final settlement and satisfaction' of his claim against it for negligence and breach of statutory duty in causing his fatal disease by exposing him to asbestos at various premises at which he had worked, including those of the defendant, at which BE had undertaken work. Following J's death the plaintiffs, his executors, issued proceedings under s 1 of the Fatal Accidents Act 1976 for loss of dependency against the defendant as a concurrent tortfeasor in respect of the same exposure to asbestos dust alleging similar, but not identical, negligence and breach of statutory duty. The defendant joined BE as a third party and, on the basis that the parties were concurrent tortfeasors, contended on the trial of certain preliminary issues that it could not be liable since J's settlement with BE satisfied his claim and had thus discharged any action that he might have had against it as a concurrent tortfeasor. The judge held that the defendant was not released from liability since the sum of £80,000 was significantly less than the full liability value of the claim and that, in the event of the plaintiffs succeeding, the defendant was entitled to maintain proceedings for contribution against BE under s 1(1)[a] of the Civil Liability (Contribution) Act 1978. The defendant appealed, contending, inter alia, that where a plaintiff agreed to accept a sum 'in full and final settlement and satisfaction' from a tortfeasor, the agreement discharged other concurrent tortfeasors, and that the judge had therefore erred in considering whether the figure of £80,000 was full satisfaction on a full liability basis. BE appealed, contending that the defendant was not entitled to seek a contribution from it in respect of the dependency claim because there was no common 'damage' for the

a Section 1(1) is set out at p 54 *e f*, post

purposes of s 1(1) of the 1978 Act, since the damage in an action under the 1976 Act was not that suffered by the deceased before he died but that suffered by his dependants as a result of the death.

Held – The appeals would be dismissed for the following reasons—

(1) Where a plaintiff settled an action for damages against a tortfeasor, that settlement did not release a concurrent tortfeasor from liability unless it amounted to satisfaction of the full value of the plaintiff's claim, since the concurrent tortfeasor was the subject of a separate cause of action. In the instant case, although J's settlement was expressed to be in full and final settlement and satisfaction , those words did not impress the settlement sum when paid with the quality of full satisfaction and the judge had been entitled to find that the settlement figure of £80,000 did not represent the full value of J's claim against BE. It followed that the plaintiffs were not barred from proceeding with their dependency claim against the defendant as a concurrent tortfeasor (see p 48 *f g*, p 49 *g* to *j*, p 51 *a b*, p 52 *h*, p 53 *a b* and p 64 *e f*, post).

(2) For the purposes of s 1(1) of the 1978 Act the relevant damage was the alleged wrong causing the injury and death and not the damages that the deceased could have recovered for his injury. It followed that the liability of the defendant and BE was in respect of 'the same damage' within the meaning of s 1(1) and that the defendant was entitled to seek a contribution from BE (see p 61 *j*, p 62 *h* and p 64 *e f*, post).

Per curiam. The meaning and effect of the Fatal Accidents Act 1976 are plain. It entitles a deceased's dependants to claim for loss of dependency after death where his injury and death were caused by a wrongful act, whether or not there was an interval between injury and death and whether or not the injury had disabled him from working before death (see p 60 *c*, post).

Notes

For settlement or compromise of proceedings, see 37 *Halsbury's Laws* (4th edn) para 383–392.

For recovery of contribution, see 45 *Halsbury's Laws* (4th edn) para 1237, and for cases on the subject, see 46 *Digest* (Reissue) 263, *2176–2177*.

For the Fatal Accidents Act 1976, s 1, see 31 *Halsbury's Statutes* (4th edn) (1994 reissue) 252.

For the Civil Liability (Contribution) Act 1978, s 1, see 13 *Halsbury's Statutes* (4th edn) (1996 reissue) 650.

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Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

Bird v Randall (1762) 1 Wm Bl 373, 96 ER 210.

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Black v Martin (1930) 292 P 577, Mont SC.

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Dering v Uris [1964] 2 All ER 660, [1964] 2 QB 669, [1964] 2 WLR 1298.
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Gardiner v Moore [1966] 1 All ER 365, [1969] 1 QB 55, [1966] 3 WLR 786.
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Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.
Koursk, The [1924] P 140, [1924] All ER Rep 168, CA.
Lampitt v Poole BC (Taylor, third party) [1990] 2 All ER 887, [1991] 2 QB 545, [1990] 3 WLR 179, CA.
Latham v Des Moines Electric Light Co (1942) 6 NW 2d 853, Iowa SC.
Lisoski v Anderson (1941) 112 P 2d 1055, Mont SC.
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Logan v Uttlesford DC [1984] CA Transcript 263.
Lovejoy v Murray (1865) 70 US (3 Wall) 1, US SC.
Morris v Baron [1918] AC 1, HL.
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Oliver v Ashman [1961] 3 All ER 323, [1962] 2 QB 210, [1961] 3 WLR 669, CA.
Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett [1979] 1 All ER 774, [1980] AC 137, [1978] 3 WLR 955, HL.
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Cooper v Parker (1855) 15 CB 822, 139 ER 650.

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DPP v Turner [1973] 3 All ER 124, [1974] AC 357, HL.
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McCann v Shephard [1973] 2 All ER 881, [1973] 1 WLR 540, CA.
Mahon v Burke [1991] 2 IR 495, Ir HC.
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Murray v Shuter [1975] 3 All ER 375, [1976] QB 972, CA.
Nugent v Londonderry Collieries Ltd [1930] 1 KB 159, CA.
Pacific Associates Inc v Baxter [1989] 2 All ER 159, [1990] 1 QB 993, CA.
Peto v Checy (1611) 2 Brownl 128, 123 ER 854.
Rose v Ford [1937] 3 All ER 827, [1937] AC 826, HL.
Saipem SpA v Dredging VO2 BV, The Volvox Hollandia (No 2) [1993] 2 Lloyd's Rep 315.
Seward v Vera Cruz (owner), The Vera Cruz (1884) 10 App Cas 59, [1881–5] All ER Rep 216, HL.
Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] 1 All ER 791, [1988] QB 758, CA.
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Stott v West Yorkshire Road Car Co Ltd (Home Bakeries Ltd, third party) [1971] 3 All ER 534, [1971] 2 QB 651, CA.
Talbot v Berkshire CC [1993] 4 All ER 9, [1994] QB 290, CA.
White (Arthur) (Contractors) Ltd v Tarmac Civil Engineering Ltd [1967] 3 All ER 586, [1967] 1 WLR 1508, HL.
Wimpey (George) & Co Ltd v British Overseas Airways Corp [1954] 3 All ER 661, [1955] AC 169, HL.

Appeals

In two separate appeals the defendant, the Central Electricity Generating Board (CEGB), and Babcock Energy Ltd as third party appealed from the decision on preliminary issues of Sir Haydn Tudor Evans sitting as a judge of the High Court in Southampton on 31 March 1995, inter alia, that the plaintiffs, Elizabeth Ann

Jameson and Alan William Wyatt acting as executors of the estate of David Allen Jameson, deceased, were entitled to maintain their action against the CEGB for damages for loss of dependency on behalf of his widow under s 1 of the Fatal Accidents Act 1976, and that, in the event of the plaintiffs succeeding in their claim, the CEGB was entitled to maintain proceedings against the third party for a contribution under the Civil Liability (Contribution) Act 1978. The facts are set out in the judgment of Auld LJ.

Ian McLaren QC (instructed by *Dibb Lupton Allsop*, Birmingham) for the CEGB.

William Woodward QC and *Elizabeth Hodgson* (instructed by *Hextall Erskine*) for Babcock Energy.

Ronald J Walker QC and *Anthony Coleman* (instructed by *Payne Marsh Stillwell*, Southampton) for the plaintiffs.

Cur adv vult

13 February 1997. The following judgments were delivered.

AULD LJ (giving the first judgment at the invitation of Nourse LJ). There are two appeals before the court from a judgment of Sir Haydn Tudor Evans, sitting as a judge of the High Court in the Queen's Bench Division, given on 31 March 1995. The first is by the defendant, the Central Electricity Generating Board (the CEGB), against a number of rulings made on preliminary issues in favour of the plaintiffs, the executors of the estate of David Allen Jameson, deceased, in their claim against the CEGB for damages for loss of dependency under the Fatal Accidents Act 1976. The second is by the third party, Babcock Energy Ltd (Babcock Energy), against those rulings in the main action and also against the ruling that, in the event of the plaintiffs succeeding in their claim against the CEGB, the CEGB was entitled to maintain proceedings against it for a contribution under the Civil Liability (Contribution) Act 1978.

The issue in the first appeal is whether a 'full and final' settlement by a plaintiff with a tortfeasor of a personal injury action bars a dependency claim after his death against a concurrent tortfeasor. The issue in the second appeal is whether, if it does not, the latter tortfeasor can seek a contribution from the tortfeasor who settled with the deceased.

Mr Jameson died on 24 April 1988 at the age of 50 from malignant mesothelioma. Shortly before his death he agreed to accept £80,000 in 'full and final settlement and satisfaction' from his former employer, Babcock Energy, of his claim in proceedings against it for negligently and in breach of statutory duty causing that disease by exposing him to asbestos. The sum of £80,000 was significantly less than the full liability value of his claim, reflecting both parties' appreciation of the uncertainty of the outcome of the litigation if it had proceeded.

Mr Jameson's claim against Babcock Energy was that the harmful exposure had occurred at various premises at which it had employed him, including those of the CEGB at which Babcock Energy was undertaking work. The fatal disease may have been caused solely by Babcock Energy's negligence or breach of statutory duty as employer, or solely by the negligence and breach of statutory duty of the CEGB as occupier, or by the respective negligence and breach of statutory duty of both of them. Assuming liability by both, it is accepted by the parties that they are to be regarded as several or concurrent, not joint, tortfeasors.

After Mr Jameson's death his executors issued proceedings against the CEGB under the 1976 Act in respect of the same exposure to asbestos dust as for part of the claim in the settled action against Babcock Energy, alleging similar, but not identical, negligence and breach of statutory duty. The executors also claimed on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934, but later abandoned that claim because it was extinguished by the receipt of the settlement sum of £80,000.

The executors of Mr Jameson's estate cannot claim under the 1976 Act against Babcock Energy as well as the CEGB because, by s 1 of the Act, such a claim would only lie if, but for Mr Jameson's death, he would have been entitled to maintain an action and recover damages against Babcock Energy. He would not have been so entitled since his settlement with it in his lifetime was an accord and satisfaction which discharged it from further liability to him.

The CEGB denied any culpable responsibility for Mr Jameson's fatal illness, but maintained that, in any event, it could not be liable because Mr Jameson's settlement with Babcock Energy had satisfied his claim and had thus discharged any claim that it might have had against the CEGB as a concurrent tortfeasor.

The CEGB joined Babcock Energy as a third party to the claim. Babcock Energy resisted that claim, similarly maintaining that its settlement with Mr Jameson barred the claim against the CEGB as a concurrent tortfeasor. It also maintained that, in any event, a claim under the 1976 Act in such circumstances is not within the provisions of the 1978 Act or that, if it is, the contract between it and the CEGB had expressly excluded liability for contribution.

The relevant facts in a little more detail were as follows. Mr Jameson was exposed to asbestos for relatively short periods in the 1950s while working for Babcock Energy at the CEGB's and other premises. His last contact with the substance was at the end of 1958, shortly before leaving Babcock Energy's employment. The disease of malignant mesothelioma was first diagnosed nearly 30 years later, in 1987, when he was 50. The nature of the disease is such that by the time it is manifest it has already severely curtailed expectation of life, and death normally follows within two years. In 1987, shortly after Mr Jameson's discovery of his fatal illness, he issued proceedings against Babcock Energy, against whom his advisers considered he had a stronger claim than against the CEGB. He alleged breaches of the Factories Act 1937 and of the Building (Safety, Health and Welfare) Regulations 1948, SI 1948/1145, and negligence at common law. Babcock Energy denied liability.

In early 1988 Mr Jameson successfully applied to the court for an order that the issue of liability should be tried first. He knew that he had not long to live and that any damages he might recover by way of judgment in his lifetime would be less than those that might be recovered for Mrs Jameson, his sole dependant, under the 1976 Act after his death. He decided, therefore, that it would be to her advantage for him to obtain judgment on liability before he died, leaving her to reconstitute the action and introduce her dependency claim under that Act after his death.

However, on 30 March 1988, shortly before the date fixed for trial of the issue of liability, Babcock Energy paid £75,000 into court. Then, on 19 April 1988, five days before Mr Jameson's death, his solicitor, on his behalf, agreed with Babcock Energy's advisers to settle the action for £80,000 with costs, a sum of damages which included some provision for future loss of income. The view of both parties' advisers was that the claim, including that for future loss of income, was worth about £130,000 if it were to succeed on liability, a valuation which the

judge said was reasonable. However, they both clearly took the view that there were weaknesses in the claim. These were mainly on the issue of liability, stemming from the shortness of time during which Mr Jameson had been exposed to asbestos and uncertainty as to whether it had been sufficiently widely known in the 1950s that inhalation of small quantities of asbestos dust could cause injury to health. The judge, therefore, found that the settlement sum was significantly less than the full liability value of the claim, reflecting as it did, both parties' assessment of the hazards of litigation.

On 29 April 1988, five days after Mr Jameson's death, the action was stayed, save for the purpose of enforcement, in the form of a Tomlin order. The order provided, so far as material:

> '1. That the Defendant do pay to the Plaintiff the sum of £80,000·00 ... in full and final settlement and satisfaction of all causes of action in respect of which the Plaintiff claims in the Statement of Claim ...
>
> 4. That upon payment by the Defendants of the balance of damages and agreed costs the Defendants be discharged from any further liability in respect of the Plaintiff's claim in this action.
>
> 5. That the record be withdrawn ...'

There was no provision in the original settlement agreement or in the order barring a claim against the CEGB or any other party, and no basis that I can see for implying one. Whilst Mr Jameson's advisers appear to have considered at the time the possibility of such a claim, the judge, having heard evidence from his solicitor on the matter, rejected the suggestion made on behalf of the CEGB that such consideration was in any way improper so as to bar future proceedings against the CEGB.

In the present proceedings, by agreement between the parties the judge considered a number of questions of law, leaving for later determination, if necessary, consideration of the issue of liability on the facts. The questions of law in the main action were: (1) the effect of Mr Jameson's settlement with Babcock Energy on his executors' entitlement to make a dependency claim against the CEGB; and (2) whether, in any event, it would be an abuse of process to allow such a claim to proceed; and (3) what, if any, value there is in the dependency claim.

I turn to the first of the questions, which, more precisely, is whether release by judgment or settlement of one tortfeasor discharges a concurrent tortfeasor. It requires careful consideration of the separate defences of accord and satisfaction and of satisfaction.

ACCORD AND SATISFACTION

The judge, in a characteristically thorough and well-constructed judgment, held that settlement by one concurrent tortfeasor only releases another concurrent tortfeasor if it amounts to actual satisfaction (ie payment) of the full value of the claim. Accordingly, he held that Mr Jameson's settlement with Babcock Energy for a figure clearly less than his claimed whole loss did not release the CEGB from any liability that it might have to Mr Jameson. He held that the recital in the settlement that it was 'in full and final settlement and satisfaction' of the action did not prevent the court from considering whether the settlement figure did represent the full value of the claim and that, in any event, it referred only to the action against Babcock Energy not to any potential action

against the CEGB or anyone else. After a thorough review of English, Scottish and North American authorities, he summarised his ruling in the following way:

> 'No English case has been cited in which it has been held that payment to a claimant by one concurrent tortfeasor by way of an accord and satisfaction is satisfaction of the claimant's action against another concurrent tortfeasor. On the contrary, the strong indications from *Clark v Urquhart, Stracey v Urquhart* [1930] AC 28, *Bryanston Finance Ltd v de Vries* [1975] 2 All ER 609, [1975] QB 703, and from the two *Townsend* cases, *Townsend v Stone Toms & Partners (a firm)* [1981] 2 All ER 690, [1981] 1 WLR 1153 and *Townsend v Stone Toms & Partners (a firm) (No 2)* (1984) 27 BLR 26, especially the second, are that a plaintiff can go on against another joint tortfeasor or a party having a concurrent liability but that he must bring into account what he has already received and his success or failure in such a second action will depend on how the balance is struck between what he has received in the first and what he obtains in the subsequent action. In so far as the ratio of the Scottish case or any of the American cases or any observation in them conflict with that principle, I decline to follow them.'

Accordingly, he held that Mr Jameson had vested in him at the moment of death a cause of action which, if he had survived, he could have maintained against the CEGB, and which thus entitled his executors to make a dependency claim against it on behalf of his widow under the 1976 Act. He also held that, even if the settlement sum of £80,000 were taken as the full value of Mr Jameson's claim if he had lived, it could not have amounted to satisfaction so as to extinguish his claim before death because it was not paid in full until after it.

Mr Jameson's settlement with Babcock Energy, whether regarded as an accord and satisfaction or simply as a covenant not to sue, barred his widow from claiming against it under s 1 of the 1976 Act. By the settlement he had divested himself of his cause of action against it on which her entitlement to sue it depended under that provision. (See *Read v Great Eastern Rly Co* (1868) LR 3 QB 555 and *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1979] 1 All ER 774 at 783, [1980] AC 137 at 152 per Lord Salmon.) The question is whether the settlement also barred his executors from making a 1976 Act claim against the CEGB.

Assuming liability by both Babcock Energy and the CEGB to Mr Jameson for his fatal disease, the parties have rightly agreed for the purpose of this part of the proceedings that they were not joint tortfeasors because the acts of negligence and breach of statutory duty alleged against each of them were not all the same. They were concurrent tortfeasors, that is to say several tortfeasors who have caused the same damage. The importance of the distinction is that whilst it is well-established by authority that settlement with one tortfeasor may, as an accord and satisfaction, bar a claim by him as against a joint tortfeasor, the position as to concurrent tortfeasors is said to be less clear.

Mr Ian McLaren QC on behalf of the CEGB, and Mr William Woodward QC on behalf of Babcock Energy, submitted that where a plaintiff, who has causes of action against concurrent tortfeasors, agrees to accept a sum 'in full and final settlement and satisfaction' from one of them, the agreement discharges the others, unless it expressly or impliedly recognises that the settlement is only in partial satisfaction of the tort. They submitted that it is the agreement, the accord, that discharges the obligation and that the only materiality of satisfaction, whether there are joint or concurrent tortfeasors, is that it makes the accord

operative. They relied on a passage from the judgment of Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 643–644, [1933] All ER 320 at 327, not a joint or concurrent tortfeasor case, in which he stated, that, contrary to early law on the matter, consideration in accord and satisfaction could be executory, consisting of an exchange of obligations in the agreement itself.

They submitted, therefore, that the judge was wrong to consider whether the settlement figure of £80,000 was full satisfaction on full liability basis. Mr McLaren suggested that all the cases of partial satisfaction by one tortfeasor where the court has permitted an action against another tortfeasor are not examples of the inapplicability of the defence of accord and satisfaction to concurrent tortfeasors but of an express or implied reservation by the plaintiff in his acceptance of partial satisfaction of his right to proceed against another in respect of the same matter.

Mr Ronald Walker QC on behalf of Mr Jameson's executors, replied that, whilst Mr McLaren's and Mr Woodward's submissions might be correct as to the treatment of satisfaction in a defence of accord and satisfaction, they had no relevance to this case because: (1) the defence of accord and satisfaction, as distinct from the quite separate defence of satisfaction, is available only to joint, not concurrent, tortfeasors, and, in any event (2) the settlement with Babcock Energy was not an accord and satisfaction, but merely a covenant not to sue it, and, for that reason, would not have barred a claim against the CEGB even if the latter were a joint tortfeasor.

There is no reported English authority in which it has been held that an accord and satisfaction, as distinct from full satisfaction of a claim, given by one tortfeasor discharges a concurrent tortfeasor. There is much support for Mr Walker's contrary submission in the approach of the House of Lords and of this court in a number of decisions to which I shall refer and in the views of leading academic writers on the subject. That approach is also of a piece with the statutory inroads made on the former common law bar to successive proceedings against those jointly liable, originally by s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 and now, more widely drawn, in the 1978 Act. Putting aside the added complications of a dependency claim under the fatal accidents legislation, the trend, it seems to me, is to inhibit further litigation against joint or concurrent tortfeasors only to the extent necessary to prevent greater recovery than the damage suffered.

I take as a starting point the assertion of the editors of *Clerk and Lindsell on Torts* (17th edn, 1995) pp 147–148, para 4-55, that accord and satisfaction does not release several, as distinct from joint, tortfeasors:

> 'The only remaining consequence of the distinction between joint tortfeasors and several tortfeasors causing the same damage is that release of one joint tortfeasor whether under seal or by way of accord and satisfaction releases all others, and this is not the case with several tortfeasors.'

Glanville Williams, in his 1951 study *Joint Torts And Contributory Negligence* p 46, was of the same view. Citing a Manitoban authority of first instance, *Negrich (Negrych) v Werner* [1937] 1 WWR 190, he said that the rule as to release by accord and satisfaction 'does not apply to concurrent tortfeasors, except of course to the extent that actual satisfaction discharges'. In *Negrich*'s case Taylor J held that settlement by a plaintiff of her claim against the owner and driver of one of two vehicles in a road traffic accident in which her husband was killed did not

preclude her from proceeding with an action against the owner and driver of the other vehicle since the pairs of defendants were not joint tortfeasors.

As I have said, the rule that accord and satisfaction, as distinct from a covenant not to sue, operates as a release for joint tortfeasors, is well-established. The oft-stated rationale of the rule is that the cause of action against them is 'one and indivisible'. (See eg *Duck v Mayeu* [1892] 2 QB 511 at 513, [1891–4] All ER Rep 410 at 411 per A L Smith LJ, *Apley Estates Co v de Bernales* [1947] 1 All ER 213 at 214–215, [1947] Ch 217 at 220–221 per Morton LJ and *Gardiner v Moore* [1966] 1 All ER 365, [1969] 1 QB 55.) It may be executed or it may be executory where there is a settlement agreement replacing and extinguishing the right of action. (See *Chitty on Contracts* (27th edn, 1994) vol 1, para 22-014, *Morris v Baron* [1918] AC 1 at 13, 35 per Lord Finlay LC and Lord Atkinson and *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 643–645, [1933] All ER Rep 320 at 327–328 per Scrutton LJ.)

In either case, the effect of the settlement will, in any event, depend on whether it amounts to a release of all joint tortfeasors as distinct from a covenant not to sue, or, as Neill LJ has described it, 'a release with a reservation': see *Bryanston Finance Ltd v de Vries* [1975] 2 All ER 609 at 626, [1975] 1 QB 703 at 732 per Lord Diplock and *Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578 per Neill LJ. Thus, in *Gardiner v Moore* [1966] 1 All ER 365, [1969] 1 QB 55 Thesiger J held that an agreement to 'discharge' a claim against two joint tortfeasors was not a release but a covenant not to sue because of an implied preservation of the cause of action against a third joint tortfeasor.

Because of the hardship that the rule can cause, the inclination of the courts has been to confine it narrowly (see *Apley Estates Co v de Bernales* [1947] 1 All ER 213 at 214–215, [1947] Ch 217 at 221 per Morton LJ). This inclination has received a boost from the replacement of s 6(1)(a) of the 1935 Act with s 3 of the 1978 Act extending the scope for successive actions against tortfeasors to 'any other person ... jointly liable ... in respect of the same debt or damage'. The following words of Steyn LJ in *Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578 with which I respectfully agree, suggest that now is not the time to extend to concurrent tortfeasors a rule as to joint tortfeasors which is in retreat:

> 'These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. In Victorian times judges of great distinction reasoned that in a case involving joint and several liability of joint tortfeasors there is only a single cause of action, and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action, or as it was usually put, releases the other joint tortfeasors. The rule has been relaxed by statute. The fact that joint tortfeasors can be sued successively heavily compromised the perceived rule of logic. But the old rule apparently still survives. In truth there is no inexorable march of logic. In a less formalistic age it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue. Either solution is logically defensible. But good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for

contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is concerned the settlement between the plaintiff and the released tortfeasor is res inter alios acta. If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution. See Glanville Williams *Joint Obligations* (1949) pp 137–138. The absurd consequences of applying the rule of logic invariably led judges, in the best common law tradition, to devise ways of escaping the rigours of its application. The first was the invention of the distinction between an agreement operating as a release of one joint tortfeasor from liability (which resulted in the discharge of the other joint tortfeasor from liability) and an agreement not sue one joint tortfeasor (which did not involve a discharge of the other). The second technique was the creation of the rule that, even if the agreement operates as a release of one joint tortfeasor, nevertheless the other tortfeasor was not released if the agreement contained a reservation of the plaintiff's rights against the other tortfeasor. In combination these two subsidiary rules, generously interpreted, have ensured that in the majority of cases satisfactory solutions are achieved. But plainly the law is not in a satisfactory state. It is true that a claimant, who engages sophisticated lawyers, can by suitably drafted contractual stipulations avoid the application of the primary rule. But the rule is undoubtedly a trap for the unwary. And for those who are aware of the problem it is a potential disincentive to entering into bona fide and reasonable compromises. The rule requires re-examination, notably in the light of the suspect logic on which it was founded and, in any event, on the basis that the rationale of the rule disappeared once the "one cause of action" theory was undermined by the statute which authorised successive actions against joint tortfeasors. The point is of considerable importance since it potentially affects a large number of transactions. But it seems to me that binding authority compels me to approach the problem in the traditional way.'

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There is no such binding authority compelling that approach in the case of concurrent tortfeasors, to whom Steyn LJ's remarks apply a fortiori. In my view, the principle to be extracted from the authorities to which I have referred is that accord without full satisfaction reached with one tortfeasor does not release a concurrent tortfeasor. That is because the latter is a defendant or a potential defendant to a separate action.

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Logically, and in the normal expectation of the settling plaintiff, the release of one, unless and to the extent that it amounts to satisfaction of the full value of his several claims, should not be expected to release the others. (See e g *Townsend v Stone Toms & Partners (a firm)* [1981] 2 All ER 690, [1981] 1 WLR 1153, where the court held, in overlapping claims by a building owner against a builder for defective work and against an architect for defective supervision, that the building owner's acceptance of a payment into court by the builder did not operate to stay proceedings against the architect by virtue of RSC Ord 22, r 3(4).) That rule operated, on a plaintiff's acceptance of a defendant's payment into court, to stay all further proceedings against 'any other defendant sued jointly or in the alternative' with the defendant whose payment he had accepted. Though the plaintiff's claims against the builder and the architect overlapped as to much of the alleged defective work, he had a different cause of action against each of them. Eveleigh LJ, with whom Watkins LJ and Sir David Cairns agreed, held that the words in the rule 'sued jointly' meant sued 'in respect of joint liability' and,

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therefore, did not apply to a case, such as that, where there are separate causes of action against two or more defendants albeit in relation to the same subject matter. He concluded his judgment with the following observation, which I respectfully regard as being a sound principle whatever the procedural context: '... where there are two separate causes of action, satisfaction of the one should not be a bar to proceedings in the other.' (See [1981] 2 All ER 690 at 695, 696, [1981] 1 WLR 1153 at 1160, 1161.)

It seems to me that such a clear approach is likely to be at least as conducive to the proper settlement of actions as the one for which Mr McLaren and Mr Woodward have contended. Mr Woodward argued that a plaintiff and settling defendant have the reassurance of finality if they know that their agreement prevents all further litigation between the plaintiff and others arising out of the same matter. That would be true, if finality were the only object of settlement and if one looks at it solely through the eyes of the settling defendant and other potential defendants. Whilst finality is clearly of importance to defendants, a plaintiff who has potential claims against two or more tortfeasors is less likely to settle with one if he knows that in so doing, whatever the level of recovery achieved in that settlement, he may lose his right of recovery against all the others unless he clearly reserves it. In any event, where there are separate, concurrent, claims, why should a reservation as between a plaintiff and one settling tortfeasor affect the plaintiff's right to proceed with his separate claim against the other tortfeasor? Neither logic nor policy requires it, as Steyn LJ's remarks in *Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578 about settlement in joint tortfeasor cases make clear. The only justification in law suggested by Mr McLaren—somewhat theoretical, in my view—is that the settling tortfeasor may have, as part of the settlement, negotiated and be willing to pursue a contractual entitlement to enforce the reservation on behalf of other tortfeasors.

SATISFACTION

The defence of satisfaction, in the sense of full satisfaction of a wrong or liability, is different from that of accord and satisfaction. First, it must be full satisfaction and second it must be given, executed. Its basis is the simple one that a claimant should not receive more than is necessary to compensate him for the wrong or wrongs done to him or in respect of the liability or liabilities owed to him. Where accord and satisfaction cannot be relied on, as where a claimant settles with only one of two concurrent tortfeasors, the tortfeasor facing a claim will nevertheless have a defence if the plaintiff's settlement with the other has fully compensated him for the separate wrongs done to him. A further question raised in this appeal is whether the use of such words as 'in full and final satisfaction' in a negotiated settlement for a sum less than the formulated claim impresses the settlement sum when paid with the quality of full satisfaction for this purpose.

Mr McLaren and Mr Woodward submitted that a settlement with one tortfeasor expressed to be in full and final settlement and satisfaction should be regarded as full satisfaction so as to bar an action against a concurrent tortfeasor unless the claimant as part of the settlement reserved the right to proceed against any other concurrent tortfeasor. Mr Woodward added that most settlement figures are less than the potential full value of claims, but that they should nevertheless be regarded as 'full satisfaction' if that is what the parties have agreed.

Mr Walker submitted that the defence of satisfaction, as distinct from that of accord and satisfaction, is only available where the claimant has been fully compensated in accordance with his claims for the wrongs done to him or in respect of the liabilities owed to him. He maintained that the fact that in settling with one tortfeasor a claimant is content to characterise the agreed sum as 'full satisfaction' of the claim against him does not render it so for the purpose of claims against others.

The authorities cited by Mr McLaren and Mr Woodward in support of their submission that the answer is to be found in the words of the parties in the settlement agreement are meagre.

The first was *Apley Estates Co v de Bernales* [1947] 1 All ER 213, [1947] Ch 217 which concerned joint, not concurrent, tortfeasors and where the defence under consideration was accord and satisfaction, not satisfaction.

The second was a Scottish case, *Carrigan v Duncan* 1971 SLT (Sh Ct) 33, which, in my view, on close examination, does not support the submission. It was a case of acceptance by a pursuer of a tender from one tortfeasor apparently in full satisfaction of his claim for all loss arising out of the matter, but which his solicitor in a subsequent action against a concurrent tortfeasor claimed to have been in partial settlement of his loss. The Sheriff's Court upheld the decision of the sheriff substitute dismissing his claim, holding that his previously undeclared and unevidenced intention of accepting the tender in partial satisfaction of his loss could not override what on an objective assessment of the matter appeared to have been an acceptance of payment in full satisfaction of his loss. Putting aside the possible differences of Scottish law, the circumstances of the case do not suggest to me a contrary approach to that of the English courts. There was no evidence before the court that the tender sum accepted by the pursuer was not the full amount of his loss, and the court felt bound to proceed on the basis that it was. The English authorities, to which I shall briefly refer, indicate that if, as a question of fact a plaintiff has secured full recovery, he cannot recover any more. In the case before us, as I have said, the judge found as a fact that Mr Jameson had not secured by his settlement with Babcock Energy full recovery of his loss.

Mr McLaren also cited some North American authorities in support of his submission that, as between concurrent tortfeasors, an agreement with one expressed to be in full satisfaction, whether or not it was, released the other. On examination, they do not support Mr McLaren's argument or, where they appear to do so, are not persuasive. In *Lovejoy v Murray* (1865) 70 US (3 Wall) 1 the Supreme Court of the United States held that a partially satisfied judgment against a trespasser did not bar recovery of the balance from a joint trespasser because the partially satisfied judgment was clearly not full satisfaction. In *Black v Martin* (1930) 292 P 577 the Supreme Court of Montana held that settlement with two joint tortfeasors for a sum less than full satisfaction did not bar an action for the balance against a concurrent tortfeasor. In *Lisoski v Anderson* (1941) 112 P 2d 1055 the Supreme Court of Montana held that release of a tortfeasor discharged a joint tortfeasor. In *Latham v Des Moines Electric Light Co* (1942) 6 NW 2d 853 the Supreme Court of Iowa declared that the tortfeasors were not joint but appears to have barred the second claim on the basis that the two causes of action were indivisible and that the two tortfeasors were responsible for the same wrong.

Such guidance as can be found in English authorities on the point indicate that satisfaction is a practical and objective defence, not dependent on agreement or accord, though often the result of it, by which a defendant says simply that the

plaintiff has already been fully compensated for the wrong or wrongs for which he claims damage. As I have said, unlike accord and satisfaction, it can only be executed. It is available where the plaintiff has received the full value of his claim, whether by judgment or acceptance of money in court or by settlement. Its basis is simply that a plaintiff should not recover more than his true loss. Thus, unlike accord and satisfaction in the case of joint tortfeasors, it does not apply to a negotiated settlement figure which is less than that full value of that claim. For the same reason Mr McLaren's reliance on the immateriality of the adequacy of consideration in contract as applied to a settlement agreement expressed to be in full satisfaction is misconceived.

This is how Glanville Williams, citing from very early authorities, put it in his 1951 study, *Joint Torts and Contributory Negligence* p 33:

> 'Satisfaction by any concurrent tortfeasor discharges the others. Satisfaction means payment of damages, whether after judgment or by way of accord and satisfaction, or the rendering of an agreed substitution therefor. If the payment is of damages, it must be of the full damages agreed by the plaintiff or adjudged by the court as the damages due to him; otherwise it will only be a satisfaction pro tanto.'

The court may give effect to the defence of satisfaction in different ways. (1) Where the plaintiff has obtained full recovery, by declining to give him judgment because he can no longer prove an essential part of the cause of action, an entitlement to damages: see *Bird v Randall* (1762) 1 Wm Bl 373 at 387, 96 ER 210 at 218, *Clark v Urquhart, Stracey v Urquhart* [1930] AC 28 at 38, 50, 54, 57, 63, 66 and 76 per Lord Sumner, Lord Atkin and Lord Tomlin, *United Australia Ltd v Barclays Bank Ltd* [1940] 4 All ER 20 at 31, [1941] AC 1 at 21 per Viscount Simon LC and *Bryanston Finance Ltd v de Vries* [1975] 2 All ER 609 at 618–620, 624–628 and 632–633, [1975] QB 703 at 722–724, 729–734 and 740 per Lord Denning MR, Lord Diplock and Lawton LJ. Or (2) where there has only been partial recovery, by confining any subsequent judgment to the unrecovered amount of the plaintiff's loss from the overlapping claims: see *Townsend v Stone Toms & Partners (a firm)* [1981] 2 All ER 690 at 695, [1981] 1 WLR 1153 at 1160 per Eveleigh LJ, *Townsend v Stone Toms & Partners (a firm) (No 2)* (1984) 27 BLR 26 per Oliver, Purchas and Waller LJJ at 38–39, 51 and 56 respectively and *The Koursk* [1924] P 140, [1924] All ER Rep 168. Or (3) where there has been full or partial recovery, by giving judgment for an amount but denying him his right to execution of it or confining execution to the unrecovered amount: see eg *Dering v Uris* [1964] 2 All ER 660, [1964] 2 QB 669, *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] 2 All ER 257, [1975] AC 507 and *Townsend v Stone Toms & Partners (a firm)* [1981] 2 All ER 690 at 695, 696–697, [1981] 1 WLR 1153 at 1160, 1162 per Eveleigh LJ and Sir David Cairns.

Mr McLaren has subjected *Bryanston Finance Ltd v de Vries* [1975] 2 All ER 609, [1975] QB 703 to detailed analysis, distinguishing it on its facts, including the fact that it was a joint tortfeasor case, correctly observing that it did not deal with the precise issue before this court and drawing attention to the differences between the judgments of Lord Denning MR, Lord Diplock and Lawton LJ. He conducted much the same exercise with the two *Townsend* cases, emphasising, in particular, that, though there were concurrent claims in that dispute, it did not follow that when the facts came to be established there would be concurrent tortfeasors, and that though the allegation was that they had caused some overlapping damage, it was not alleged that they were responsible for precisely the same damage.

In my view, none of the distinctions that Mr McLaren made of *Bryanston Finance Ltd v de Vries* is material. Although it was a joint tortfeasor case, it was not concerned with an accord and satisfaction, but with a consent judgment against one of the joint tortfeasors. The plaintiff was, therefore, entitled, by s 6 of the 1935 Act to proceed against the other tortfeasor. The relevant question for the Court of Appeal was how it should treat the subsequent claim against the second tortfeasor, having regard to the finding of the trial judge that the judgment sum against the first joint tortfeasor, if paid, more than compensated him for the wrong. Lord Denning MR and Lawton LJ regarded it as a bar to further recovery; Lord Diplock regarded it as a defence if pleaded. The court's conclusion on the main issue that a claimant should not recover more than his true damage is as applicable to concurrent as to joint tortfeasors and as to judgments as to settlements whatever form the latter take (see [1975] 2 All ER 609 at 619, [1975] QB 703 at 723 per Lord Denning MR).

As to the *Townsend* cases, Mr McLaren's submissions similarly do not meet the main thrust of the judgments, which was against over-recovery of damages, in this instance against concurrent tortfeasors or potentially concurrent tortfeasors. It seems to me that Oliver LJ pointed the way in the following passage from his judgment in *Townsend v Stone Toms & Partners (a firm) (No 2)* (1984) 27 BLR 26 at 38, in which, though talking of concurrent claims, he clearly had in mind principles governing valid claims against concurrent tortfeasors:

> 'The treatment of moneys taken out in satisfaction of claims against one defendant whilst the action proceeds against another, and where there is no precise coincidence of claims is a question which, curiously enough, appears to be uncovered by any reported authority. The plaintiffs' submission in this case, however, appears to me to be misconceived and to be based on the fallacious proposition that an unsatisfied judgment is to be treated for purposes of account in the same or another action on the same footing as a satisfied judgment. This, in my judgment, is palpably wrong. The starting point, and one on which there is a good deal of clear authority, is that where a plaintiff with concurrent claims against two persons has actually recovered part or all of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant. A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person, recover more than the total sum due.'

(See also his application (at 51) of that approach.)

Returning to this case, I can see no basis in law or in common sense why an agreement expressed to be in 'in full and final settlement and satisfaction' between a claimant and one tortfeasor should be regarded as full satisfaction in respect of any claims that he may have against a concurrent tortfeasor who was not a party to it. These are separate causes of action, not a single and indivisible action as is the case with joint tortfeasors. Nor am I impressed by the argument of Mr Woodward that, in a case of concurrent tortfeasors, it is undesirable and difficult for a court to attempt to determine the value of a claim on the basis of full liability regardless of the settlement figure. Such argument may apply to joint tortfeasors, but not to concurrent tortfeasors where satisfaction is not a reflection of an agreement but of whether the claim, good or bad, made against the second tortfeasor has in fact been satisfied. Where there is a question about that, in personal injury cases or otherwise, the task for the court is the same as that performed daily by civil courts throughout the country.

As I have said, the judge found that the settlement figure of £80,000 did not represent the full value of Mr Jameson's claim against Babcock Energy on a full liability basis. In my view, and for the reasons I have given, he was not bound to equate full satisfaction with a figure acceptable to both parties representing their respective assessment of the risks of the litigation. And, on the material before him, it was a finding he was entitled to make.

Accordingly, as Babcock Energy and the CEGB are agreed for the purpose of this preliminary issue to be concurrent tortfeasors and as Mr Jameson's settlement sum was only partial satisfaction of the full value of his claim, his receipt of that sum could not bar his executors from proceeding with their claim.

Mr Walker has advanced a further reason, which he described as 'subsidiary' and 'somewhat artificial', why the settlement payment of £80,000 cannot provide a defence of satisfaction to the CEGB.

It is that, even if the £80,000 were regarded as capable of being full satisfaction, it was not executed, because Mr Jameson did not receive it all before he died. The final £5,000 making up the total sum was not paid until 29 April 1988, after his death.

Bryanston Finance Ltd v de Vries and the other authorities to which I have referred indicate the importance of actual receipt of full satisfaction before it can be relied on as a defence. The entitlement of Mr Jameson to proceed against the CEGB and, hence, that of his executors under the 1976 Act turns on his entitlement at the moment of death (see *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034 at 1041 per Lord Dunedin, giving the judgment of their Lordships). At that time, he had not received the sum which, on the CEGB's and Babcock Energy's case, amounted to full satisfaction. Mr Walker submitted, therefore, that he was still entitled for that reason to maintain an action against the CEGB at the moment of death, thus founding his executors' present action against the CEGB.

In reply, Mr McLaren relied on the fact that the judge, by his order of 31 March 1995 giving effect to his judgment on the preliminary issues, has ordered that Mr Jameson's executors 'cannot now maintain any action against' Babcock Energy, the only basis for which could be a finding that there had been an executory accord and satisfaction of Mr Jameson's claim at the time of his death. Mr McLaren's reliance on that order to support a defence of satisfaction is misconceived. Babcock Energy as a matter of contract was entitled to rely on the executory settlement agreement as an accord and satisfaction; the CEGB as a concurrent tortfeasor cannot rely on it on the quite separate defence of satisfaction.

Mr McLaren submitted that, in any event, the date of payment is irrelevant since the settlement agreement was made and the case was effectively 'finished' on 19 April 1988, at which time £75,000 was already in court. That submission, it seems to me is simply another way of putting the same misconceived argument, namely that accord and satisfaction, as distinct from satisfaction, bars a claim against a concurrent tortfeasor.

I would not care to determine the case against the CEGB on a point such as this, and in the light of my conclusion on the main issue as to satisfaction, do not need to do so. However, it cannot be dismissed as an artificial or technical point. Unless Mr Jameson received full satisfaction—for the purpose of this alternative argument of Mr Walker, the agreed settlement figure—before his death so as to deprive him of any further right of action against the CEGB, the statutory right of his executors to make a dependency claim on behalf of his widow vested on his

death. Subsequent payment of the balance of the agreed sum could not, it seems to me, take away that entitlement.

ABUSE OF PROCESS—CONSTRUCTION OF S 1 OF THE 1976 ACT

As to abuse of process, the judge held that it would not have been an abuse for Mr Jameson to have proceeded against the CEGB had he lived; such an action would not have been, and the present action was not, a collateral attack on the settlement or akin to a collateral attack on a final judgment; he had found that the law permitted it and he referred by way of example to *The Koursk* [1924] P 140, [1924] All ER Rep 168 and ss 3 and 4 of the 1978 Act, which provide for successive actions against persons jointly liable for the same damage. He rejected the suggestion that Mr Jameson's advisers in negotiating the settlement had in mind further recovery against Babcock Energy by proceedings against the CEGB in which they contemplated Babcock Energy would be brought in as a third party. As to the possible 'windfall' to Mr Jameson's widow in recovering both the £80,000 through his estate and, thanks to s 4 of the 1976 Act, full dependency damages in the region of £142,000, as claimed, he referred to similar windfalls upheld by the courts.

A dependency claim under the Fatal Accidents Acts has always depended on the entitlement of the deceased at the moment of death to sue and recover damages for the wrongful act causing his death. Section 1(1) of the 1976 Act provides:

> 'If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.'

Section 4 of the Act provides that in assessing, inter alia, dependency damages, benefit to dependants from the deceased's estate shall be disregarded. More precisely, it provides:

> 'In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.'

Mr McLaren made two alternative submissions. The first, which he described as a matter of statutory construction of s 1 of the 1976 Act, only arises if, contrary to my view, the settlement sum of £80,000 would have been regarded as full satisfaction, as distinct from accord and satisfaction of the claim against Babcock Energy, but was only prevented from being so because the final £5,000 was not paid before Mr Jameson's death. Mr McLaren argued that at the time of death Mr Jameson would have lost his right of action against the CEGB because, by reason of the payment five days later, he would not in practice have been able 'to maintain an action and recover damages in respect thereof' as required by s 1.

Mr McLaren's submission on this point results from a misreading of s 1(1). It enables the bringing of an action on behalf of dependants if the wrong, but for the deceased's death, would have 'entitled' him 'to maintain an action and recover damages'. The test is the deceased's 'entitlement' just before death to achieve that end if he had lived, not whether he could have achieved it given the fact that he died when he did or that his claim would thereafter have been struck out as an abuse of process as a result of the payment five days later. In any event, as, in my

view, the settlement figure of £80,000 did not amount to full satisfaction of Mr Jameson's claim, it was not capable, whenever paid, of releasing the CEGB as a concurrent tortfeasor.

Mr McLaren's second submission, which Mr Woodward supported, was that it would have been an abuse of process to allow Mr Jameson's widow to make a dependency claim against the CEGB, he having entered unreservedly into a full and final settlement with Babcock Energy for a sum which included a significant amount for future loss of earnings that she received as part of his estate. (Such loss could not have been recovered in a claim by his estate for 'the lost years' after his death, and it will be remembered that the 1934 Act claim was abandoned at the trial.) Mr McLaren added that it was a further abuse of process if, as Babcock Energy maintained, the CEGB could not recover contribution from it. He submitted that that abuse taints this 'derivative' action on behalf of Mr Jameson's widow and offends the general canon that there should be finality in litigation.

Whilst the categories of cases that may be struck out as an abuse of process are not closed, examples are rare and usually fall into one of two classes, namely: invoking the judicial process for some collateral purpose (see eg *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 per Lord Diplock and *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338) and stultifying the process of the court (see eg *Headford v Bristol and District Health Authority* (1994) Times, 30 November, [1994] CA Transcript 1388).

The judge rejected the argument of Mr McLaren that there was evidence indicating that the action was tainted by reason of a secret or planned 'procedural device' under which Mr and Mrs Jameson agreed that he would not proceed with one of his causes of action so as to enable her to take advantage of the windfall of part of his damages by virtue of s 4 of the 1976 Act. Even if the judge had found that there had been some such arrangement, it is, in my view, open to question whether it would have rendered the present action an abuse.

I cannot see how, if Mr Jameson had lived, it would have been an abuse of process for him to have sued the CEGB for the balance of his claimed loss after settling as he did with Babcock Energy. He was not bound to sue all alleged tortfeasors in one action or to settle his claim as against all of them. (See *Clerk and Lindsell on Torts* pp 147–148, para 4-55 and eg *The Koursk* [1924] P 140, [1924] All ER Rep 168 and *United Australia Ltd v Barclays Bank Ltd* [1940] 4 All ER 20 at 50–51, [1941] AC 1 at 50 per Lord Porter; also s 6 of the 1935 Act and ss 3 and 4 of the 1978 Act expressly providing for successive actions). If, as the judge found, his settlement did not amount to full satisfaction of his claim against all those responsible for his condition, I can see no reason in law or as a matter of policy why he should not, if he had lived, proceed against a concurrent tortfeasor for the balance.

As to the present claim, Mrs Jameson has a statutory right, as her deceased husband's dependant, to damages for her loss of dependency against those who caused it. She is also entitled, by s 4 of the 1976 Act, to ask the court to disregard any sums received 'from his estate or otherwise as a result of his death', including the sum of £80,000 from his settlement agreement with Babcock Energy. It cannot normally be an abuse of process to enforce an express statutory entitlement. (See eg *Pidduck v Eastern Scottish Omnibuses Ltd* [1990] 2 All ER 69, [1990] 1 WLR 993 and also *Gammell v Wilson, Furness v B & S Massey Ltd* [1981] 1 All ER 578, [1982] AC 27 and other 'lost years' damages cases until the scope for such claims was removed by s 4(2) of the Administration of Justice Act 1982, substituting s 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934.)

Mr McLaren suggested nevertheless that it was an abuse of process for Mrs Jameson to seek and obtain double recovery of at least some of her husband's lost future earnings already included in the £80,000 settlement. He said that the 1976 Act was not intended to assist those who had already recovered damages which could provide for dependency, as the 1982 Act still permits a living plaintiff to do.

Mr McLaren, in making that suggestion, relied heavily on a passage from the speech of Lord Salmon in *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1979] 1 All ER 774 at 782–783, [1980] AC 137 at 152–153, a 'lost years' claim by a plaintiff continued after his death by his widow as administratrix, not a dependency claim under the 1976 Act. Lord Salmon clearly considered the function of that Act and its predecessors to provide for a fatally injured man's dependants where the interval between the fatal injury and death was so short that the injured man could not make similar provision by proceeding to judgment in a claim for his 'lost years' before death. He seems to have regarded the 'lost years' entitlement of a dying man and the dependency entitlement of his family after his death as alternative ways to the same end, the alternative chosen depending on the timing. This is how he put it ([1979] 1 All ER 774 at 783, [1980] AC 137 at 153):

> 'When the Fatal Accidents Acts 1846 to 1908 were passed, it is, in my view, difficult to believe that it could have occurred to Parliament that the common law could possibly be as stated many years later, by the Court of Appeal in *Oliver v Ashman* [1961] 3 All ER 323, [1962] 2 QB 210 ... [holding that there was no entitlement to claim for 'the lost years']. The clear intention of Parliament in passing those Acts appears to have been to deal with the all too frequent cases in which, as a result of someone else's negligence, a man suffered injuries which incapacitated him from earning and caused his death before he could obtain any damages from the tortfeasor to compensate him for the loss of the money he would have earned but for the tort. The policy of the Acts was, in my opinion, clearly to put that man's dependants, as far as possible, in the same financial position as they would have been in if the breadwinner had lived long enough to obtain judgment against the tortfeasor. In my opinion, Parliament correctly assumed that had the deceased lived, he would have recovered judgment for a lump sum by way of damages as compensation for the money he would have earned but for the tortfeasor's negligence and that these damages would have included the money which the deceased would have earned during "the lost years". Otherwise, Parliament would, surely, have made it plain that no judgment in favour of the deceased or settlement of his claim could bar a claim by his dependants under the Fatal Accidents Acts; I certainly do not think that Parliament would have used the language which it did use in s 1 of those Acts.'

Lord Salmon was not, of course, concerned in that case with the precise nature of entitlement under the Fatal Accidents Acts or with a dependency claim after death against a concurrent tortfeasor. The principle of law that he described as 'probably correct' ([1979] 1 All ER 774 at 782, [1980] AC 137 at 152) is that as a matter of construction of s 1 of the 1976 Act and its predecessors, if a dying man settles with or obtains judgment against a tortfeasor his dependants have no claim against that tortfeasor because he has none at death and his death does not create a fresh cause of action (see eg *Read v Great Eastern Rly Co* (1868) LR 3 QB 555, *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804 and *Murray v*

Shuter [1972] 1 Lloyd's Rep 6). However, as I have said, that principle does not apply where a dying man has a claim against another, concurrent, tortfeasor which he has not settled and against whom he has not obtained judgment, because there, if he had lived, he would have been entitled to maintain an action against that tortfeasor.

As to the effect on Mr Jameson's notional claim if he had lived, or on his widow's dependency claim, of the possible injustice to Babcock Energy in now being subjected to a third party claim despite its 'full and final' settlement with Mr Jameson, it seems to me that the possibility or probability of that at the time of settlement could not 'taint' either claim. Mr Jameson's only agreement was with Babcock Energy; it was nothing to do with him whether, in any subsequent claim by him or by his widow under the 1976 Act against the CEGB, it might seek a contribution from Babcock Energy; and it was nothing to do with the CEGB, finding itself a defendant to a dependency claim, that Mr Jameson had settled his claim against Babcock Energy 'in full and final satisfaction'. This appears to have been the approach of Steyn LJ in the passage that I have cited from his judgment in *Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578 in which he suggests that release of a tortfeasor should not release a joint tortfeasor, putting him in the same position as a concurrent tortfeasor in this respect. For convenience, I repeat that part of the passage:

> '... but good sense, fairness and respect for the reasonable expectation of contracting parties suggest that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is concerned the settlement between the plaintiff and the released tortfeasor is res inter alios acta. If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution ...'

Accordingly, my view is that there is no basis, evidential or otherwise, for regarding Mrs Jameson's dependency claim, which she is legally entitled to make against the CEGB, as tainted by her husband's settlement with Babcock Energy so as to render the present action an abuse of process.

DAMAGES

The issue as to damages arises only if, as I would hold, Mr Jameson's cause of action before death has not been satisfied and the present claim is not an abuse of process. It is whether Mrs Jameson can establish that her loss of dependency has resulted from her husband's death.

The judge rejected the CEGB's and Babcock Energy's argument that at the time of Mr Jameson's death there was no dependency because by then he had no actual or potential earning capacity. He held that the effect of the Fatal Accidents legislation from its inception was to require a tortfeasor whose tort had caused loss of earning capacity and death, whether or not simultaneously, to compensate the deceased's dependants for that loss. He also declined to accept the argument advanced on behalf of Babcock Energy that he should set against any dependency the fact that had Mr Jameson lived he would have required costly full-time nursing and would not have been able to do any work about the house.

I set out the relevant provisions of the 1976 Act, for convenience repeating ss 1(1) and 4, emphasising parts of the provisions particularly relevant to this issue, and observing that s 1(1) is essentially the same as it was in the 1846 Act:

> *'If death is caused by any wrongful act, neglect or default which is such as would* (if death had not ensued) *have entitled the person injured to maintain an action and recover damages in respect thereof,* the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.'

Section 1(2) provides, subject to immaterial exceptions, that 'every such action shall be for the benefit of the dependants of ... the deceased ...' Section 3(1) identifies in broad terms the damages recoverable:

> 'In the action such *damages*, other than damages for bereavement, may be awarded as are proportioned *to the injury resulting from the death* to the dependants respectively.'

Section 3(3) excludes consideration in the assessment of damages of the prospect of a widow's re-marriage:

> 'In an action under this Act where there fall to be assessed *damages* payable to a widow *in respect of the death of her husband* there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.'

And s 4 provides that in assessing damages certain benefits shall be disregarded:

> 'In assessing *damages in respect of a person's death* in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.'

Mr McLaren and Mr Woodward submitted that Mrs Jameson's loss of dependency, including the claimed allowance for the work that he did around the house, did not result from her husband's death, as required by those provisions, because he had already lost all future earning and 'DIY' capacity before it occurred. They maintained that the 1976 Act does not provide compensation for loss of dependency caused by the wrong or the injury that it caused during the deceased's lifetime, but only for that resulting from the death, and they drew attention to the highlighted words in ss 3(1), 3(3) and 4. They placed particular reliance on the words of Lord Dunedin in *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034 at 1041, albeit that they were couched in terms of actionability rather than recovery of loss of dependency:

> '... the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, [have] maintained, i.e., successfully maintained, his action, then the action under the Act does not arise.'

The consequence of their submission, if correct, would be to deprive dependants of any recovery under the Act whenever the injury causing permanent loss of earning capacity does not also instantaneously cause death. It would also mean that possibly hundreds of thousands of judgments and settlements in the 150 years of the Fatal Accidents legislation have erroneously provided for the dependants of those who did not die instantaneously from another's wrong, including those who died only after a lingering fatal illness.

Mr McLaren and Mr Woodward suggested that such an outcome would not produce an injustice in this case because Mr Jameson had already recovered a substantial amount of damages for his injury which would enure for the benefit of Mrs Jameson as part of his estate, thus merely preventing double recovery. That line of reasoning led Mr McLaren to soften the surprising consequence of the argument. He acknowledged that the clear policy of the 1976 Act and its predecessors was to provide for dependants whenever their provider died after suffering a fatal injury or disease. However, he suggested that the policy conflicted with the plain meaning of its words, particularly those that I have highlighted in ss 3(1), 3(3) and 4. To overcome that dilemma he suggested that, where the deceased has not obtained judgment or settled his claim before death, courts should apply the absurdity test to the literal meaning of the Act and the policy should prevail, but where he has done either the courts should give the provisions the literal and natural meaning for which he and Mr Woodward contended. They maintained, therefore, that Mrs Jameson cannot establish any dependency and that her only effective claim is for bereavement damages.

Mr McLaren sought, as part of this submission, to close a possible loophole in it based on any additional loss of dependency that Mrs Jameson might be able to establish from her husband's entitlement before death to recover against the CEGB the balance of his claim for future loss. He said that as Mr Jameson had settled his claim against Babcock Energy in full and final settlement, he would have been unlikely to have made any claim against the CEGB if he had lived. He would have had to give credit for the substantial settlement sum £80,000, much of it going to future loss (not having the benefit of s 4 of the 1976 Act given to a deceased's dependants); any claim by him against the CEGB would, as Mr Walker has conceded, have been weaker than that against Babcock Energy; and he would have been at risk as to costs under s 4 of the 1978 Act in bringing successive actions in respect of the same damage. Mr McLaren submitted that, in practice, Mr Jameson had no further claim at the time of death on which he could have maintained an action and have recovered damages against the CEGB and that, therefore, Mrs Jameson had no basis for a claim for loss of dependency under s 1(1) of the 1976 Act.

Mr Woodward argued additionally, though he did not press it as strongly as he had done to the judge, that if Mr Jameson had not died any claim that he might have had for future loss of earning capacity would have been of no benefit to his widow because it would have been substantially or entirely consumed in providing full-time care for him.

It is said that the cause of action under the 1976 Act and its predecessors is a new cause of action arising only at death, distinct, both as to cause and the nature of recoverable damages, from that of the deceased if he had lived (see eg *Pym v Great Northern Rly Co* (1863) 4 B & S 396, [1861–73] All ER Rep 180, *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034 at 1039–1040 per Lord Dunedin and *Davies v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657 at 662, 665 and 673, [1942] AC 601 at 611, 617 and 623 per Lord Wright and Lord Porter). Damages for dependency are not what a deceased would have recovered by way of his own action. They are what his dependants have lost by reason of his death, based conventionally on what he would have earned but for his death.

Whether one calls a dependency claim new or derivative, or both, the scheme of s 1 of the 1976 Act is plain. It vests in dependants a right to claim for loss of dependency resulting from a wrongful act causing injury and death in respect of which a deceased could have claimed for his injury if he had lived. Putting aside

for a moment any question of full or partial recovery of future loss of earnings during life by settlement or judgment, in every case where death is caused by a wrongful act the deceased has suffered injury depriving him of his earning capacity before or by his death. Up to the moment of death he has an entitlement to claim for damages for the injury and its disabling consequence caused by that wrongful act. It is that entitlement which, by s 1(1) of the Act, is the basis for the dependants' entitlement provided by s 1(2) and assessed in accordance with s 3(1) for the quite separate 'injury' of loss of dependency 'resulting from the death'. The two forms of injury though distinct, are successive results of the same wrongful act.

Accordingly, in my judgment, even without resort to the notion of absurdity in the case of settlement or judgment before death, the meaning and effect of the 1976 Act are plain. It entitles a deceased's dependants to claim for loss of dependency after death where his injury and death were caused by a wrongful act, whether or not there was an interval between injury and death and whether or not the injury had disabled him from working before death. As Mr McLaren's qualified submission on the matter acknowledged, any other interpretation of the statute would be absurd. It would frustrate the clear purpose of the Fatal Accidents legislation since its introduction in 1846 and contradict the effect given to it by the courts in the 150 years of its existence. When Parliament continued in the 1976 Act substantially the same formula for entitlement as that in the 1846 Act it must have intended that it should continue to have that effect.

Mr Woodward's additional and alternative submission is also contrary to the clear meaning of the Act and absurd, namely that there is no dependency entitlement because, if Mr Jameson had lived, all his loss of earnings would have been absorbed in maintaining him and he could have done no work about the house. It wrongly equates Mr Jameson's cause of action before death for damages for the disabling effects of asbestosis with that of Mrs Jameson after his death, namely for loss of her dependency resulting from death. The scheme of s 1(1) of the 1976 Act in establishing an entitlement to a dependency claim is to enable a deceased's dependants to recover their loss resulting from the wrongful act causing his injury and death, not to assume that the deceased has not died and that his loss continues after death.

INDEMNITIES

The CEGB maintains that if it fails in its other arguments, it is entitled, by virtue of s 1 of the 1978 Act, to a contribution from Babcock Energy notwithstanding the latter's settlement with Mr Jameson, because their potential respective liabilities were 'in respect of the same damage'. Babcock Energy's case is that it is not liable to contribute because its potential liability is not 'in respect of the same damage' and that, in any event, it has contractually excluded such liability.

'In respect of the same damage'

The judge found that Mr Jameson developed the fatal mesothelioma after the 1978 Act came into force and that, therefore, the question of contribution was governed by that Act and not the Law Reform (Married Women and Tortfeasors) Act 1935, s 6 of which the 1978 Act replaced and extended to include contribution for damage caused by any wrong whether or not tortious. He held that the CEGB was entitled to seek contribution from Babcock Energy in the third party proceedings, and Babcock Energy now appeals that decision.

The 1978 Act, provides in s 1:

> '(1) ... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise) ...
>
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage ...'

By s 2(1):

> '... in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage in question.'

By s 6(1), which clearly had liability under the Fatal Accidents legislation in mind, a person is liable in respect of any damage for the purpose of the Act:

> '... if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).'

By s 6(2) and (3):

> '(2) References in this Act to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants.
>
> (3) In this Act "dependants" has the same meaning as in the Fatal Accidents Act 1976.'

The first issue is whether the damage for which the CEGB may be liable in the present action is 'the same damage' for which Babcock Energy may be liable. By s 1(3) of the Act a person may be liable to contribute 'notwithstanding that he has ceased to be liable in respect of the damage ...' unless by limitation or prescription extinguishing the claim. Thus s 6(1) must be interpreted as if it read *'is or has been at any time* entitled to recover compensation ...' (see *R A Lister & Co Ltd v E G Thomson (Shipping) Ltd (No 2), The Benarty (No 2)* [1987] 3 All ER 1032 at 1037–1038, 1039, [1987] 1 WLR 1614 at 1621, 1623 per Hobhouse J). Similarly, in s 1(6), as qualified by s 6(2), a person's 'liability in respect of any damage' means a liability which has been or could have been or could be established in an action against him 'by or on behalf of the person who suffered the damage', including an action brought for the benefit of a deceased's estate or his dependants. (See eg *Logan v Uttlesford DC* [1984] CA Transcript 263 per Donaldson MR, in which this court upheld the right of a defendant in a road traffic case to seek contribution from another with whom the plaintiff had settled his claim in respect of the same accident without resort to litigation.)

Mr McLaren submitted that the relevant damage in this context is the alleged wrong that caused injury and death to Mr Jameson, not the damages that he could have recovered for his injury. He said that the only wrong/damage was to Mr Jameson, not to Mrs Jameson, and that the action on her behalf is a derivative one 'in respect of the same damage', namely in respect of the damage suffered by him. He added that the fact that Babcock Energy ceased to be liable to Mr

Jameson for that wrong/damage on the settlement is irrelevant on the question of contribution because ss 1(3), 1(6) and 6(1) create an entitlement to contribution in respect of a liability which could have been established at any time. He relied on the following passage from the judgment of Donaldson MR in *Logan v Uttlesford DC*, explaining the code of the 1978 Act and in particular its provision in s 1(2) for a defendant who was but is no longer liable to a plaintiff to recover a contribution from a third party, and in s 1(3) for a defendant to recover contribution against a third party who was, but is no longer, liable to the plaintiff:

> 'Subsection (3) looks at the problem from the point of view of [the third party] against whom the [defendant] has made a claim for contribution in circumstances in which [the third party] is outside the general rule, because he has ceased to be liable to [the plaintiff]. It provides that he will nevertheless be liable to contribute if he was at one time liable to [the plaintiff], unless he ceases to be liable to [the plaintiff] by virtue of the expiry of a period of limitation or prescription which extinguished the right on which [the plaintiff's] claim was based as contrasted with merely barring [the plaintiff's] remedy.'

Mr Woodward submitted that Babcock Energy is not liable under the 1978 Act to contribute to any damages that the CEGB may be ordered to pay for her benefit under the 1976 Act. Put at its simplest his argument was that, as Mrs Jameson is and always was unable to maintain an action against Babcock Energy in respect of her husband's death, the CEGB is unable to obtain a contribution from Babcock Energy in respect of his death because there is no common 'damage' for the purpose of s 1(1) of the 1978 Act. The premise of his argument was that the injury or damage in an action under the 1976 Act is not that suffered by the deceased before he died but only that suffered by his dependants on and as a result of his death. He relied on a number of authorities under the Fatal Accidents legislation, to some of which I have referred, indicating that a dependency claim is a new cause of action arising only on death. Thus, he reasoned that Mrs Jameson's only claim for damage is that arising after her husband's death and in respect of his death; she could never have had such a claim against Babcock Energy before his death and his settlement with Babcock Energy has deprived her of a claim after his death in respect of it. Accordingly, he submitted, Babcock Energy is not and never was putatively liable in respect of the same damage as that claimed against the CEGB, namely death and loss of dependency.

In my judgment, Mr McLaren has interpreted the 1978 Act correctly. Mr Woodward's argument confuses 'damage' as it is used in the 1978 Act with 'damages' in its normal sense of compensation.

To demonstrate this, it is important to bear in mind the scheme of the 1976 Act (see ss 1(1) and (2), 2(4) and 3(1) and 4), which, as I have said, the draftsman of the 1978 Act clearly had in mind. It is to provide 'damages' to the dependants of a deceased for 'any wrongful act, neglect or default' that caused his death. In the 1978 Act the word 'damage' is not defined, but, in my view, its meaning is plain in the various contexts in which it appears. It is the wrong causing injury and/or death; it does not mean death and it does not mean loss of dependency resulting from death. It thus corresponds to the 1976 Act formula 'any wrongful act, neglect or default'. The scheme of the 1978 Act, as I put it in *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm) (Estates and General plc, third party)* [1995] 4 All ER 260 at 272, [1997] QB 85 at 102, is to provide for contribution in

respect of 'compensation' for 'damage' (see also *Birse Construction Ltd v Haiste Ltd (Watson, third party)* [1996] 2 All ER 1 at 8, [1996] 1 WLR 675 at 682 per Roch LJ).

Thus, s 2(1) directs the court when assessing the amount of any contribution to have regard to his responsibility for 'the damage in question'. As Mr McLaren observed, apportionment of responsibility 'for the damage in question' only makes sense if it means apportionment of responsibility for the wrong causing injury and death and not the statutory remedy of dependency damages provided by the 1976 Act. (See also ss 1(6) and 6(2), which I have set out above.)

Any other interpretation would result in a narrowing of the provision for contribution as originally provided in s 6 of the 1935 Act, which is clearly not what was intended by 1978 Act. See eg *Lampitt v Poole BC (Taylor, third party)* [1990] 2 All ER 887 at 892–893, [1991] 2 QB 545 at 555 per Lord Donaldson MR.

Contractual exclusion of right to contribution

Babcock Energy maintains in the alternative that it has contractually excluded any liability to contribute and relies on s 7(3)(b) of the 1978 Act, which provides:

> 'The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances, but nothing in this Act shall affect—(a) any express or implied contractual or other right to indemnity; or (b) any express contractual provision regulating or excluding contribution; which would be enforceable apart from this Act ...'

The contract between Babcock Energy and the CEGB included a form of general conditions recommended by a number of professional engineers' bodies. Condition 21(iv) of those conditions provided for Babcock Energy to indemnify the CEGB, in certain specified circumstances, against claims in respect of damage or injury occurring during the contract works caused by Babcock Energy's negligence, but made no provision for contribution. Condition 21(vi) provided: 'The Contractor [Babcock Energy] shall not be liable to the Purchaser [the CEGB] for ... (b) except as provided in these Conditions, any claim made against the Purchaser [the CEGB].'

Mr Woodward submitted that that provision expressly excluded contribution as provided by s 7(3)(b). Mr McLaren, on the other hand, contended that it excludes only the right to an indemnity falling outside the circumstances specified in condition 21(iv), not the statutory right to a contribution.

Section 7(3)(b) protects any provision regulating or excluding contribution 'which would be enforceable apart from this Act'. At common law there was, in general, no right of contribution between tortfeasors outside contract (see the Law Commission's *Law of Contract: Report on Contribution* (1977) (Law Com No 79) pp 3–5, paras 13-17). The 1935 Act made no provision for statutory contribution in contract, only in respect of tortfeasors liable in respect of the same damage. However, the 1978 Act, in s 6(1), introduced a statutory right of contribution, based, inter alia, on contractual liability. It thus became necessary also to include in the 1978 Act a provision protecting contractual provision for, or exclusion of, a right to contribution. Hence s 7(3) provides that the statutory right to a contribution in s 1 supersedes all but such express contractual provision.

Here, condition 21(iv) provides only for an indemnity and then in carefully specified circumstances. There is no express contractual provision for a contribution. The use of the general words 'any claim' in that context does not

seem to me to amount to 'an express contractual provision excluding contribution'. There is, therefore, no candidate for exclusion under condition 21(vi), that is, a contribution 'which would be enforceable apart from [the] Act'. In addition, the condition excluding liability—'except as provided in these Conditions, any claim made against the Purchaser'—seems to me to be primarily intended to restrict to the specified circumstances the right of indemnity or other claim expressly provided for in the contract.

In my judgment, as a matter of construction of the contract and of s 7(3)(b) of the 1978 Act, the contract did not expressly exclude the CEGB's statutory right of contribution under the 1935 Act and now the 1978 Act. I am reassured in that construction by the inherent implausibility, as Mr McLaren described it, of the parties having intended that the CEGB's right of recovery against Babcock Energy should be a full indemnity or nothing.

Exercise of discretion

A further and alternative ground of appeal by Babcock Energy in the third party proceedings was that the judge should have exercised his discretion under s 2(2) of the 1978 Act so as to exempt Babcock Energy from liability to make a contribution.

As Mr McLaren submitted, it would have been inappropriate for the judge to have attempted to exercise such a discretion in determining these preliminary points of law. He had yet to hear evidence on and make findings of fact which would bear on the exercise of such discretion.

Accordingly, I would dismiss both appeals and confirm the judge's orders.

SIR PATRICK RUSSELL. I agree.

NOURSE LJ. I also agree.

Appeals dismissed. Leave to appeal to the House of Lords refused.

30 June 1997. The Appeal Committee of the House of Lords gave leave to appeal.

L I Zysman Esq Barrister.

Inland Revenue Commissioners v Willoughby and related appeal

HOUSE OF LORDS

LORD NOLAN, LORD MUSTILL, LORD HOFFMANN, LORD CLYDE AND LORD HUTTON

10 MARCH, 10 JULY 1997

Income tax – Avoidance – Transfer of assets abroad – Income payable to persons resident or domiciled outside United Kingdom – Residence of transferor – Whether transferor required to be ordinarily resident in United Kingdom for charge to income tax – Income and Corporation Taxes Act 1988, s 739.

Income tax – Avoidance – Transfer of assets abroad – Income payable to persons resident or domiciled outside the United Kingdom – Investment in offshore premium bonds – Holder having ability to choose underlying investments – Offshore bonds subject to separate tax regime – Whether purpose of transfer being avoidance of liability to taxation – Income and Corporation Taxes Act 1988, s 741.

In July 1986 W retired from his post as professor of law at the University of Hong Kong and became entitled to a lump sum payment from the university's provident fund. On advice he put the lump sum into a single premium personal portfolio bond with RL, a company incorporated, managed, controlled and resident in the Isle of Man, which issued to him in return 19 policies of insurance linked to fund 1121. W and his wife subsequently returned to England and became ordinarily resident in the United Kingdom in May 1987. In February 1989, on the maturity of the first of three offshore insurance policies previously taken out, W chose to effect a further single premium personal portfolio bond with RL (No 2387). The proposal was made by his wife and the appropriate policies were issued to her on 13 March 1989. In February Mrs W took out a third bond (No 3343) funded by the second and third insurance policies. Under the statutory taxation regime for offshore life policies W and his wife would pay no tax on the income or capital gains until the maturity of the bond or the occurrence of one of the other specified chargeable events. However, the Revenue took the view that the taxpayers had sought to avoid income tax by the transfer of assets abroad and on that basis they assessed W to tax on the income arising under the bonds for the years 1987–88, 1988–89, 1989–90 and 1990–91 and his wife for the year 1990–91 under s 739[a] of the Income and Corporation Taxes Act 1988 (and its statutory predecessor), which had effect 'for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets'. A special commissioner allowed the taxpayers' appeals. He held that s 739 did not apply to fund 1121 as W had not been resident or ordinarily resident in the United Kingdom when the funds were transferred; in relation to all three bonds, he rejected the Crown's distinction between personal portfolio bonds in which the policyholder had the ability to nominate the underlying investments and other offshore bonds where such investment was pooled which qualified for exemption from s 739 liability pursuant to s 741(a)[b] and concluded that the transfers had not been made for the

a Section 739, so far as material, is set out at p 67 *f* to *j*, post

b Section 741, so far as material, is set out at p 72 *a b*, post

purpose of avoiding liability to tax. The Court of Appeal affirmed the commissioner's decisions on both points and the Crown appealed.

Held – The appeals would be dismissed for the following reasons—

(1) In view of the natural and plain meaning of the words used, s 739 of the 1988 Act only applied to transfers of assets by individuals who were ordinarily resident in the United Kingdom at the time of the relevant transfer. Since W was not ordinarily resident in the United Kingdom when he purchased bond No 1121, the income from that bond did not therefore fall within the scope of s 739 (see p 71 *b* to *d j* and p 75 *b* to *f*, post); *Vestey v IRC (Nos 1 and 2)* [1979] 3 All ER 976 considered; *IRC v Herdman* [1969] 1 All ER 495 not followed.

(2) Moreover, for the purposes of s 741(a) of the 1988 Act, tax avoidance was a course of action designed to conflict with or defeat the evident intention of Parliament and not the acceptance of an offer of freedom from tax which Parliament had deliberately made. The mere fact that the personal portfolios bondholder might fare better or worse in terms of benefits by reason of his control over investment policy than did his fellow bondholder with the standard type of bond had nothing to do with tax or with tax avoidance and there was no reason why Parliament should have intended to distinguish between them in fiscal terms. It followed, in the instant case, that the investment in all three personal portfolio bonds could not be characterised as tax avoidance and the taxpayers' claim for exemption under s 741(a) would therefore be upheld (see p 73 *j*, p 74 *h j* and p 75 *b* to *f*, post).

Notes

For prevention of avoidance of income tax, see 23 *Halsbury's Laws* (4th edn reissue) para 1565.

For exemption from charge on income arising from a transfer of assets abroad, see 23 *Halsbury's Laws* (4th edn reissue) para 1571.

For the Income and Corporation Taxes Act 1988, ss 739, 741, see 44 *Halsbury's Statutes* (4th edn) (1996 reissue) 1132, 1135.

Section 739 was amended by s 81 of the Finance Act 1997, which inserted sub-s (1A). Section 739(1A) applies irrespective of when the transfer or associated operations took place, but applies only to income arising on or after 26 November 1996.

Cases referred to in opinions

Congreve v IRC [1948] 1 All ER 948, HL; *affg* [1947] 1 All ER 168, CA.

Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] 2 All ER 275, [1992] 1 AC 655, [1992] 2 WLR 469, HL.

IRC v Goodwin [1976] 1 All ER 481, [1976] 1 WLR 191, HL.

IRC v Herdman [1969] 1 All ER 495, [1969] 1 WLR 323, NI CA and HL

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

Vestey v IRC (Nos 1 and 2) [1979] 3 All ER 976, [1980] AC 1148, [1979] 3 WLR 915, HL.

Appeals

The Commissioners of Inland Revenue appealed from the decision of the Court of Appeal (Glidewell, Hobhouse and Morritt LJJ) ([1995] STC 143) on 16 December 1994 upholding a decision of a commissioner for the special

purposes of the Income Tax Acts, Mr D A Shirley, allowing appeals against assessments to income tax by Peter Geoffrey Willoughby and his wife, Ruth Marylyn Willoughby. The assessments had been raised pursuant to s 739 of the Income and Corporation Taxes Act 1988 to prevent avoidance of tax by the transfer of certain assets abroad. The facts are set out in the opinion of Lord Nolan.

Launcelot Henderson QC and *Rabinder Singh* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

David Goy QC and *Philip Baker* (instructed by *Speechly Bircham*) for the taxpayers.

Their Lordships took time for consideration.

10 July 1997. The following opinions were delivered.

LORD NOLAN. My Lords, in these appeals the Commissioners of Inland Revenue seek to uphold five assessments to income tax, four of which were made on the respondent, Professor Willoughby, for the years of assessment 1987–88 to 1990–91 inclusive and the fifth of which was made on his wife, the respondent Mrs Willoughby, for the year of assessment 1990–91. The assessment upon Professor Willoughby for 1987–88 was made under s 478 of the Income and Corporation Taxes Act 1970. The remaining assessments were made under s 739 of the Income and Corporation Taxes Act 1988, which replaced and re-enacted s 478 of the 1970 Act without material alteration. The origin of these sections is to be found in s 18 of the Finance Act 1936, a section whose provisions, either in their original or in their re-enacted form, have been considered by your Lordships' House on previous occasions. It will be convenient, and sufficient for all relevant purposes, if as a general rule I refer to these provisions in the form in which they appear in the 1988 Act.

Section 739 is the first section in Ch III of Pt XVII of the 1988 Act, which is concerned with the transfer of assets abroad. The purpose which the section is intended to serve appears from sub-s (1), which reads:

> 'Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.'

The charging provision upon which the commissioners rely is sub-s (2), which is in these terms:

> 'Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.'

By virtue of s 742(9)(a), the reference in s 739 to an individual is to be deemed to include the wife or husband of the individual. Section 742 also contains definitions of a number of the other words and phrases used in s 739, such as 'transfer', 'power to enjoy' and 'associated operations', but fortunately it is unnecessary to consider any of these definitions because it is common ground between the parties that by virtue or in consequence of transfers of assets to Royal Life Insurance International Ltd (Royal Life), a person resident or domiciled outside the United Kingdom, Professor and Mrs Willoughby had power to enjoy income of Royal Life at a time when they were ordinarily resident in the United Kingdom, that is to say during the tax years for which the disputed income tax assessments were made upon them.

More specifically, the facts upon which the claim for tax is based are these. In 1973 Professor Willoughby took up employment as Professor of Law at the University of Hong Kong and he and Mrs Willoughby became resident there. The university had a provident fund scheme of which Professor Willoughby was a member, but he wished to make additional provision for his retirement. This additional provision included the taking out of three offshore personal portfolio bonds with Royal Life. The first bond (No 1121) was taken out by Professor and Mrs Willoughby jointly in August 1986, with funds provided by Professor Willoughby on his retirement as Professor of Law at the University of Hong Kong. The second bond (No 2387) was taken out by Mrs Willoughby in March 1989, and was funded by the proceeds of an earlier offshore policy taken out by Professor and Mrs Willoughby in 1979 with Save and Prosper International Insurance Ltd (Save and Prosper), a Bermudan insurance company. The third bond (No 3343) was taken out by Mrs Willoughby in March 1990, and was funded by the proceeds of two further policies which had also been taken out by Professor and Mrs Willoughby with Save and Prosper, in 1981 and 1982 respectively. There is no dispute that the payments of premiums on the taking out of these policies were transfers of assets to Royal Life for the purposes of s 739, nor is there any dispute about the amount of income arising from the investments comprised in the bonds which is the subject of the various assessments. The premium on the first bond was, however, paid on 8 August 1986 when both Professor and Mrs Willoughby were still resident outside the United Kingdom. They contend that for this reason alone no liability to tax can arise upon the income of the first bond, because they say s 739 only applies to transfers of assets by individuals who are ordinarily resident in the United Kingdom at the time of the transfer.

The special commissioner accepted this contention. So did the Court of Appeal. My Lords, so do I. It has now been made clear, by the decision of your Lordships' House in *Vestey v IRC (Nos 1 and 2)* [1979] 3 All ER 976, [1980] AC 1148, reversing the first part of its decision in *Congreve v IRC* [1948] 1 All ER 948 that the charging provisions of the section can be applied only to the individual (or the wife or husband of the individual) who has made the relevant transfer of assets. Lord Wilberforce described the section as being 'directed against persons who transfer assets abroad; who by means of such transfers avoid tax, and who yet manage when resident in the United Kingdom to obtain or to be in a position to obtain benefits from those assets' (see [1979] 3 All ER 976 at 986, [1980] AC 1148 at 1174–1175). He added: 'For myself I regard this as being the natural meaning of the section.'

Mr Henderson QC, for the commissioners, pointed out that Lord Wilberforce, with whose speech Lord Salmon and Lord Keith of Kinkel agreed, expressed

himself in terms which did not support the taxpayers' case but which were perfectly consistent with the commissioners' case. Lord Wilberforce did not indicate that the individual to be charged had to be ordinarily resident in the United Kingdom at the time of the relevant transfer: on the contrary, he confined his references to the case of individuals who avoid tax 'when resident in the United Kingdom'.

This submission had not formed part of the commissioners' written case, and was, I suspect, put forward by Mr Henderson in argument to ward off the reliance placed in the written case of the taxpayers upon other passages in the *Vestey* speeches, in particular those of Viscount Dilhorne, and again Lord Keith of Kinkel, implying or assuming that liability depended upon the individual being ordinarily resident in the United Kingdom at the time of the transfer (see [1979] 3 All ER 976 at 992 and 1004, [1980] AC 1148 at 1183 and 1197 respectively).

My Lords, I am satisfied that no useful purpose would be served in the present case by comparing these various passages in the *Vestey* speeches. Their Lordships in *Vestey* were simply not concerned with the particular question which arises in the present case. The transferors in *Vestey* had been ordinarily resident in the United Kingdom at all material times. If I were to read anything relating to the present issue into the words used by Lord Wilberforce, it would be merely that he was leaving the matter open.

Leaving *Vestey* aside, Mr Henderson submitted that the suggested restriction of liability to individuals who were ordinarily resident here at the time of transfer was unwarranted by the statutory language, and would give rise to anomalies. It would not be sensible, he argued, to distinguish between the cases of an individual intending to take up residence in the United Kingdom, who made a transfer of assets with a view to the future avoidance of United Kingdom tax and who settled here a few days after the transfer, and another individual acting with precisely the same intention who settled here a few days before making an identical transfer. The sensible time at which to consider the question of residence, Mr Henderson submitted, was the time at which the income from the transferred assets arose, and the avoidance of tax would (but for the section) take place. He reminded your Lordships that in the second part of its decision in *Congreve* this House had held that this latter approach should be adopted in relation to the residence of the transferee. In consequence of *Congreve* it matters not, for the purposes of the section, if the transferee was resident in the United Kingdom at the time of the transfer. It suffices if the transferee is non-resident at the time when the relevant income arises and the avoidance of tax would otherwise take place. This part of the *Congreve* decision was unaffected by the subsequent decision in *Vestey*.

Finally, Mr Henderson invoked the persuasive authority of a decision by the Court of Appeal in Northern Ireland, in *IRC v Herdman* [1969] 1 All ER 495. One of the issues raised in *Herdman* was precisely that now raised before your Lordships, and it was resolved by the Court of Appeal in favour of the Commissioners of Inland Revenue. The commissioners appealed unsuccessfully to your Lordships' House (see [1969] 1 All ER 495, [1969] 1 WLR 323) on another aspect of the case but there was no appeal by Mr Herdman against the decision of the Court of Appeal on the point now in dispute.

Before considering the *Herdman* decision I must return to that part of the *Congreve* decision which was reversed by your Lordships' House in *Vestey*. In *Congreve* the Commissioners of Inland Revenue had successfully contended that for the purposes of liability under s 18 of the Finance Act 1936 the identity of the

transferor of the assets in question was immaterial. I mention in passing that this contention ran directly counter to what the House of Commons had been told by the Financial Secretary to the Treasury when the 1936 Finance Bill was being debated. The Financial Secretary had made it plain that, for liability to arise under the section the transfer of assets must have been made by the individual who was to be assessed. Indeed the Financial Secretary went further and said that 'there has to be a transfer of assets abroad by an individual resident in this country' (see 313 HC Official Report (5th series) col 685). That, of course, was long before the decision of your Lordships' House in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, and the possibility of referring to statements in Parliament as a guide to the intentions of the legislature was not considered. Even if it had been considered, it seems that no such reference would have been permitted under *Pepper v Hart* principles, because your Lordships' House detected no ambiguity in the section. The leading speech was given by Lord Simonds, and he said ([1948] 1 All ER 948 at 953):

> 'The language of the section is plain. If there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the section, then the prescribed consequences follow.'

This was the state of the law when *Herdman*'s case came before the Court of Appeal in Northern Ireland. In March 1951 Mr Herdman while resident in the Republic of Ireland had transferred assets to a company which was also resident in the republic. In October 1953 he became resident in the United Kingdom. Like Professor and Mrs Willoughby in the present case, he contended that the section did not apply to him because he had not been ordinarily resident in the United Kingdom at the time of the transfer. Not surprisingly, in the light of *Congreve*, the contention failed. After citing the speech of Lord Simonds in that case, Lord MacDermott CJ said ([1969] 1 All ER 495 at 503–504):

> 'The individual, accordingly, at whom s. 412 is aimed is the person who seeks to avoid liability to charge, irrespective of whether he was or was not a participant in setting up the scheme for avoidance. This explains the reference to "ordinarily resident in the United Kingdom", for that points to those who would gain by the avoidance rather than to those who may have contrived it—perhaps in some earlier year. There seems no reason why the section should make such residence necessary for those who play a part in the scheme for avoidance at the time they do so, and I do not think the language used provides for such a requirement.'

Mr Henderson accepts that in so far as the *Herdman* decision was thus based upon the reasoning in *Congreve* it cannot avail him. He submits, however, that the reversal of *Congreve* by *Vestey* does not of itself lead to a conclusion that *Herdman* was wrongly decided, and he relies upon a passage in the judgment of Lord MacDermott CJ immediately following that which I have quoted. In this passage Lord MacDermott CJ (at 504) said that 'it would be surprising if Parliament had left such a large loophole open as would be the case' if the taxpayer's argument were correct, and that neither the wording of the section nor its underlying purpose seem to call for such 'an anomalous distinction' as would arise if an individual who was resident in the United Kingdom at the time of the relevant transfer was caught by the section, but one who was non-resident

at that time escaped liability. These, then, are the grounds upon which Mr Henderson bases his case that the contention put forward by Professor and Mrs Willoughby gives rise to anomalies and is, he submits, unwarranted by the statutory language. I now return to that language.

The crucial words, as it seems to me, are those in sub-s (1) which state that the section is to 'have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets', coupled with the identification, in sub-s (2), of 'such an individual' as the subject of liability. What can the words 'such an individual' refer to save for an individual of the kind described in sub-s (1), that is an individual ordinarily resident in the United Kingdom seeking to avoid liability by means of transfers of assets? Although the point was not determined in *Vestey*, the view there taken that the individual to be charged must be the individual who made the transfer seems to me to lead inevitably to the conclusion that the individual concerned must be the only type of transferor with which the section is concerned, and that is a transferor ordinarily resident in the United Kingdom. At the risk of seeming overconfident in expressing an opinion about language which has been construed in diametrically opposite senses by your Lordships' House in the past, I would say in the light of *Vestey* that this is the natural and plain meaning of the words used.

I accept that in consequence the immigrant tax avoider who makes his dispositions before taking up residence in this country would escape liability under the section. I would for my part find it fruitless to speculate whether this consequence was foreseen and accepted, or arose through inadvertence. I would not, in any event, regard it as sufficiently astonishing in itself to cast doubt on what I have described as the natural meaning of the words used, and I do not believe that Lord MacDermott CJ's remarks in *Herdman* were intended to go so far. As I read them, these remarks were made by way of comment upon what Lord MacDermott CJ regarded as a satisfactory result of the *Congreve* decision rather than as an independent ground for his own decision.

I accept also that, at first sight, there appears to be something of an imbalance in a statutory requirement that the transferor must be ordinarily resident at the time of the transfer, but not the transferee. But the appearance of imbalance is, to my mind, little more than superficial. So far as the words used are concerned, it is to be noted that it is sufficient that income becomes payable to the non-resident person 'by virtue or in consequence' of the transfer, either alone or in conjunction with associated operations. This wording is apt to cover the case where there has been a lapse of time between the transfer and the accrual of income to the non-resident person. It is scarcely surprising that the legislature should have contemplated and provided for such a case. Otherwise it would have been too easy, as the facts of *Congreve* show, for liability under the section to be escaped by means of the relevant transfer being made to a resident person who thereafter became non-resident.

I therefore conclude that the income from bond No 1121 does not fall within the embrace of sub-ss (1) and (2), because Professor Willoughby was not ordinarily resident in the United Kingdom when he purchased it. I would only add by way of postscript that Parliament, has now, by s 81 of the Finance Act 1997, changed the law in respect of income arising on or after 26 November 1996.

In the case of bonds No 2387 and No 3343, which were taken out after Professor and Mrs Willoughby had become ordinarily resident in the United

Kingdom, s 739 is plainly applicable unless it is displaced by s 741 of the 1988 Act, which reads:

> 'Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either—(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation ...'

The special commissioner, Mr Shirley, found that Professor and Mrs Willoughby had discharged the burden of proof thus imposed upon them under both paras (a) and (b) in relation to all three policies, although strictly, of course, the exemption under s 741 was not required for the first policy (see [1995] STC 143 at 167).

I have mentioned that the first of the Royal Life bonds was taken out with the funds arising from the Hong Kong provident fund scheme, and the second and third with the proceeds of three policies taken out by Professor and Mrs Willoughby with Save and Prosper in Bermuda. I note in passing that each of these policies was certified by the Revenue under para 1(1)(a) of Sch 2 to the Finance Act 1975 as a 'qualifying policy'. The effect of such certification, under the law then in force, was that the profits of the policy on maturity would be entirely free of United Kingdom tax.

On 17 November 1983 the Revenue published a press release entitled *Offshore and Overseas Funds; Life Assurance Policies Issued by Non-Resident Life Offices* (see *Simon's Tax Intelligence* 1983 p 512). The press release made clear the government's intention to introduce legislation in the 1984 Finance Bill which would: (i) in general prevent new policies of life assurance issued by non-resident life offices from being qualifying policies; and (ii) change the rules for computing the tax charge on profits received by UK-resident policy holders from non-qualifying policies issued by non-resident life offices, so that on the maturity of the policy, and in certain other events, the holder would be liable to both basic and higher rate income tax on the profits.

Thus, the total freedom from tax accorded to the benefits derived by Professor Willoughby from policies such as his Save and Prosper policies would cease to be available. The general rule for the future was that profits from policies issued by non-resident life offices would carry with them a liability to income tax on the benefits received at the time when they accrued. Until that time, however, the income and capital gains arising from the funds comprised in the policy could be accumulated free of United Kingdom tax. The new legislation bringing about these results was enacted in 1984 and is now incorporated in ss 539 to 554 of the Income and Corporation Taxes Act 1988.

In 1985 Professor Willoughby decided to take early retirement from the university and in July of that year he gave one year's notice accordingly. On retirement he was due to receive a lump sum payment from the university's provident fund. He sought advice from Personal Financial Consultants Ltd (PFC), a company which he had earlier consulted before taking out his Save and Prosper policies. He accepted its advice to put his money into a single premium personal portfolio bond taken out with Royal Life.

It is common ground that Professor Willoughby's sole concern in consulting PFC was to provide for his ultimate retirement and to have an arrangement

which would be flexible and also simple for his wife to deal with in the event of his death. At the time the first bond was taken out Professor Willoughby had made up his mind to return to live in the United Kingdom. The avoidance of United Kingdom tax was not in his mind, although he was well aware of the tax aspects of the policy. He could hardly fail to be, because they were naturally stressed in the Royal Life advertising material. Professor and Mrs Willoughby were, of course, resident in the United Kingdom when the second and third bonds were taken out. It was not suggested that there is any difference between the three bonds as regards either their inherent nature or the purposes for which they were acquired.

The principal feature distinguishing a personal portfolio bond from other bonds issued by Royal Life was that the purchaser of the personal portfolio bond retained the ability to choose, switch and manage the investments comprised in the fund to which the bond was linked. Personal portfolio bonds amounted to some 2% of the total of bonds issued by Royal Life, the remainder being bonds linked to what was described as a fixed menu of investments, selected by Royal Life. It was only the personal portfolio bonds which were regarded by the Revenue as falling foul of s 739. The remainder, it was accepted, were exempt by reason of the provisions of s 741(a).

In order to understand the line thus drawn, submitted Mr Henderson, it was essential to understand what was meant by 'tax avoidance' for the purposes of s 741. Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.

My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of 'tax avoidance', the more so since they owe much to the speeches of Lord Templeman and Lord Goff of Chieveley in *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275 at 290–291 and 295, [1992] 1 AC 655 at 675–676 and 681 respectively. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who have received such fiscal encouragement in various forms over the years. This, no doubt, is why the holders of qualifying policies, even those issued by non-resident companies, were granted exemption from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. But it would be absurd in the context of s 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of s 741 is a course of action designed to conflict with or defeat the evident intention of Parliament. In saying this I am

attempting to summarise, I hope accurately, the essence of Mr Henderson's submissions, which I accept. *a*

Proceeding on this basis Mr Henderson contrasted the position of a United Kingdom resident who directly owned the underlying investments, and one who profited from the investments through the medium of the personal portfolio bond. The former would be liable to income tax at both basic and higher rates on the income from the investments, and also to capital gains tax on chargeable gains realised on disposal. The latter, under the tax regime applicable to overseas life policies, would pay no tax on the income or capital gains until the maturity of the bond or the occurrence of one of the other specified chargeable events. *b*

In these circumstances, submitted Mr Henderson, the underlying reality of the matter is that the holder of the Royal Life personal portfolio bond continues to manage and benefit from his own portfolio of investments, but by the insertion of the bond structure he escapes tax on the income and gains from those investments as they arise. Parliament cannot sensibly have intended the statutory taxation regime for offshore life policies to apply in such circumstances, so the purpose of an investor in such bonds cannot be characterised as mere tax mitigation. *c*

My Lords, there is a basic fallacy in this argument. It lies in the proposition that the 'underlying reality' is that the holder of the bond continues to manage and benefit from 'his own portfolio of investments'. As my noble and learned friend Lord Hoffmann pointed out in the course of argument, so far from the underlying investments being owned by the bondholder, he has no legal or equitable interest in them whatever. As cl 12 of the policy makes clear, the allocation of investment units to the bond for which the policy provides is purely notional. Units are referred to solely for the purpose of computing benefits under the policy. The reality in truth is that the bondholder has a contractual right to the benefits promised by the policy, no more and no less. It is therefore quite wrong to describe the bondholder as having, in the words of the commissioners' printed case, 'in substance all the advantages of direct personal ownership without the tax disadvantages'. The significance of this misdescription would become all too apparent if—perish the thought—Royal Life were to become insolvent and unable to meet its obligations to the bondholders. *d* *e* *f*

This fallacy goes to the heart of the commissioners' case. For the attack which they have launched against Professor and Mrs Willoughby and other Royal Life bondholders is limited as I have said to those who hold personal portfolio bonds, that is to say bonds under which the bondholder has effective control of the investment policy, the commissioners accepting that the remaining offshore bonds issued by Royal Life do not involve the avoidance of tax. *g*

Like the special commissioner and the Court of Appeal, I am unable to follow the reasoning of the commissioners. The personal portfolio bondholder may fare better or worse in terms of benefits by reason of his control over investment policy than does his fellow bondholder with the standard type of bond, but the difference between them seems to me to have nothing to do with tax or with tax avoidance. I can see no reason why Parliament should have intended to distinguish between them in fiscal terms. *h* *j*

It follows that, in agreement with the Court of Appeal, I would affirm the clear and carefully reasoned decision of the special commissioner upholding the taxpayers' claim for exemption under s 741(a). It is therefore unnecessary to decide whether the special commissioner was equally entitled to hold that the taxpayers had established their claim to the protection conferred by s 741(b) on

'bona fide commercial transactions ... not designed for the purpose of avoiding liability to taxation'. At first sight the point seems a straightforward one, but the precise scope of the phrase 'bona fide commercial' as it occurs in the related context of s 703(1) of the 1988 Act, which also deals with tax avoidance, has given rise to dispute in a number of cases of which *IRC v Goodwin* [1976] 1 WLR 191, [1976] 1 All ER 481, a decision of your Lordships' House, is an example. In the instant case your Lordships did not think it necessary to call upon counsel for the taxpayers, and in company with the Court of Appeal I think it better to defer consideration of s 741(b) until a case arises in which it is crucial to the decision.

For these reasons, I would dismiss the appeals.

LORD MUSTILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Nolan. For the reasons he gives I would dismiss the appeals.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Nolan. For the reasons he gives I would also dismiss the appeals.

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Nolan. For the reasons he gives I would dismiss the appeals.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Nolan. For the reasons he gives I also would dismiss the appeals.

Appeals dismissed.

Susan J Murphy Barrister.

National Trust for Places of Historic Interest or Natural Beauty v Ashbrook and others

CHANCERY DIVISION

LINDSAY J

11, 12, 13, 20 JUNE 1997

Nuisance – Land – Enclosure of common land – National Trust – Whether Trust having power to erect fences or walling on Trust property – National Trust Act 1907, s 29 – National Trust Act 1971, s 23.

On the true construction of s 29[a] of the National Trust Act 1907 and s 23[b] of the National Trust Act 1971 the National Trust has power to carry out fencing, walling or similar works intended to stand for a long term on the whole or any part of any Trust property to which s 29 of the 1907 Act applies whether or not the same encloses such property. That power is, however, subject to (i) it bona fide appearing to the Trust to be desirable for the purpose of providing or improving opportunities for the enjoyment of the property by the public, and in the interests of persons resorting thereto within the meaning of s 23(1) of the 1971 Act and (ii) to the consent of the Secretary of State for the Environment being duly obtained under s 23(2) of the Act where access by the public to any such property would thereby be prevented or impeded (see p 88 *j* to p 89 *a*, post).

Notes

For general powers of the National Trust, see 34 *Halsbury's Laws* (4th edn) para 406.

For the National Trust Act 1907, s 29, see 32 *Halsbury's Statutes* (4th edn) (1996 reissue) 559.

For the National Trust Act 1971, s 23, see ibid 598.

Cases referred to in judgment

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353, [1981] AC 1001, [1981] 2 WLR 188, HL.

Altrincham Union Assessment Committee v Cheshire Lines Committee (1885) 15 QBD 597, CA.

Arlett v Ellis (1827) 7 B & C 346, [1824–34] All ER Rep 294, 108 ER 752.

Freedman v British Railways Board, Church Comrs for England v British Railways Board (1992) 69 P & CR 13, CA; *rvsg* (1990) 68 P & CR 25.

Hambledon RDC v Hinde, Surrey CC v Hinde (1968) 19 P & CR 212.

Paddington Street (42–48) and Chiltern Street (62–72), St Marylebone, Re, Marks & Spencer Ltd v London CC [1952] 1 All ER 1150, [1952] Ch 549, CA; *affd* [1953] 1 All ER 1095, [1953] AC 535, HL.

Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

River Wear Comrs v Adamson (1877) 2 App Cas 743, [1874–80] All ER Rep 1, HL.

Searle v Wallbank [1947] 1 All ER 12, [1947] AC 341, HL.

a Section 29 is set out at p 82 *d* to *h*, post

b Section 23 is set out at p 83 *d* to *j*, post

Shannon Ltd (The) v Venner Ltd [1965] 1 All ER 590, [1965] Ch 682, [1965] 2 WLR 718, CA.

Stewart v River Thames Conservators [1908] 1 KB 893.

Cases also cited or referred to in skeleton arguments

Allison v Cumberland CC (1907) 5 LGR 871.

Boyes v Cook (1880) 14 Ch D 53, CA.

Brannigan v Robinson [1892] 1 QB 344.

Firstpost Homes Ltd v Johnson [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

R v Westminster City Council, ex p Leicester Square Coventry Street Association Ltd (1990) 59 P & CR 51.

Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, HL.

Rowbotham v Wilson (1860) 8 HL Cas 348, [1843–60] All ER Rep 601, 11 ER 348.

Stephens v Cuckfield RDC [1960] 2 All ER 716, [1960] 2 QB 373, CA.

Tapsell v Crosskey, Tapsell v Vernham (1841) 10 LJ Ex 188.

Originating summons

By summons dated 21 June 1996 the plaintiff, the National Trust for Places of Historic Interest or Natural Beauty, applied to the court for a declaration against the defendants, Kate Ashbrook, Rodney Legg, David Beskine and Philip Aldis, that on the true construction of s 29 of the National Trust Act 1907 and s 23 of the National Trust Act 1971 the National Trust had the power to carry out fencing or any other works permanently enclosing the whole or any part of any Trust property to which s 29 of the 1907 Act applied. The facts are set out in the judgment.

Sheila Cameron QC and *Frank Hinks* (instructed by *Winckworth & Pemberton*) for the National Trust.

David Ainger (instructed by *Brooke North & Goodwin*, Leeds) for the defendants.

Cur adv vult

20 June 1997. The following judgment was delivered.

LINDSAY J. I have before me an originating summons which raises a question as to the extent of a power conferred by statute upon the National Trust; does it, in certain circumstances, permit the Trust to fence common land which it holds?

This is a subject on which there is a marked divergence between some of its members and others of them. In particular, members of the National Trust who are also members of the Open Spaces Society (the full title of which society is 'The Commons, Open Spaces and Footpaths Preservation Society') are already disposed, or likely to be disposed, in the internal debates of the National Trust to oppose any fencing of its common land even where other National Trust officers or members hold it to be necessary. In that circumstance, the National Trust and the Open Spaces Society, both registered charities, made approaches to the Attorney General of the day, who in 1995 suggested as a possible way of proceeding that the differences as to the true construction of the relevant statutes should be resolved by way of the issue of proceedings for declaratory relief with the National Trust as plaintiff and with a number of its members who are also members of the Open Spaces Society as defendants.

In that way, the originating summons of 21 June 1996 now before me was brought into existence. The National Trust is the only plaintiff and the four defendants are all individuals who are both members of the National Trust and of the Open Spaces Society. The issues raised in the originating summons are far from merely academic. There is at least one common or group of commons in which the statutory procedure by way of public inquiry, without which fencing would not in the particular circumstances have been lawful, is already thought by the National Trust to have been duly completed and where, so far as the National Trust itself is concerned, it is only the resolution of the issues raised by the originating summons which is delaying the erection of fences.

In the course of argument, there has been amendment suggested to the relief claimed in the originating summons, both as to the relief to be claimed therein and as to the form of any representation order I should be invited to make under RSC Ord 15, r 13. I shall return later to those subjects but from the outset I should emphasise as to the identity of the persons bound by this judgment and the order made herein that no one is bound other than present and future members of the National Trust as such and that this judgment is concerned only with the statutory powers I shall later describe. A person who, for example, is entitled to rights of common over the National Trust's common land or who asserts some other relevant right other than deriving from the provisions I shall construe or otherwise than merely by way of his or her membership of the National Trust is not intended to be bound in any such other respect or capacity, whether or not he or she is also a present or future member of the National Trust.

Before I go further I should say something about the Open Spaces Society and the National Trust. The society is said in the evidence to be the oldest of our national conservation bodies, it having been founded in 1865 as the Commons Preservation Society. Its objects include the protection from encroachment of common land, open spaces and town and village greens and, subject to the rights of commoners, the securing of their use by the general public and the protection of footpaths and bridle ways. Miss Kate Ashbrook, its general secretary, deposes as to its role as a doughty and successful fighter in support of those objects. There are many commons in England and Wales where fencing has been resisted by the society and the society, no doubt rightly, claims to have played an important part in the establishment or preservation of, and in the framing of legislation affecting, important commons and open spaces such as Wimbledon Common, Epping Forest, Hampstead Heath and land at Bournemouth. Miss Ashbrook, referring to the society as 'OSS', states:

> 'It is clear that from the outset OSS was opposed to the impeding of access to, and the change of appearance by intrusive fencing of, commons and similar open spaces. This opposition has continued throughout its history.'

I am told that the society is entitled to appoint one member of the council of the National Trust and, although their objects, as will shortly appear, differ, they are not so different that persons cannot enthusiastically be members of both the society and the National Trust and, as I have already indicated, the four defendants are, indeed, members of both.

As for the National Trust, it is derived from a body incorporated in 1895. Later that body was dissolved and reincorporated under the National Trust Act 1907 under its full name, 'The National Trust for Places of Historic Interest or Natural Beauty'. Section 4(1) of the 1907 Act provides:

> 'The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.'

Unlike the society, the National Trust is, in terms of the area it owns, a significant landowner and amongst its holdings are some 159,500 acres of freehold land in England and Wales registered as common land under the Commons Registration Act 1965.

Before I turn to the statutory provisions which I am required to construe, I shall first say something of some problems encountered in the management of common land in recent times and of the law applicable to the fencing of commons as it was before any statutory intervention on the subject.

In 1958 the report of the *Royal Commission on Common Land 1955–1958* (Cmnd 462) noted that the then last 50 years had seen a sharp decline in the use of commons for grazing due to a large extent to the advent of the motor car. The report continued (p 39, para 108):

> 'Where cars and other motor traffic cross a common, sheep and cattle can no longer be safely turned out to pasture. There are other causes for the decline in grazing and even if the public were to cease driving cars, it is by no means certain that livestock would be pastured again on some commons.'

The sheep, cattle, horses, ponies and sometimes geese which were once turned out onto common land cropped the grass, trod down bracken and gorse and fed the herbage with their manure. The society itself reported to the Royal Commission that there was then, in 1958, no method of destruction of bush and scrub as efficient as grazing. Without systematic grazing, noted the Royal Commission, vegetation naturally changes and, depending on the fertility of the soil and its situation, a vegetational succession is started in which turf gives way to scrub, thicket and, if the conditions are propitious, to high forest. As the Royal Commission put it (p 40, para 109):

> 'It may start with an old lady with her picnic basket being unable to penetrate the tangled growth; and finish, as on parts of Maidenhead Thicket (Berks), with none but the most adventurous or foolhardy wanting to try.'

The concern in that report, of almost 40 years ago, is still present and, if anything, exacerbated. There is detailed evidence adduced before me of common land owned by the National Trust on the Quantock Hills where some described fencing has been proposed by the National Trust but where the fencing is resisted, inter alia, by the four individual defendants in their capacities as members of the National Trust and is resisted also by the society. In that particular case, the National Trust owns well over 300 hectares of common land. The area is designated as an area of outstanding natural beauty and is popular as an open space for recreation and, in particular, for walking, horse riding and bird watching. If the land is not sufficiently grazed it will, as it is said, 'scrub-up'—that is to say it will follow a vegetational succession of the kind feared by the Royal Commission. There is evidence of a need for some grazing to be carried out by ponies, which are particularly valuable for eating down the scrub, but grazing numbers have fallen. From 1984 to 1993 sheep fell from 958 to 829, and whereas in 1983 there were some 42 mares turned out, by 1993 there were only 20.

The report by the inspector following a public local inquiry held in 1994 as to the erection of the fence proposed in the Quantocks concluded that open heathland was being lost to scrub and that the principal reason for the scrubbing-up was understocking. The inspector reported to the Secretary of State for the Environment that the risk of animals being injured on the roads and the prospect of legal liability for damage caused by straying animals had had a depressing effect on the exercise of common grazing rights. That was not the only factor but in the inspector's view a contributory factor in the decline in stock numbers. The inspector continued:

> 'I consider the fence will be of benefit to the neighbourhood by increasing commoners' confidence, and encouraging them to run more stock on the hills, especially ponies, so preserving the grazing and the openness of the hills which is a key factor in the enjoyment of them by the public. It follows there will also be a benefit to the private interests, in that the Trust as owners will be better placed to maintain the commons in a state which enables them to be enjoyed by the public for recreation and enjoyment, and the commoners will have better security and safety for their stock.'

The proposal considered by the inspector included the provision of 15 gates and stiles covering, in his view, every point which the public then appeared to use for access. He held that the proposals represented no practical impediment to entry by the public.

I mention the problems of 'scrubbing-up' and understocking and the possibility, in some cases, of fencing being at least a contribution to a solution of those problems not because of any direct materiality to the question of statutory construction, to which I shall shortly turn (although the problems are part of the legislative context I shall need to have in mind), but lest it be thought that the erection of any fence in any circumstances by the National Trust would inevitably be an unwarranted step, a step contrary to its objects of the 'preservation (so far as practicable)' of the 'natural aspect features and animal and plant life' of the land it holds. It will have been seen from the report of the Royal Commission and from the conclusions of the inspector after a public inquiry that it can, at lowest, be sometimes reasonably argued on the facts of particular cases that, so far from harming them, fences can in some circumstances preserve the natural aspects, features and plant life of the land fenced.

As for the law relating to the fencing and the removal of fences on or about commons before statutes intervened, the position is, in my view, far from clear. Mr Ainger, who, on behalf of the defendants, has vigorously put the case against fencing, relies on there being what he calls the rule in *Arlett v Ellis* (1827) 7 B & C 346, [1824–34] All ER Rep 294, namely, he urges, a rule that a commoner has a right to throw down any fence he finds on the common land. I do not read the case as authority for any so unqualified a rule. *Brooke's Abridgment* (but in translation and without identification of whether the citation was from the 1573, 1576 or 1589 edition) and the *Year Book* for the regnal year, 15 Hen 7 (1500), were, with other authorities, cited to the court in *Arlett v Ellis* and Bayley J said (7 B & C 346 at 362, [1824–34] All ER Rep 294 at 297):

> 'The authorities cited from Brooke's Abridgment and the Year Book satisfy my mind, that where a fence has been erected upon a common, inclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law

restrained, in the exercise of those rights, to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but that they are entitled to consider the whole of that fence so erected upon the common as a nuisance, and to remove it accordingly.'

It will be noted that he is dealing there not with any fence but ones which enclosed and separated parts of the common from the rest and which, on that account, interfere with the rights of commoners. A fence around the perimeter of the whole common would not, it seems, on that test be capable of being removed in total but, if at all, only to the extent to which it impeded access and egress. In the same case Holroyd J, whilst expressing himself to be of the same opinion as Bayley J, was satisfied—

'that where fences are wrongfully erected upon land, subject to a right of common, the commoner in exercising his rights is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the locus in quo, but that he may remove the nocumentum injuriosum.' (See 7 B & C 346 at 372, [1824–34] All ER Rep 294 at 301.)

But that citation deals only with fences wrongfully erected; it does not assist in ascertaining which fences are wrongful and which are not. Littledale J had no doubt but that a commoner was authorised to throw down part of the enclosure, and he went on to hold, on the basis of *Brooke's Abridgment* and the *Year Book*, that—

'there does not appear to be any reason why the commoner should not pull down the whole. It might be a great injury to the commoner to have fences set up on a common in different places, and although he might bring an action for the obstruction, yet he is in this, as in other analogous cases, entitled to abate the nuisance ...' (See 7 B & C 346 at 377–378, [1824–34] All ER Rep 294 at 303.)

In *Arlett v Ellis* the defendant's plea in answer to the plaintiff's claim in trespass had been that he could not use or enjoy his common of pasture 'in so ample and beneficial a manner as he otherwise might and would and ought to have done' (see 7 B & C 346 at 348). There is, I hold, no unqualified rule emerging from that case such that any commoner might, on finding a fence on or about the common over which his rights existed, uproot that fence by way of abatement. Regard was likely to be had instead to questions such as whether the fence was only on the perimeter of the common, dividing off no part of it from the rest, or whether it did physically enclose a part or parts of the common separating it or them from the rest, as to whether reasonable access and egress was none the less still left unimpeded and as to whether whatever rights of common were claimed could still conveniently and sufficiently be exercised notwithstanding the erection of the fence.

The passage in *Brooke's Abridgment* which had been referred to in the case itself appears to distinguish between a fence on the common and one which runs immediately outside the perimeter of the common, as to which not the whole fence can be broken down but only such parts of it where access to the common was exercised. Common sense suggests that there can be cases where perimeter fences or, indeed, fences around poisonous trees or shrubs or around dangerous grounds, can be to the benefit rather than to the disadvantage of commoners. To

the extent that it is material that I should have *Arlett v Ellis* in mind, as Mr Ainger urges, as part of the historical and legislative context in which the statutes to which I shall need to turn were made, I shall have the case in mind not as creating the unqualified rule he suggested but as indicating that the proper response to fencing depended more upon the answers to questions of the kind I have described.

The section with the construction of which I am chiefly concerned is s 23 of the National Trust Act 1971, a private Act promoted by the National Trust to amend its constitution and 'to confer further powers on the said National Trust', but as those further powers are described as additional to earlier ones, s 23 is best understood after reference to the earlier provision, which is to be found in s 29 of the 1907 Act, a private Act by the association under the name of the National Trust for Places of Historic Interest or Natural Beauty, which, as I earlier described, had been incorporated in the 1890s and which was, by the 1907 Act, dissolved and reincorporated as the present National Trust, a body corporate with perpetual succession.

Section 29 of the 1907 Act mixes duties cast upon the National Trust with powers conferred upon it and provides as follows:

> 'By virtue of this Act there shall be imposed upon the National Trust with respect to any of the Trust property which consists of common or commonable land the following duties and the National Trust shall (subject to the provisions of this Act) have with respect to the same property the following powers (namely): (A) Except as in this Act otherwise provided they shall at all times keep such property unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public: (B) They may plant drain level and otherwise improve and alter any part or parts of such property so far as they may deem necessary or desirable and they may make temporary enclosures for the purposes of this subsection and for the purpose of protecting or renovating turf and for protecting trees and plantations: (C) They may make and maintain roads, footpaths and ways over such property and may make and maintain ornamental ponds and waters on such property: (D) They may on such property erect sheds for tools and materials and may maintain and repair such sheds: (E) They shall by all lawful means prevent resist and abate all enclosures and encroachments upon and all attempts to enclose or encroach upon such property or any part thereof or to appropriate or use the same or the soil timber or roads thereof or any part thereof for any purpose inconsistent with this Act: (F) They may set apart from time to time parts of such property upon which persons may play games or hold meetings or gatherings for athletic sports.'

Miss Cameron QC, who appears with Mr Hinks on behalf of the National Trust, draws attention to the radical nature of the duty in para (A). Historically, whereas in practice others than commoners and land owners had doubtless used common lands for passage and for recreation, they had not in general done so as a matter of right. Specific cases, such as metropolitan commons, had been specifically dealt with. Here, for the first time, say the plaintiffs, there was a general provision that common land in a particular ownership should, wherever situated, be kept unenclosed (meaning here not physically separated into a close or closes) and open and available for the recreation and enjoyment of the public. But the duty in para (A) is, as Miss Cameron emphasises, one which is 'except as

in this Act otherwise provided' and one then sees that by way of qualification of, or encroachment upon, the s 29(A) duty there can be, for example, temporary enclosures for some purposes (para (B)) and even permanent buildings within the very limited class described in para (D). The direction in para (E) that the National Trust shall 'prevent, resist and abate' enclosures is plainly directed not at the National Trust's own activity; if that had been so the draftsman would have had clearly to qualify para (E) to take account of, for example, para (D), and in any event the words 'prevent, resist and abate' in context are appropriate to describe reactions to the actions of others rather than a limitation on the National Trust's own powers.

Whilst the National Trust had conferred on it wide powers of management over its own lands (see s 4(2) of the 1907 Act) the language of s 29 would, in the light of the general law as to fencing, which I have described, have left real doubt as to whether the National Trust was enabled, for example, to put up a perimeter fence around common land or, as another example, a fence separating common land from a highway running through the common. In 1907, of course, the motor car was still young, relatively infrequently encountered and puny and the four-wheel drive off-road vehicle lay in the future.

Then in 1971 came the National Trust Act of that year. I shall read s 23 in full:

> '(1) Subject to the provisions of this section, in addition to the powers conferred on the National Trust by section 29 (Powers exercisable over certain Trust property) of the Act of 1907, the National Trust shall have power with respect to any Trust property to which that section applies to do anything appearing to the National Trust to be desirable for the purpose of providing, or improving, opportunities for the enjoyment of the property by the public, and in the interests of persons resorting thereto, and in particular—(a) to provide or arrange for the provision of facilities and services for the enjoyment or convenience of the public, including meals and refreshments, parking places for vehicles, shelters and lavatory accommodation; (b) to erect buildings and carry out works.
>
> (2) The erection of any building (other than a shed for tools and materials), or the construction of any other work, whereby access by the public to any Trust property to which the said section 29 applies is prevented or impeded, shall not be lawful unless the consent of the Secretary of State is obtained, and in giving or withholding his consent the Secretary of State shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act 1876, to be taken into consideration and held by the Secretary of State before forming an opinion whether an application under the Inclosure Acts 1845 to 1882 shall be acceded to or not.
>
> (3) Notwithstanding anything in subsection (2) of section 30 (Power to charge for admission to Trust property) of the Act of 1907 the National Trust may make such reasonable charges as they may from time to time determine for the use by the public of any facilities, services, parking places or other accommodation provided under this section.'

Miss Cameron draws attention to the great width of the power 'to do anything appearing to the National Trust to be desirable' for the purposes there specified. She accepts that before the power can be exercised that desirability must bona fide appear to the National Trust but the National Trust's bona fides are not in

issue in the matter before me. She points out that the word 'works' as referred to in s 23(1)(b) is a word of wide meaning and plainly (from the reference in s 23(2) to 'any other work') extends beyond the erection of a building or shed. In *Re 42–48 Paddington Street and 62–72 Chiltern Street, St Marylebone, Marks & Spencer Ltd v London CC* [1952] 1 All ER 1150, [1952] Ch 549, in which the Court of Appeal was concerned with the meaning of the phrase 'any works for the erection or alteration of a building', Jenkins LJ described the phrase as one of wide import, as did Morris LJ. Morris LJ took the view that as Parliament in the Act then before the Court of Appeal had not defined the term 'works' it would be 'unnecessary and perhaps unfortunate to attempt a definition. The word is a wide word' (see [1952] 1 All ER 1150 at 1158, 1164, [1952] Ch 549 at 563, 572). I shall not rush in where Morris LJ elected not to tread but I am invited by Miss Cameron to adopt one of the meanings given by the *New Shorter Oxford English Dictionary* (1993), namely:

> '... A thing, structure, or result produced by the operation, action, or labour of a person or other agent ... An architectural or engineering structure, as a house, bridge, pier, etc.; an edifice ...'

It will have been noted that s 23 inescapably encroaches further upon the broad duty under s 29(A) of the 1907 Act to keep National Trust common land as open space than had s 29(B) and (D) of the 1907 Act. Section 23 expressly enables the National Trust to build, for example, restaurants, snack bars, public lavatories, shelters and car parks on its common lands. The power so conferred on the National Trust is, though, qualified. Not only must the particular works bona fide appear to the National Trust to be desirable for the purposes stipulated but the public and commoners alike are given the further protection, if, for example, access is prevented or impeded, of the consent of the Secretary of State being required under s 23(2) and the Secretary of State can then (as was done in relation to the application to fence in the Quantocks, which I earlier mentioned) require the public inquiry machinery of s 10 ff of the Commons Act 1876 to be used (see the note, 'Inclosure Commissioners', at 6 *Halsbury's Statutes* (4th edn) (1992 reissue) 1011 for the succession of the Secretary of State to the powers of the inclosure commissioners).

At this point of the argument the National Trust's case is thus a simple and attractive one; the erection of a fence on a common will be works or a work carried out. If its erection is bona fide seen to be desirable by the National Trust for the purpose of providing or improving opportunities for the enjoyment of the common by the public (as it may be, for example, as part of steps taken to ensure the land is sufficiently grazed that its 'scrubbing-up' is kept at bay and that walkers thus remain or become free to traverse it as they might please) then the National Trust is empowered to erect that fence by way of the broad power in s 23(1) which empowers the National Trust 'to do anything' as there described. It is by no means every fence on its common land, says the National Trust, that will impede or prevent access by the public to National Trust property. A fence along a dangerous cliff edge, for example, would be unlikely to do so, and there will be other cases where, on the facts of the particular case, the impediment is de minimis or, at all events, de minimis when regard is had to the manner in which access or egress is generally enjoyed and to the gates and stiles to be provided (consider *Hambledon RDC v Hinde, Surrey CC v Hinde* (1968) 19 P & CR 212 at 218).

However, where such access is to be impeded or prevented then the National Trust accepts, of course, that the consent of the Secretary of State is required and that the machinery of public inquiry can then be brought into use, as it was in the Quantocks case to which I earlier referred where, after receiving the inspector's report, the Secretary of State for the Environment not only gave his consent to the particular fence there described (1·05 to 1·11 metres high and about 1,710 metres long) but concurred with the inspector's view—

> 'that there is no practical alternative to the fencing proposed. Care has been taken to site the proposed fence as inconspicuously as possible and there will be a total of 15 gates and/or stiles provided at every point which the public appear to use for access. The conclusion reached is that the proposed fence (to encourage increased stocking levels) should enhance the environment of the area and improve road safety, that any disadvantages there may be are more than outweighed by the benefits, and that it is expedient that consent should be given.'

These proceedings, emphasises Miss Cameron, represent no attempt to avoid the consent of the Secretary of State or the use of public inquiries where such is required but rather, in the light of the society's objections, to determine upon the construction of the relevant statutes whether the National Trust has the power, even where the Secretary of State's consent has been given, to erect fences on its common land, a question which the Secretary of State scrupulously considered was not for him to determine. So put, the National Trust's case is at first blush one difficult to resist, but I must now turn to the society's case voiced through the four individual defendants.

Mr Ainger first draws my attention to cases showing that, in cases of ambiguity, private acts such as those of 1907 and 1971 should be construed against the promoter, here the National Trust. He refers me to *Altrincham Union Assessment Committee v Cheshire Lines Committee* (1885) 15 QBD 597 at 603. Two points emerge from the citation. Firstly, Lord Esher MR was referring to a case where, as he puts it, the private Act was 'obtained by persons for their own benefit'.

Section 23, by contrast, was promoted by a body, the National Trust, whose purposes look to the public good rather than to its own profit and is a section the terms of which are themselves directed to the enjoyment of the public (see also *Stewart v River Thames Conservators* [1908] 1 KB 893 at 902). Secondly, the citation from Lord Esher MR goes on to make the point that where the construction is perfectly clear there is no difference between the modes of construing a public and a private Act. Were ambiguity here to be found I would need to entertain a construction against the promoter but I have found no relevant ambiguity.

Next, Mr Ainger emphasises that such Acts should be construed in their legislative and historical setting (see *Freedman v British Railways Board, Church Comrs for England v British Railways Board* (1990) 68 P & CR 25 at 29 per Hoffmann J (reversed by the Court of Appeal ((1992) 69 P & CR 13), but not on this point). I shall try to have such settings in mind but, for the reasons given above, they do not include, in my judgment, a right in every commoner to dismantle whatever fence might be erected by the freeholder on common land regardless of the description, extent and function of the fence and of whether the fence incommoded him or his fellow commoners or denied enjoyment of whatever rights of common the commoner had.

I am enjoined to have in mind a purposive approach to the construction of the 1907 and 1971 Acts and I have been taken at one end of the chronology on that subject to *River Wear Comrs v Adamson* (1877) 2 App Cas 743, [1874–80] All ER Rep 1 and, at the other, to *Prenn v Simmonds* [1971] 3 All ER 237 at 240, [1971] 1 WLR 1381 at 1384 and Lord Wilberforce's reference to the matrix of fact and to *The Shannon Ltd v Venner Ltd* [1965] 1 All ER 590 at 594, [1965] Ch 682 at 691, where there is a reference to documents not being executed in a vacuum. The particular legislative purpose I am especially invited to have in mind is, says Mr Ainger, that from at least the time of Elizabeth I the fencing of commons has been regarded with repugnance. He cites to that end the Act 35 Eliz 1 c 6 (restriction on building (1592)). But that Act fails to illustrate any general distaste for the fencing of commons; it related only to land within three miles of any of the gates of the City of London and only to such fences as hindered the training or mustering of soldiers or walking for recreation or the then laudable exercise of shooting. Moreover, the history of inclosure under the Inclosure Acts, summarised in an enviably compressed account by Viscount Maugham in *Searle v Wallbank* [1947] 1 All ER 12 at 14–15, [1947] AC 341 at 347–349, shows no abiding general distaste for the erection of fences on, or for the physical enclosure or the legal inclosure of, common land. I do not understand there to be any relevant legislative purpose behind s 23 of the 1971 Act, a provision which is plainly directed to the provision or improvement of opportunities for the enjoyment of the National Trust's common land by the public, which obliges or encourages me to depart from the ordinary meaning of the words used in the section, nor one which suggests that I should regard the erection of fences with a distaste so obviously not to be directed to the restaurants, snack bars, car parks, shelters and lavatories, the erection of which the section more specifically contemplates as possible.

Next, I am reminded by Mr Ainger of *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353 at 383, [1981] AC 1001 at 1020, where, in his dissenting judgment, Lord Keith of Kinkel, after a citation from the *Altrincham Union* case says:

> 'It is the duty of those promoting private Acts to make plain the precise extent to which they propose to derogate from the common law rights of those who may be affected by their proposals. It will not do to slip through Parliament provisions which do not on the face of them express reasonably clearly the intention to take away the rights of others, with a view to subsequently relying on them as having had that effect. In order to check any such tendency, it is essential that any doubtful provision of the kind in question should be most strictly construed.'

I have no reason to think that s 23 of the 1971 Act was 'slipped through' Parliament, with or without such a view, and in any event I would regard it as sufficiently clearly intended and expressed in that section that the rights of others than the National Trust were being taken away or qualified. No one could reasonably expect that a right of common or pasture would persist entirely unaffected over a National Trust car park or that a commoner would, for example, continue to be able to dig for peat in the land newly covered by a National Trust lavatory. Leaving aside whether Lord Keith's dictum in his dissenting judgment represents the law, I do not see it as doubtful, given the wide import, which I accept, of the word 'works', but that the works which might be carried out under the section could include the erection of fences and that the rights of persons other than the National Trust might thereby be affected.

Subsection (2) after all expressly contemplates that access by the public may in some cases be prevented or impeded.

Next, Mr Ainger refers me to s 194 of the Law of Property Act 1925. He accepts that s 193 of that Act (which gives the public rights of access for air and exercise to certain commons) does not apply to any of the National Trust's common lands as to which any fencing is at present contemplated but he draws attention to the express inclusion of a reference to fences in s 194. Section 194(1) reads as follows:

> 'The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act, 1876, to be taken into consideration and held by the Minister before forming an opinion whether an application under the Inclosure Acts, 1845 to 1882, shall be acceded to or not.'

Subsection (2) provides a mechanism for complaint to the county court if, inter alia, a fence is erected without the required consent and sub-s (3) applies the section to any land which at the commencement of the 1925 Act was subject to rights of common. However, sub-s (4) provides:

> 'This section does not apply to any building or fence erected or work constructed if specially authorised by Act of Parliament, or in pursuance of an Act of Parliament or Order having the force of an Act, or if lawfully erected or constructed in connection with the taking or working of minerals in or under any land to which the section is otherwise applicable, or to any telecommunication apparatus installed for the purposes of a telecommunications code system.'

In the light of sub-s (4) Mr Ainger does not argue that s 194 would affect any fence otherwise authorised under the provisions of s 23 of the 1971 Act but he argues that, in s 194, Parliament shows that when it means to refer to fences it does so expressly, that the provisions of s 194(1) are so akin to those of s 23(2) of the 1971 Act that it must be taken (as plainly was the case) that the 1925 Act was being used as a model for the 1971 provision and that it is thus of particular significance that the word 'fence' in the 1925 model is dropped from the 1971 formulation. I do not find that approach helpful. I must principally construe the 1971 provision by reference to the language used, not by reference to the language not used. If there was no other explanation possible for the omission of the word 'fences' in the description of things enabled to be done under the 1971 Act the argument might have had some force but I do not see that to be the case. Section 194, inter alia, prohibits fences and the construction of 'any other work' without the required consent. It thus sees the erection of a fence as a 'work'. The draftsman of s 23, even one starting with s 194 as a model, could sensibly have taken the view that if he was to begin expressly to specify some 'works' within s 23(1)(b) without his succeeding in specifying all works foreseeably necessary he might end up, by reference to the expressio unius rule, as inadvertently excluding what otherwise would have been intended to be permissible. He might well have thought that if he specified 'fences' within s 23(1) he would do little but endanger the position of boundary or other walls, dry stone walls or other forms of barriers,

posts and railings. I do not find this argument based on s 194 as capable of limiting the wide meaning ordinarily to be attached to the word 'works'. a

Next, Mr Ainger refers to the terms of s 9 of the Countryside Act 1968, sub-s (3) of which provides:

> 'A local authority shall have power to do anything appearing to the local authority to be desirable for the purpose set out in section 6(1) above, and in the interests of persons resorting to the common land, and in particular—(a) to provide facilities and services for the enjoyment or convenience of the public, including meals and refreshments, parking places for vehicles, shelters and lavatory accommodation; (b) to erect buildings and carry out works ...' b

c

This subsection was used by the National Trust promoters and was disclosed to Parliament as the model for s 23(1)(a) and (b). Mr Ainger then draws attention to the mechanism of s 9 under which the site so built upon by the local authority is to be 'taken out of the common land' in accordance with the provisions of s 9 of and Sch 2 to that Act. However, it does not follow from the fact that the mechanism used in one Act is that the land upon which any erection is to be d constructed has first to be taken out of the common that a later Act cannot employ a different and simpler mechanism, even where the first Act has in part been used as a model for the second. I thus do not find this argument assists on the true construction of s 23, although, as Miss Cameron points out, Mr Ainger's oral argument that a local authority would be able to fence, for example, the car park or public lavatories it might erect under s 9 is at least consistent with the words in s 9(3)(b) including an ability to erect fences. The language of s 23(1)(b), only three years later, is identical. e

I have by now, I believe, dealt with all the arguments pressed on me on behalf of the defendants in opposition to the National Trust's ability under statute to erect fencing on common land. I have found no reason not to accept the National f Trust's submission which I earlier described as difficult to resist. I find the language of s 23 to be clear and unambiguous and to be wide enough, in an appropriate case, to empower the National Trust to erect fences. I am not concerned with the facts relating to any particular fence or wall on the National Trust's common land, nor will my decision deprive any commoner of any right g he or she has as such to object to any particular construction. Nor will my order deprive any member of the public of his or her right to object to any particular work save in the case where his or her objection is only to the technical vires of the National Trust and where he or she is or becomes a member of the National Trust and objects as such.

h

Although I recognise the court should approach declaratory relief of a general nature with some caution, I see it as right in my discretion both to grant relief here of such a nature and, by way of a representation order, to bind others than those before me. Accordingly, I declare that upon the true construction of s 29 of the 1907 Act and s 23 of the 1971 Act, and subject, firstly, to its bona fide appearing to the National Trust to be desirable for the purpose of providing or j improving opportunities for the enjoyment of the property by the public, and in the interests of persons resorting thereto within the meaning of s 23(1) of the 1971 Act and, secondly, to the consent of the Secretary of State for the Environment being duly obtained under s 23(2) of the Act where access by the public to any such property would thereby be prevented or impeded, the National Trust has

power to carry out fencing, walling or similar works intended to stand for a long term on the whole or any part of any Trust property to which s 29 of the 1907 Act applies whether or not the same encloses such property.

I shall now hear counsel as to the particular form of representation order that is appropriate on the basis, firstly, that it is to include all present and future members of the National Trust and, secondly, that it is to exclude any such members from being bound in any of their respective capacities as commoners or as others having or claiming to have rights to resist or oppose the construction of any such works by way of rights other than as a member of the Trust and on the basis of the vires of the Trust under the particular statutory powers I have been concerned with.

Order accordingly.

Celia Fox Barrister.

Forthright Finance Ltd v Carlyle Finance Ltd

COURT OF APPEAL, CIVIL DIVISION

STUART-SMITH, PILL AND PHILLIPS LJJ

28 JANUARY 1997

Hire-Purchase – Agreement – Nature of agreement – Sale of motor car by finance company to car dealer – Agreement conferring option to purchase car which hirer/dealer deemed to have exercised when all instalments paid unless hirer electing not to take title – Whether hire-purchase agreement or conditional sale agreement – Sale of Goods Act 1979, s 25(1).

The plaintiff finance company was the owner of a Ford motor car which it delivered to a car dealer under an agreement described as a hire-purchase agreement. The agreement conferred an option on the dealer to purchase the car which the dealer was deemed to have exercised when all instalments had been paid, whereupon the property in the car passed to the dealer unless the dealer elected not to take title. The dealer subsequently delivered the car to a customer under a conditional sale agreement financed by the defendant, another finance company, to whom it purported to transfer ownership. It was common ground that the customer acquired a good title to the car. In proceedings between the two parties, the question arose whether the agreement between the plaintiff and the dealer was a hire-purchase agreement or a conditional sale agreement. The county court judge held that the agreement was a hire-purchase agreement, since the property in the car passed to the hirer unless he elected not to exercise the option to purchase and accordingly that, at the time when the title was vested in the plaintiff, the defendant wrongfully converted it with the result that the defendant was liable to the plaintiff in the sum of £12,943 plus interest. The defendant appealed, contending that the agreement between the plaintiff and the dealer was one whereby the dealer 'agreed to buy' the car within the meaning of s 25(1)[a] of the Sale of Goods Act 1979 so that, having been placed in possession of the car with the consent of the plaintiff, the dealer was in a position to pass good title to the defendant under s 25(1) and did so.

Held – On its true construction, the agreement between the plaintiff and the dealer was a conditional sale agreement, not merely in substance but in form, since the dealer was contractually obliged to pay all the contractual instalments until it had provided all the payments required by the contract as consideration for its right, inter alia, to become the owner of the car, at which stage, unless it exercised the option to decline to receive title, it was to pass to the dealer. The option not to take title, which one would only expect to be exercised in the most unusual circumstances, did not affect the true nature of the agreement. Accordingly, the appeal would be allowed (see p 97 *j* to p 98 *d*, post).

Helby v Matthews [1895–9] All ER Rep 821 considered.

a Section 25 is set out at p 92 *d* to *h*, post

Notes

For distinction between hire-purchase agreements and conditional sale agreements, see 22 *Halsbury's Laws* (4th edn) paras 35–37.

For of the Sale of Goods Act 1979, s 25, see 39 *Halsbury's Statutes* (4th edn) (1995 reissue) 97.

Cases referred to in judgments

Combined Lease Finance plc v Carlyle Finance Ltd (unreported), Cty Ct.
Combined Lease Finance plc v Carlyle Finance Ltd (7 March 1994, unreported), QBD.
Helby v Matthews [1895] AC 471, [1895–9] All ER Rep 821, HL.
Lee v Butler [1893] 2 QB 398, [1891–4] All ER Rep 1200, CA.

Cases also cited or referred to in skeleton arguments

AG Securities v Vaughan, Antoniades v Villiers [1988] 3 All ER 1058, [1990] 1 AC 417, HL.
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 163 CLR 236, Aust HC.
Heap v Motorists' Advisory Agency Ltd [1923] 1 KB 577, [1922] All ER Rep 251.
Jeffcott v Andrew Motors Ltd [1960] NZLR 721, NZ CA.
Lambert v G & C Finance Corp Ltd (1963) 107 SJ 666.
Langmead v Thyer Rubber Co Ltd [1947] SASR 29, Aust SC.
Martin (R F) Ltd v Duffy [1985] 11 NIJB 80, NI QBD.
Newtons of Wembley Ltd v Williams [1964] 3 All ER 532, [1965] 1 QB 560, CA.
Oppenheimer v Attenborough & Son [1904–7] All ER Rep 1016, [1908] 1 KB 221, CA.
Stadium Finance Ltd v Robbins [1962] 2 All ER 633, [1962] 2 QB 664, CA.

Appeal

The defendant, Carlyle Finance Ltd, appealed from the order of Judge Graham Jones made in the Cardiff County Court on 19 January 1995 entering judgment for the plaintiff, Forthright Finance Ltd, in the sum of £12,943 plus interest in an action brought by the plaintiff against the defendant for wrongfully converting a Ford Cosworth motor car. The facts are set out in the judgment of Phillips LJ.

Adrian Brunner QC and *Barbara Hewson* (instructed by *Anthony W Jeremy & Co*, Cardiff) for the defendant.
Frederick Philpott (instructed by *Gordon Williams*, Cardiff) for the plaintiff.

PHILLIPS LJ (delivering the first judgment at the invitation of Stuart-Smith LJ). This appeal relates to a dispute between two finance houses as to the title to a Ford Cosworth motor car. It is against an order made by Judge Graham Jones in the Cardiff County Court on 19 January 1995. The judge held that, at a time when the title was vested in the plaintiff, Forthright Finance Ltd (Forthright), the defendant, Carlyle Finance Ltd (Carlyle), wrongfully converted it with the result that Carlyle was liable to Forthright in the sum of £12,943 plus interest. Three issues were raised in the court below and Forthright succeeded on each of them. Before us Carlyle seeks to revive only one, which turns on the distinction between a hire-purchase agreement and a conditional sale agreement.

On 6 April 1992 Forthright, which then owned the car, delivered it to Fernland Ltd, a company which dealt in motor cars under the trade name of Senator Motors (Senator), pursuant to a contract described on its face as a 'Hire Purchase

Agreement' (the agreement). Senator subsequently delivered the car to a Mr Griffiths under a transaction financed by Carlyle. The judge found the following facts in relation to this transaction:

> 'On 10 March 1992 the defendants (Carlyle) entered into a conditional sale agreement with a Mr D F Griffiths in relation to a Mercedes Benz motor car. On 23 April 1992 that agreement was modified. It was agreed that for the Mercedes car there should be substituted a Ford Sierra Cosworth motor car. The Ford Sierra Cosworth car so substituted is the car which was acquired by Forthright and of which Senator were in possession under the agreement. That is no longer in dispute. Carlyle had been unable to find any invoice in relation to the car from any supplier. Clearly, however, Senator supplied the Ford car to Mr Griffiths and purported to transfer ownership of it to Carlyle.'

It is common ground that Mr Griffiths acquired a good title pursuant to the provisions of Pt III (ss 27–29) of the Hire-Purchase Act 1964 (title to motor vehicles on hire-purchase or conditional sale).

The issue

Section 25 of the Sale of Goods Act 1979 provides:

> '(1) Where a person, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or document of title with the consent of the owner.
>
> (2) For the purposes of subsection (1) above—(a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods, and (b) "conditional sale agreement" means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.'

Subsection (2) can have no application in the present case because the purchase price of the car placed the transaction outside the ambit of the Consumer Credit Act 1974.

It was and is Carlyle's case that the agreement between Forthright and Senator was one whereby Senator agreed to buy the car so that, having been placed in possession of the car, Senator was in a position to pass good title to Carlyle under s 25 and did so.

It was and is Forthright's case that the agreement was in truth, as it was described, a hire-purchase agreement under which Senator had no more than an option to buy the car. Senator had not agreed to buy the car and was not in a position to pass good title under s 25.

This issue as to the nature of the agreement is the only one raised on this appeal. Forthright served a respondent's notice, indicating their intention to

contend that Carlyle had failed to establish that the transfer made to them by Senator was in the ordinary course of Senator's business or that Carlyle had entered into the transaction in good faith and that the burden had been on them to do so in order to make good a defence under s 25.

We have been provided with a transcript of the argument below where the parties were differently represented. At the outset of the hearing Mr Jeremy for Carlyle interrupted Mr Kember's opening to state what he understood to be the only three issues alive on the pleadings. Mr Kember accepted his summary. Neither then nor in subsequent argument after the evidence had been called was there any suggestion that Carlyle had to do more to establish their s 25 defence than show that the agreement between Forthright and Senator was one whereby Senator had agreed to buy rather than agreed to hire the car. Carlyle's good faith received a passing reference in the context of an alternative defence advanced under s 2 of the Factors Act 1889, but it appears from the transcript that the parties accepted that the judge could infer good faith in the absence of evidence to the contrary and, in the event, the judge rejected the Factors Act defence without the need to refer to the issue of good faith. Having regard to the agreement between the parties as to the live issues at the start of the hearing, we concluded that it would not be just at this stage to permit Forthright to advance the points raised by their respondent's notice and declined to permit this.

The agreement

As I have said, the agreement is headed 'Hire Purchase Agreement'. Forthright is described as the owner and Senator as the hirer throughout. On the face of the agreement a schedule of payments is set out showing under the heading 'Terms of Hire':

'Cash Price of Goods	£13,000·00
VAT on Cash Price	
Total	£13,000·00
Less Initial Deposit (A)	£3,000·00
Amount of Credit	£10,000·00
Hire Purchase Charges	£2,250·00
Balance Payable (B)	£12,250·08
Payable by 36 monthly instalments	
Commencing on the 30 day of April 1992	
First instalment of (inc. £20 Doc Fee)	£360·28
35 instalments of £340·28	
Total Purchase Price (A) + (B) + £20	£15,270·08'

Under the signature of the hirer is stated: 'The Goods will not become your property until you have made all the payments. You must not sell them before then.' The back of the agreement provides, inter alia, as follows. In the recital:

> 'The Owner agrees to let and the Hirer agrees to take on hire with option to purchase mentioned below the goods and accessories specified in the said Schedule'

Clause 1(a):

> 'The Hirer agrees (a) Having paid the initial Deposit ... to pay the Balance Payable specified in the ... Schedule in accordance with the terms thereof ...'

Clause 2:

> 'When the Hirer (having meanwhile conformed with all the terms herein) has paid the Balance Payable and all other sums due to the Owner hereunder the Hirer shall be deemed to have exercised the option to purchase hereby given and the property in the Goods shall pass to the Hirer (unless the Hirer has told the Owner before that time that such is not the case) but until such time the Hirer is a bailee of the Goods and he must not sell or offer for sale assign mortgage pledge lend or otherwise deal with them or with any interest therein or in this Agreement which is personal to the Hirer.'

Clause 3(d) of the agreement provided that in the event of termination by the owner the hirer would be liable to pay any accrued arrears and the balance of the total purchase price subject to certain specified deductions.

In approaching the question of whether this agreement was a hire-purchase agreement or a conditional sale agreement the judge drew a distinction between two different types of instalment agreement under which property in goods customarily passes to the party whom it is convenient to describe as the customer: (1) an agreement under which the customer will automatically become the owner of the goods when the final instalment is paid; (2) an agreement under which the customer will only become the owner of the goods if he exercises an option to acquire the ownership at the end of the period covered by the agreement.

The former type of agreement the judge identified as a conditional sale agreement, citing as an example *Lee v Butler* [1893] 2 QB 398, [1891–4] All ER Rep 1200; the latter he identified as a hire-purchase agreement, citing as an example *Helby v Matthews* [1895] AC 471, [1895–9] All ER Rep 821.

The judge went on to hold that the agreement in the present case fell into the latter category. He held that the crucial term that produced this result was the provision in brackets in cl 2 whereby, on paying all final instalments, property in the car passes to the hirer 'unless the Hirer has told the Owner before that time that such is not the case'. The reasoning of the judge appears from this passage of the judgment:

> 'In my judgment the effect is to give the hirer the right not to acquire title to the goods. It is true that he has to take an active step, i e he has to inform the owner that the property is not to pass or else he is, as it were, fixed with ownership automatically, which is the converse of the situation where he has to exercise the option to acquire the goods and if he does not exercise the option and does nothing he does not acquire them. But in my judgment the legal effect is the same. It is also true that he cannot under this agreement terminate the hire. He has to pay all the hire charges. But once he has paid all the hire charges, if he has told the owner that he is not exercising the option to purchase and the property in the goods is not to pass to him, then the hire comes to an end and the goods revert to the owner. Consequently I am of the view, and I find, that the effect of those words in brackets in cl 2 is to render this agreement a hire-purchase agreement.'

The conclusion of the judge differs from that which has been reached in two other cases, also involving Carlyle as defendant, in which the same point arose in relation to virtually identical wording. In *Combined Lease Finance plc v Carlyle Finance Ltd* (another unreported decision in the Cardiff County Court more recent than that of Judge Jones, although the precise date is not clear from the

transcript before us), Judge Burr held that the agreement in question was a conditional sale agreement. This was his reason:

> 'It is quite clear from an examination of the agreement that there is no clause enabling the hirer to determine the hiring before the final instalment of hire becomes payable. There is further no requirement for the active exercise of the option to purchase which the hirer is deemed to have exercised at the conclusion of the agreement after all rental sums have been paid. It seems inconceivable that any hirer having paid the total price representing the value of the vehicle should at the conclusion of the agreement repudiate the goods and require the owner to take possession of them and for the same reasons advanced by Professor Goode [in *Consumer Credit Legislation*] I find that Micro had "agreed to buy" within the terms of s 25(1) of the Sale of Goods Act 1979 having with the consent of the plaintiff obtained possession of the goods at the outset of the agreement.'

In an earlier case between the same parties in the High Court (7 March 1994, unreported), Gage J reached the some conclusion on the same form of agreement. Although the issue was simply whether Carlyle had an arguable defence, the decision of the judge suggests that he thought it not merely arguable but clearly sound. At the end of the judgment, he said:

> 'It seems to me that had the hirer paid all the sums under the agreement it is inconceivable that he would then return the goods. The option is only a form of words. It does not reflect reality and the big difference here is that this agreement has no provision for termination.'

Judge Jones was influenced in reaching his decision by the consideration that there is little difference in effect between the form of contract in this case and the form of hire-purchase agreement under which the hirer is obliged to pay all the instalments but then only acquires title if he exercises a positive option to pay a further nominal sum. As to that point, Mr Philpott for Forthright drew our attention, in order to challenge it, to the proposition advanced by Professor Goode in his work on *Consumer Credit Legislation* para 218:

> 'To avoid classification as a contract of sale, the agreement must be framed so as to avoid a commitment to purchase. This may be achieved in one of two ways. The hirer may be given the right to terminate the agreement before it has run its full course. Alternatively the hiring agreement may be for a fixed period, with no power of termination, if at the end of the period of hire the hirer is required to exercise his option to purchase by payment of a further sum which is not purely nominal. The absence of the right to terminate is not material in such a case, for even if the hiring agreement runs its full course the hirer is not thereby committed to paying the full price. In practice, the latter form of hire-purchase agreement is rarely encountered, and the hirer is almost invariably given a right to terminate the agreement at any time.'

It was with the words 'which is not purely nominal' that Mr Philpott joined issue, those words being supported by decisions in the Commonwealth but not by any authority in this country. Mr Philpott submitted that those words were not justified, having regard to certain technical complications that they imported, referred to elsewhere by Professor Goode.

Mr Philpott's submission was that it is of the essence of a conditional sale agreement that the purchaser is contractually obliged both to pay all the instalments that make up the purchase price and to take title in the goods purchased. If, however expressed, the contract gives him an option whether or not to become the owner of the goods, it will constitute a hire-purchase rather than a conditional sale agreement. In so submitting, Mr Philpott relied on certain passages in the speeches of the House of Lords in the leading case on this topic of *Helby v Matthews* [1895] AC 471, [1895–9] All ER Rep 821. The facts as set out in the headnote were ([1895] AC 471):

> 'The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments and pledged it with a pawnbroker as security for an advance:—*Held*, that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy; that he had therefore not "agreed to buy goods" within the meaning of the Factors Act 1889 s. 9, and that the owner was entitled to recover the piano from the pawnbroker.'

Lord Herschell LC began the leading speech in that case as follows ([1895] AC 471 at 475–476, [1895–9] All ER Rep 821 at 823–824):

> '... it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10*s.* 6*d.* a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due. My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had "agreed to buy" the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10*s.* 6*d.* so long as he kept the piano. He had an option no doubt to buy it by

a continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose the obligation.'

b Mr Philpott focused particularly in that passage on the words:

> 'An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot ... properly be said to have been an agreement to buy.'

c He also relied on this further passage in the speech of Lord Herschell LC ([1895] AC 471 at 477, [1895–9] All ER Rep 821 at 824):

> '... when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an
d agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.'

e In this case, argued Mr Philpott, there was no legal obligation on Senator to buy as Senator had an option to decline to take title: ergo, Senator had not agreed to buy the car.

For myself, I consider that the reason why the House of Lords held that the contract under consideration in *Helby v Matthews* was not one whereby the customer had agreed to buy the piano appears from the following short passages
f in some of the speeches. First, this passage in the longer passage I have already read from the speech of Lord Herschell LC:

> 'He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10*s*. 6*d*. so long as he kept the piano.'

g Then from the speech of Lord Macnaghten ([1895] AC 471 at 481, [1895–9] All ER Rep 821 at 827):

> 'The customer was under no obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep
h the piano for a single day or a single hour.'

Finally this passage is from the speech of Lord Shand ([1895] AC 471 at 483–484, [1895–9] All ER Rep 821 at 828):

> 'An agreement to purchase would infer an obligation to pay a price, the
j payment of which could be enforced by action, while here it is plain that no action for any balance of the alleged price could be maintained if Brewster thought fit at any time to return the instrument to its owner.'

In the present case Senator were contractually obliged to pay all the contractual instalments until they had provided all the payments required by the contract as consideration for their right, inter alia, to become the owner of the car. At that

stage, unless they had exercised the option to decline to receive title, it was to pass to them. *a*

In my judgment, this contract has all the ingredients of a conditional sale agreement. The option not to take title, which one would only expect to be exercised in the most unusual circumstances, does not affect the true nature of the agreement. It seems to me that it is incorporated simply to enable the supplier to advance the very argument that has been urged by Mr Philpott. He *b* has urged it most elegantly, but I remain of the view that it is specious. The conclusions reached by Gage J and Judge Burr on this point were correct. This agreement is, not merely in substance but in form, a conditional sale agreement. Whether, as Professor Goode has suggested, contracts which differ from this one only in that they include a positive option to acquire title for a nominal payment also constitute conditional sale agreements I need not decide. *c*

For the reasons I have given, I consider this appeal should be allowed.

PILL LJ. I agree.

STUART-SMITH LJ. I also agree. *d*

Appeal allowed. Leave to appeal to House of Lords refused.

Mary Rose Plummer Barrister.

Forthright Finance Ltd v Ingate (Carlyle Finance Ltd, third party)

COURT OF APPEAL, CIVIL DIVISION
STAUGHTON, HENRY AND THORPE LJJ
14 MAY 1997

Sale of goods – Conditional sale agreement – Antecedent negotiations – Defendant agreeing to purchase car from plaintiff finance company under conditional sale agreement – Defendant subsequently seeking to part-exchange car for another – Dealers offering to purchase car and pay outstanding balance due to plaintiff – Defendant paying dealers deposit on second car and entering into conditional sale agreement with second finance company – Dealers later going into liquidation without having paid sum due to plaintiff – Whether second finance company liable to discharge defendant's debt to plaintiff – Consumer Credit Act 1974, s 56(1)(b)(2)(4).

The defendant agreed to buy an Austin Metro car under a conditional sale agreement made with the plaintiff finance company, F Ltd. A year later she went to car dealers in Cardiff as she was interested in purchasing a secondhand Fiat Panda car from them. They were licensed credit brokers and explained that they would buy her Metro in part exchange and discharge the balance of £1,992 owed to F Ltd under the finance agreement; for that purpose they valued the Metro at £2,000. The defendant paid a deposit of £1,000 to the dealers and entered into a conditional sale agreement with another finance company, C Ltd, which recorded that the Fiat was sold to her, the cash price being £2,995, the deposit being £1,000 and the amount left on credit being £1,995. The dealers subsequently went into liquidation without having paid the £1,992 due to F Ltd as agreed. F Ltd brought an action against the defendant for the amount due to them on the Metro and obtained judgment against her by consent for the amount claimed. The defendant issued third party proceedings against C Ltd seeking an indemnity on the basis that anything said by the dealer was deemed to have been said on behalf of C Ltd by virtue of s 56[a] of the Consumer Credit Act 1974. The district judge ordered C Ltd to indemnify the defendant against the claim, but his decision was set aside on appeal on the ground that s 56 did not apply because there were two separate transactions, one relating to the Metro and the other to the Fiat and the antecedent negotiations did not relate to the goods to be sold, ie the Fiat. The defendant appealed.

Held – Since the negotiations concerning the Metro were as a matter of fact part of the package to take the Fiat, they formed part of one transaction relating to the goods to be sold by the dealer to the finance company within the meaning of s 56(1)(b) of the 1974 Act, notwithstanding that the value agreed for the Metro cancelled out the debt due on it so that there was no part-exchange except in a loose sense. Moreover, s 56(4) of the Act made it clear that a wide construction should be given to the words 'negotiations ... in relation to' the goods in s 56(1)(b), since it provided that antecedent negotiations should be taken to

a Section 56, so far as material, is set out at p 101 *g* to *j* and p 106 *h*, post

commence when the negotiator and the debtor or hirer first entered into communication and included any representations made by the negotiator to the debtor or hirer and any other dealings between them. Accordingly, C Ltd was liable under s 56(2) of the Act for the dealers' promise to discharge the defendant's debt under the finance agreement relating to the Metro and the appeal would therefore be allowed (see p 105 *c* to *f j* and p 106 *a* to *c f* to p 107 *b*, post).

UDT v Whitfield (First National Securities, third party) [1987] CCLR 60 approved.

Powell v Lloyds Bowmaker Ltd [1996] CCLR 50 disapproved.

Notes

For entry into consumer credit agreements and antecedent negotiations, see 22 *Halsbury's Laws* (4th edn) paras 62, 65, and for cases on the subject, see 26(2) *Digest* (2nd reissue) 405, *2339–2341*.

For the Consumer Credit Act 1974, s 56, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 55.

Cases referred to in judgments

Branwhite v Worcester Works Finance Ltd [1968] 3 All ER 104, [1969] 1 AC 552, [1968] 3 WLR 760, HL.

Powell v Lloyds Bowmaker Ltd [1996] CCLR 50, Sh Ct.

UDT v Whitfield (First National Securities, third party) [1987] CCLR 60, Cty Ct.

Case also cited or referred to in skeleton arguments

Woodchester Equipment (Leasing) Ltd v British Association of Canned and Preserved Foods Importers and Distributors Ltd [1995] CCLR 51, CA.

Appeal

The defendant, Maisie Olive Ingate, appealed with leave from the decision of Judge Crowther QC in the Cardiff County Court on 18 October 1996 setting aside the decision of District Judge Wyn Rees dated 19 April 1996 whereby, in third party proceedings brought by Mrs Ingate against Carlyle Finance Ltd (Carlyle), he ordered Carlyle to indemnify the defendant against the claim of the plaintiffs, Forthright Finance Ltd, for the amount due to them on an Austin Metro motor car in respect of which judgment had been entered against the defendant on 6 March 1995 by consent for the sum of £3,135·26. The facts are set out in the judgment of Staughton LJ.

Nicholas David Jones (instructed by *Dolmans*, Cardiff) for Mrs Ingate.

Colette Wilkins (instructed by *Anthony W Jeremy & Co*, Cardiff) for Carlyle.

STAUGHTON LJ. In March 1990 Mrs Ingate, who is the defendant in this action, agreed to buy an Austin Metro car. That was achieved by a conditional sale agreement. No doubt she paid part of the price at once and agreed to pay the balance by instalments. The agreement was with the present plaintiffs, Forthright Finance Ltd. A year later on 19 March 1991 Mrs Ingate went to the premises of Matthew Phillipsons Ltd, car dealers in Cardiff. She was interested in buying a secondhand Fiat Panda car which they had. Mr Taylor, a sales manager with the dealers, said that if she bought the Fiat Panda they would take the Austin Metro in part-exchange. What is more, they would discharge

the balance of the money due for the Austin Metro to Forthright. In fact, this would not achieve any significant credit to be set against the price of the Fiat Panda, because the outstanding balance on the Austin Metro was £1,992. Its value, as the parties agreed at the time, was £2,000. The difference of £8 was ignored by Mrs Ingate and the dealers and can be ignored by us. The important point to notice is that neither the Austin Metro nor the proceeds of sale of the Austin Metro were, in fact, set against the price of the Fiat Panda. The words 'part-exchange' were used in a loose sense.

Mrs Ingate told Mr Taylor that she wished to refinance, as she put it, the purchase of the Fiat Panda with Forthright with whom she had dealt previously. Had that happened it may well be that the present problem would not have occurred. However, the dealers made other arrangements, as later appeared. Mrs Ingate paid a deposit of £1,000 to the dealers and then, or else a few days later, signed a conditional sale agreement between herself and another finance house, Carlyle Finance Ltd. That agreement recorded that the Fiat Panda was sold to her, the cash price being £2,995, the deposit £1,000 and the amount left on credit, £1,995. Mrs Ingate paid the deposit of £1,000 to the dealers. At some stage she must have signed the conditional sale agreement although she did not remember doing so.

Some months later in October 1991 the dealers went into liquidation. Contrary to their agreement with Mrs Ingate they had not paid off the £1,992 due to Forthright, so that it was still due from Mrs Ingate. At that time the Austin Metro was still at the dealers' premises but soon after it disappeared.

In this action Forthright have sued Mrs Ingate in the Cardiff County Court for the amount due to them on the Austin Metro. On 6 March 1995 judgment was entered against her by consent for the sum of £3,135.26, that being the amount due with interest. Execution was stayed pending the outcome of the third party proceedings which Mrs Ingate had brought against Carlyle. Those proceedings were based on s 56 of the Consumer Credit Act 1974, to which I shall return presently.

Mrs Ingate's claim against Carlyle succeeded before District Judge Wyn Rees. He ordered that they should indemnify Mrs Ingate against the claim of Forthright and the costs ordered against her. But there was an appeal; and Judge Crowther QC set aside the order of the district judge and dismissed Mrs Ingate's third party claim. By consent he gave leave to appeal.

Section 56(2) of the Consumer Credit Act 1974 provides:

> 'Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.'

That refers one back to s 56(1), which says:

> 'In this Act "antecedent negotiations" means any negotiations with the debtor or hirer ... (b) conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within section 12 (a) ...'

Then there is another alternative, (c). It is accepted that the agreement between Mrs Ingate and Carlyle, when it came into existence, was a creditor-debtor-supplier agreement. Matthew Phillipsons Ltd, the dealers,

were licensed as a credit broker. The transaction was one by which they sold the Fiat Panda to Carlyle, and Carlyle thereafter sold it on credit to Mrs Ingate. That was a transaction of the kind mentioned in ss 11(1)(a) and 12(a) of the Act. Hence it was a creditor-debtor-supplier agreement.

When one looks at s 56(1) it is apparent that words have been deliberately inserted in s 56(1)(b) to restrict the kind of negotiations which will qualify under that paragraph. The words of restriction are 'in relation to goods sold or proposed to be sold by the credit-broker' and so forth. In this case that means in relation to the Fiat Panda, which was proposed to be sold by the credit broker, the dealers, to Carlyle before Carlyle sold it to Mrs Ingate. The problem is, granted that there were goods to be sold in that way, whether the negotiations with which we are concerned related to those goods. Mrs Wilkins who appears for Carlyle says, in terms, that there were two quite separate transactions, one transaction being the agreement by which the dealers took the Austin Metro and agreed to pay off what was due in respect of it, the other transaction being that when they accepted Mrs Ingate's deposit and undertook to arrange a credit sale by Carlyle.

Now the findings that were made in respect of that were as follows. The district judge said in terms that Mr Taylor explained to Mrs Ingate that if she bought the Fiat Panda the company would buy the Austin Metro in part-exchange and discharge the balance owed. Later in his judgment he said:

> 'Having considered the evidence in this case, I have little doubt that had Matthew Phillipsons Ltd not agreed to purchase the Austin Metro car from the defendant and discharge the balance owed by the defendant to the plaintiff in respect of that vehicle, the defendant would not have entered into the conditional sale agreement with the third party.'

Those findings of fact on the evidence, as it seems to me, show quite clearly that there were not two independent transactions but two linked aspects of one transaction. When the matter came before the circuit judge, Judge Crowther QC, he said early on in his judgment that he found all the correct factual and legal analysis in the judgment of the district judge and agreed with his conclusions as to the argument on causation. However, later in his judgment the circuit judge said:

> 'I sympathise with the defendant's view that she entered into a single credit transaction with one party, albeit a complex transaction with that party's agent. I find her view to be wrong and differ from the district judge. I prefer the reasoning of the sheriff in *Powell v Lloyds Bowmaker Ltd* [1996] CCLR 50 to that of Judge Vos in *UDT v Whitfield (First National Securities, third party* [1987] CCLR 60.'

There, as it seems to me, the judge is saying that even though he accepts the findings of fact of the district judge, nevertheless there were in law two separate transactions.

One other aspect of the facts which I should mention was raised by Thorpe LJ in the course of the argument. He pointed out that the dealers had valued the car for the purposes of this transaction at £2,000, and on that basis were prepared to take it and to pay off the outstanding balance of £1,992. But it seems very likely that if Mrs Ingate had not intended to buy the Fiat Panda the dealers would not have valued the Austin Metro at £2,000 or anything like

it, or at least it is very questionable whether they would have done. That was why that valuation was in all probability an integral part of the whole arrangement.

Against that background of facts I turn to the law. There have been two cases in recent times bearing on this question. In both of them the dealers agreed to pay off the outstanding balance of a car owned by the proposed purchaser and to take the car themselves. In both cases the dealers failed to do that, and the purchaser of the new car was held liable to the company from which he had borrowed for that car. In one case it was held that the purchaser could recover from the new finance company financing the second transaction. In the other case it was held that the purchaser could not. A feature common to both cases was that there was a small surplus on the old car. The amount at which the dealer valued it slightly exceeded the amount that was owing in respect of it to the company that had financed the original purchase of it. That small surplus was in each case carried forward into the transaction, the new transaction for the purchase on credit of a new car, as part of the deposit so to speak to the credit of the purchaser. So, on the facts of those two cases, if there was a distinction from this case it militated more in favour of there being related transactions than is the case before us.

In *UDT v Whitfield (First National Securities, third party)* [1987] CCLR 60 Judge Vos decided in favour of the customer and held that he could recover from the new finance company. His reasons are reported in effect in one short paragraph (at 63):

> 'I find that these were antecedent negotiations conducted by the credit broker in the transaction relating to goods sold by the credit broker to the creditor under a debtor-credit-supplier agreement.'

That was the *UDT* case. The second case, *Powell v Lloyds Bowmaker Ltd* [1996] CCLR 50, was decided in the Sheriff's Court in Edinburgh. The sheriff in that case held that the customer could not recover from the second finance company. The sheriff expressed his or her reasons in these words (at 56):

> 'Nevertheless, regard must be had first and last to the words of the Act. If Parliament had intended all representations made by a supplier in relation to a section 56(1)(b) transaction to be deemed to be conducted by the dealer as agent of the creditor, Parliament would in my opinion have said so, by framing the subsection in wider terms, such as can be seen in section 56(1)(a) and (c). Section 56(1)(b) is restricted in its application to goods sold or proposed to be sold by the dealer.'

There is indeed a difference between the wording of s 56(1)(b) on the one hand and s 56(1)(a) and (c) on the other. No specific point has been made on it save this: it is evident, as I have already said, that a restriction was deliberately placed in s 56(1)(b). Not all negotiations were to be deemed to have been made on behalf of the creditor, but only negotiations in relation to goods which were to be supplied under a credit agreement. That is not an answer to the question how one defines the extent of those negotiations.

We have heard some argument on the legislative history of the Consumer Credit Act 1974. One can start with the *Tenth Report of the Law Reform Committee (Innocent Misrepresentation)* (Cmnd 1782) (July 1962), which is helpfully set out in the speech of Lord Wilberforce in *Branwhite v Worcester Works Finance Ltd*

[1968] 3 All ER 104 at 123, [1969] 1 AC 552 at 588. The Law Reform Committee concluded para 20 of their report by saying:

> 'We think, therefore, that it should be made clear in any legislation on this subject that where negotiations for a hire-purchase contract are in fact conducted by a dealer he shall, notwithstanding any agreement to the contrary, be deemed to be the agent of the finance company for the purpose of any representations in respect of the goods which are the subject-matter of the contract.'

That perhaps was the mischief which the Law Reform Committee detected; and the remedy which they proposed was an agency as to representations made in respect of the goods. That was the remedy adopted by Parliament in s 16 of the Hire-Purchase Act 1965, which provided in sub-s (1):

> 'Where a person (in this section referred to as "the owner or seller") lets goods under a hire-purchase agreement, or sells or agrees to sell goods under a credit-sale agreement or a conditional sale agreement, any representations with respect to the goods to which the agreement relates which were made, either orally or in writing, to the hirer or buyer by a person other than the owner or seller in the course of any antecedent negotiations conducted by that other person shall be deemed to have been made by him as agent of the owner or seller.'

There Parliament followed the very language of the Law Reform Committee.

Then there came the *Crowther Committee's Report on Consumer Credit* (Cmnd 4596) (March 1971). This dealt with the present topic in paras 6.6.26 and 6.6.28:

> '6.6.26. There are three different ways in which the borrower might be given relief against a connected lender. The first is to make the lender answerable in damages for misrepresentations made by the seller in antecedent negotiations and for breaches of any term of the agreement relating to title, fitness or quality of the goods. An alternative and intermediate measure is to provide that, while the lender shall not incur a positive liability in damages, the borrower shall, by way of defence to a claim for sums due under the loan agreement, be entitled to set off any claim that he has for such a misrepresentation or breach. The third approach is to require the borrower to pursue his remedies against the seller in the first instance, the lender becoming liable to the consumer only if the latter is unable to obtain redress from the seller because of his insolvency. This is the solution advocated by the finance houses, who accept that a seller-linked lender must accept a measure of responsibility for misrepresentations or breaches of contract by the seller, but who urge that this should be limited to the secondary liability of underwriting the seller's solvency.
>
> 6.6.28. We therefore recommend that where the price payable under a consumer sale agreement is advanced wholly or in part by a connected lender that lender should be liable for misrepresentations relating to the goods made by the seller in the course of antecedent negotiations, and for defects in title, fitness and quality of the goods. Further, we consider that where the sale or the loan are made by separate contracts, the borrower should nevertheless have the right to set off against any sum payable by

him under the loan contract any damages he is entitled to recover from the lender for breaches of the sale agreement by the seller.'

In some respects those recommendations are drawn narrowly to reflect the old law, at other times they seem to go somewhat wider. It is difficult to discern any precise limit in the Crowther recommendations. What matters at the end of the day, as it seems to me, is that Parliament, when it came to enact the Consumer Credit Act 1974, did not adopt the limited measure which there had been in the Hire-Purchase Act 1965 that representations relating to the goods should be all that the creditor was to be liable for. A different and wider form of words was used. In those circumstances if the antecedent history has any significance at all, it is that we must look for a somewhat wider meaning.

In my judgment, what s 56(1)(b) means is that there must be goods sold or proposed to be sold by the credit broker to the creditor, which will form the subject matter of a debtor-creditor-supplier agreement. If that condition is fulfilled, one next inquires whether there were negotiations in relation to those goods. If there were, then all that was said by the credit broker in those negotiations is deemed to have been said on behalf of the creditor. On the other hand, what is said in any other negotiations which do not relate to those goods, is not deemed to be said on behalf of the creditor.

The question is then a simple one of fact, were the negotiations in this case all relating to the goods to be sold? The answer in my judgment is that they were, because they were all part of one transaction. If the dealers had been asked by Mrs Ingate, 'I no longer want the Fiat Panda, but please take my car and give me £8 and pay off what I owe on it' one can be fairly confident that the answer would be that, 'That is not on offer. We have been negotiating about one transaction overall and that is what we have been talking about'.

In my judgment the law is plain enough: one simply has to inquire whether all the negotiations form part of the one transaction as a matter of fact. The facts are plain enough to lead to that conclusion in this case.

I should perhaps have mentioned that in *Chitty on Contracts* (27th edn, 1994) para 36-062, p 548 it is said about s 56(1)(b):

> 'It is to be noted that this category belongs only to *goods* and to the goods sold or proposed to be sold by the dealer to the finance house.' (Author's emphasis.)

Then there is a footnote:

> 'But see *U.D.T.* v. *Whitfield and First National Securities* ([1987] CCLR 60), Cty. Ct. (finance house held liable for dealer's failure to fulfil his undertaking to the debtor to discharge the outstanding balance on a vehicle traded-in by the debtor as part of a transaction to take a new vehicle on hire-purchase).'

It was indeed part of the transaction. In so far as that footnote betrays only moderate enthusiasm by the editors of *Chitty* for the *UDT* decision, I am afraid that I do not agree with it. I consider that the *UDT* case was rightly decided. It follows that I would not agree with the conclusion of the sheriff in *Powell v Lloyds Bowmaker Ltd* [1996] CCLR 50.

I also agree with what I believe Henry LJ is about to say about s 56(4) of the 1974 Act. I would allow this appeal.

HENRY LJ. I agree that this appeal should be allowed and I agree with Staughton LJ's reasons for so doing. Using the old familiar language of 'hirer, dealer and finance company' the clear statutory effect of s 56 of the Consumer Credit Act 1974 is to make the dealer, in addition to his liability in his 'actual capacity', the finance company's agent in situations where he would not be at common law because he would not have had the authority express or implied so to act. The machinery for doing this is to be found in s 56(2) of the Act making him the finance company's agent in negotiations with the hirer as defined in our case in s 56(1)(b). Under that subsection the negotiations in question must be 'conducted ... in relation to' the goods that will become the subject matter of, in our case, the conditional sale agreement, i e the Fiat Panda.

Now, in relation to the acquisition of that vehicle Judge Crowther QC found that there were two separate transactions. The relevant passage of his finding has already been read by Staughton LJ. I do not believe that position to be tenable either in fact or in law.

To deal with the facts: the evidence was heard before the district judge and his findings were accepted by the judge. The district judge held that there was just one transaction here, that relating to the Fiat Panda. Staughton LJ has already quoted the passage where he found that.

The argument that there was a separate transaction relating to the Austin Metro seems to me to rest on the coincidental fact that on these particular figures the value agreed for the Austin Metro cancelled out the debt due on it. If this were the usual case of taking the Austin Metro in part-exchange, it would seem to me to be very difficult indeed to mount the 'two transactions' argument. But this coincidence does not, to my mind, create a two-transaction situation where in my judgment (as the district judge correctly found on the facts) there was in reality one. It seems to me that the district judge was right to reject the two-transaction argument as a matter of fact. However, should, as a matter of law, the words 'negotiations ... in relation to' the Fiat Panda be so narrowly construed as to exclude negotiations concerning what the district judge found to be part of the package, namely the Austin Metro? It seems to me that such a narrow interpretation of the words would not only be artificial but would fly in the face of the clear purpose of this Act to protect consumers. While I would favour a wide construction of the words on that ground alone, s 56(4) seems to me to put the matter beyond doubt in favouring the wide construction. That subsection reads:

> 'For the purposes of this Act, antecedent negotiations shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them.'

I get from that three things: first, negotiations here started when Mrs Ingate expressed an interest in the Fiat Panda after which the dealer said that if she bought it the company would buy her Austin Metro in part-exchange. Second, those negotiations included, as the representations found, the dealer's promise to Mrs Ingate to pay off her debt under the finance agreement relating to the Austin Metro. Third, even if the Austin Metro part of the package were dressed up as a separate transaction it would at best have been 'other dealings' within the meaning of that subsection included in the negotiations. Of course, as Mrs

Wilkins reminds me, in each case the negotiations so defined must relate to the goods sold by the dealer to the finance company, ie the Fiat Panda. These negotiations, for reasons that Staughton LJ and I have sought to explain, plainly did. Therefore, in my judgment, s 56 is to be construed widely. Section 56(1)(b) applies, and the third party are in my judgment liable under s 56(2) for the dealer's promise to discharge Mrs Ingate's debt under the conditional sale agreement. I would allow this appeal.

THORPE LJ. I agree with both judgments.

Appeal allowed. Leave to appeal to the House of Lords refused.

Mary Rose Plummer Barrister.

Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Price Waterhouse (a firm) and another (Abu Dhabi and others, third parties)

CHANCERY DIVISION

LADDIE J

4, 5 NOVEMBER 1996

Constitutional law – Diplomatic privilege – Immunity from legal process – Ruler of constituent territory of recognised state – Defendants seeking to bring third party proceedings against constituent territory – Defendants issuing third party notice against ruler of constituent territory in his public capacity as ruler – Ruler of constituent territory also president of the state – Ruler applying to set aside notice on ground of diplomatic immunity – Whether notice should be set aside – Diplomatic Privileges Act 1964, Sch 1, art 31 – State Immunity Act 1978, ss 14, 20.

The liquidators of the plaintiff bank commenced certain actions against the defendants, who were the bank's former auditors. The defendants sought to bring into those proceedings Abu Dhabi, which was a constituent territory of the United Arab Emirates (a recognised state), and issued a third party notice against Z, the Ruler of Abu Dhabi and President of the United Arab Emirates. Z applied to set aside the notice on the ground that he was immune from suit as a diplomatic agent under art 31[a] of the Vienna Convention on Diplomatic Relations, as set out in Sch 1 to the Diplomatic Privileges Act 1964, by virtue of s 20(1)(a)[b] of the State Immunity Act 1978. The defendants contended that they were bringing proceedings against Z in his public capacity as the Ruler and the embodiment of Abu Dhabi, and that since the territory was not immune from suit as a separate entity under s 14(2)[c] of the 1978 Act as it had not acted in the exercise of the sovereign authority of the United Arab Emirates, neither was he.

Held – Although the sovereign or head of a recognised state enjoyed immunity from suit under s 14(1)[d] of the 1978 Act when acting in a public capacity, in all other circumstances he enjoyed the immunities prescribed under the 1964 Act. It followed, in the instant case, that since it was not asserted that Z was acting in a public capacity on behalf of the United Arab Emirates, he was immune from suit under the 1964 Act; the fact that he was acting in a public capacity in relation to Abu Dhabi was irrelevant, because the public capacity referred to in s 14(1) had to be a public capacity in relation to the recognised state, which Abu Dhabi was not. Accordingly, the application would be granted and the third party notice issued against Z would be set aside (see p 113 *g* to p 114 *b d*, post).

a Article 31, so far as material, is set out at p 110 *d e*, post
b Section 20(1), so far as material, is set out at p 111 *e*, post
c Section 14(2), so far as material, is set out at p 112 *e f*, post
d Section 14(1), so far as material, is set out at p 111 *f g*, post

Notes

For immunities from jurisdiction, see 18 *Halsbury's Laws* (4th edn) paras 1548–1581.

For the Diplomatic Privileges Act 1964, Sch 1, art 31, see 10 *Halsbury's Statutes* (4th edn) (1995 reissue) 683.

For the State Immunity Act 1978, ss 14, 20 see ibid 766, 771.

Cases cited or referred to in skeleton arguments

Alcom Ltd v Republic of Colombia (Barclays Bank plc and anor, garnishees) [1984] 2 All ER 6, [1984] AC 580, HL.

Australia and New Zealand Banking Group Ltd v Commonwealth of Australia, Amalgamated Metal Trading Ltd v Department of Trade and Industry (28 April 1989, unreported), QBD.

I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, HL.

Kuwait Airways Corp v Iraqi Airways Co [1995] 3 All ER 694, [1995] 1 WLR 1147, HL.

Rayner (J H) (Mincing Lane) Ltd v Dept of Trade and Industry [1987] BCLC 667; *affd* sub nom *Maclaine Watson & Co Ltd v Dept of Trade and Industry, Re International Tin Council, Maclaine Watson & Co Ltd v International Tin Council, Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1988] 3 All ER 257, [1989] Ch 72, CA; *affd* [1989] 3 All ER, [1990] 2 AC 418, HL.

Application

His Highness Sheikh Zayed Sultan al Nahyan, the President of the United Arab Emirates and Ruler of Abu Dhabi, applied to strike out a third party notice issued against him in his public capacity as ruler of Abu Dhabi by the defendants, Price Waterhouse and Ernst & Whinney, both firms of chartered accountants, so as to bring Abu Dhabi into the proceedings brought against them by the plaintiffs, Bank of Credit and Commerce International (Overseas) Ltd. The facts are set out in the judgment.

Peter Scott QC, William Trower and *Mark Arnold* (instructed by *Macfarlanes*) for Sheikh Zayed.

Michael Crystal QC and *Adrian Beltrami* (instructed by *Lovell White Durrant*) for the plaintiffs.

Peter Goldsmith QC and *John Nicholls* (instructed by *Herbert Smith*) for the defendants.

LADDIE J. This is an application by His Highness Sheikh Zayed Sultan al Nahyan, the President of the United Arab Emirates and Ruler of Abu Dhabi, to set aside certain third party notices issued against him. The circumstances in which the third party notices were issued are as follows. The liquidators of the plaintiffs, Bank of Credit and Commerce International (Overseas) Ltd (BCCI), have commenced certain actions against the former auditors of the bank. For the present purposes I will refer to them as Price Waterhouse and Ernst & Whinney. There are effectively three actions, a consolidated action, an action referred to as the 1988 action and another action referred to as the 1989 action. In each of these, claims for large sums of money are made against the defendants.

The Price Waterhouse defendants have sought to bring in, by third party notice, Abu Dhabi. To that end they have issued third party notices against inter alia, (1) Abu Dhabi, (2) the Emirate of Abu Dhabi, (3) the government of Abu

Dhabi, and (4) His Highness the Ruler of Abu Dhabi. All of these originally sought to have their third party notices set aside on grounds of immunity under statute or at common law. But the first three third parties have now relinquished their applications. It is only Sheikh Zayed who still seeks to set aside the third party notices issued against him and the only ground he relies on is that he has immunity from suit by virtue of statute.

Before me, Mr Peter Scott QC appeared for Sheikh Zayed, Mr Peter Goldsmith QC appeared for the Price Waterhouse defendants.

There are two statutes which are relevant to this application, the Diplomatic Privileges Act 1964 and the State Immunity Act 1978. The first is concerned to bestow immunity in respect of civil and criminal proceedings on diplomatic staff. This Act implements many of the provisions of the Vienna Convention on Diplomatic Relations and Optional Protocol concerning the Compulsory Settlement of Disputes signed in 1961. In particular, it brings into effect in our domestic law, the provisions of art 31 of that convention, which, so far as relevant to this application, reads as follows:

> '1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of ... (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions ...'

When the 1964 Act became part of our law, it did not affect the common law immunity of heads of state, but only the immunity of representatives of a state, such as ambassadors. The 1978 Act is concerned primarily with state immunity. Until the passing of that Act, state immunity was a matter of common law and the extent of that immunity was the subject of some difficult case law. The 1964 Act gives some immunity to states but, at least in some respects, that immunity is less extensive than the immunity given to the diplomatic staff of the state. However, the 1978 Act goes beyond that. It also makes certain provisions for the immunity of the sovereign or heads of state.

It is necessary to start with a consideration of s 21(a) of the 1978 Act. That provides as follows:

> 'A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question—(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State.'

A recognised state, that is one in respect of which a suitable certificate under s 21 has been issued, is given immunity as provided for under s 1(1) of the 1978 Act. That means:

> 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.'

Section 1(2) provides: 'A court shall give effect to the immunity conferred by this Section even though the State does not appear in the proceedings in question.' That general immunity is subject to a number of significant exceptions. Once again, for the purpose of this application it is only necessary to refer to those

exceptions contained within s 3 of the 1978 Act. In so far as relevant, they read as follows:

> '(1) A State is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom ...
>
> (3) In this section "commercial transaction" means—(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.'

Therefore in those respects, the state itself would not be immune to proceedings brought in this country. Now into this picture we must bring the position of the sovereign or head of state. The 1978 Act includes two significant provisions relating to the sovereign or head of state, that is to say a sovereign or head of state of a state recognised by virtue of the issue of a suitable certificate. The first, s 20(1)(a), provides:

> 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State ...'

Thus, the head of state has all the immunities bestowed on diplomatic personnel such as ambassadors. Secondly, in some cases, it is possible to bring proceedings against the head of state as representing the state itself. Because that is so, s 14(1)(a) of the 1978 Act provides:

> 'The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—(a) the sovereign or other head of that State in his public capacity ...'

This means that when a head of a recognised state is acting in his private capacity, he has the same immunities as say, the ambassador of that state under the 1964 Act. On the other hand, when acting in his public capacity, effectively as the embodiment of the state, he has all the immunities the state has under the 1978 Act. It would appear at first blush that the immunities are cumulative, thus the fact that he has immunities when acting in a public capacity, does not detract from the immunities derived from the 1964 Act by virtue of s 20(1) of the 1978 Act. (See in this regard s 16 of the 1978 Act.)

If in this case the defendants had been trying to bring third party proceedings against the head of a recognised state in his private capacity, the provisions of the 1964 Act would give him immunity from suit. In particular, the provisions of art 31(1)(c) of the convention only removes the immunity from suit where the diplomatic agent, or in this case head of state, is carrying on a professional or commercial activity in the receiving state, that means in England. There is no suggestion that Sheikh Zayed is carrying on or has carried on any relevant activity in England. Furthermore, as Mr Goldsmith accepted, to avoid immunity it

would be necessary to show that the head of state carried on a continuous business activity here with a view to profit. That also was not asserted against Sheikh Zayed.

However, these are not the only statutory provisions relevant to this application. A recognised state may be a federation. The 1978 Act makes certain provisions for the constituent territories of such a federation. In particular, s 14(5) provides:

> 'Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.'

For example, an Order in Council might have the effect of treating the constituent territory as if it were itself a recognised state, so that the head of the constituent territory would also be treated as if he were head of a recognised state.

However, if there is no such order, s 14(6) applies and that provides:

> 'Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.'

This refers back to s 14(2)(a) and (b) which are the only other provisions of s 14 to which it is necessary to refer for the purpose of this application. Section 14(2) is in the following terms:

> 'A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.'

It is now possible to consider the effect of these provisions on the position of a constituent state which is not the subject of an order. When such a state does something, 'in the exercise of sovereign authority', it is given the benefit of the same immunities as the state of which it forms a constituent part. It is not in dispute that the 'sovereign authority' in s 14(2)(a) is a reference to the sovereign authority of the recognised state. In other words, when a constituent territory or other separate entity acts for and on behalf of the recognised state and effectively acts as if it was exercising the state's sovereign authority, it obtains the immunity that the state would have obtained, had it acted on its own behalf.

Secondly, if it does not fall within the provisions of s 14(2)(a), the constituent territory or other separate entity has no immunity. It neither falls under s 14 nor does it obtain immunity under the 1964 Act. In particular, there is no equivalent provision to s 20(1)(a) extending to such a constituent territory any of the 1964 Act immunities. This is not surprising because the 1964 Act immunities are clearly concerned with giving immunities from suit to individuals rather than territories.

With that in mind, it is possible to turn to the particular facts of this case. Most of these facts I do not understand to be in dispute. (1) The United Arab Emirates is a state within the meaning of the 1978 Act, a certificate to that effect has been signed by the Secretary of State. (2) His Highness Sheikh Zayed is the head of

that state. (3) Abu Dhabi is a constituent territory of the United Arab Emirates for the purpose of the 1978 Act and once again a certificate to that effect has been issued, signed by the Secretary of State. (4) It is, however, not a territory in respect of which an order under s 14(5) has be made. It therefore is treated just like a separate entity under s 14(2) of the 1978 Act. (5) As such, it has no immunity of its own, it only obtains the immunity it can acquire under s 14(2)(a), when it does things in the exercise of the sovereign authority of the United Arab Emirates. (6) Sheikh Zayed is the Ruler of Abu Dhabi. In that capacity, he is not a head of state within the meaning of 1978 Act.

The Price Waterhouse defendants want to third party Abu Dhabi. In so far as they do that, Abu Dhabi can rely on no statutory immunity because the acts of which complaint is made and which are alleged to give rise to liability here to the Price Waterhouse defendants, were not done in the exercise of the sovereign authority of the United Arab Emirates. That may well account for the fact that the first three third parties, in particular, the first third party, Abu Dhabi, have withdrawn their applications to set aside the issue of the third party notices against them. But the defendants are not content with that. They say that the Ruler of Abu Dhabi may be, effectively, indistinguishable from Abu Dhabi as a territory. Therefore they are not sure that bringing proceedings against Abu Dhabi itself is the correct course to adopt. They want to bring proceedings against His Highness the Ruler of Abu Dhabi in case that is the correct title in which to sue Abu Dhabi.

Mr Goldsmith says the defendants are bringing proceedings against Sheikh Zayed in his public capacity as Ruler of Abu Dhabi. He says that Sheikh Zayed's immunity is no greater than the immunity of the constituent territory on whose behalf he is acting in a public capacity. In particular he says that is so where he is being sued 'as the constituent territory'. The latter words are important. The defendants say they are not concerned to bring proceedings against Sheikh Zayed personally, but only in so far as he is the embodiment of Abu Dhabi.

Mr Scott, on the other hand, says that it is clear that Sheikh Zayed has immunity. This can be put in two ways. First he says that the immunities bestowed on a sovereign or head of state under s 14(1) of the 1978 Act, when acting in his public capacity are cumulative to those he acquires under the 1964 Act by virtue of s 20(1) of the 1978 Act. In other words, whether acting in his private or public capacity, he always has the 1964 Act immunity. When acting in his public capacity as head of state, he has, in addition, s 14(1) immunity.

Mr Goldsmith accepted as I understood it, that if this is a correct construction of the 1978 Act, his third party notice must be set aside, because the immunity under the 1964 Act, and particularly that deriving from art 31 of the convention, is wide enough to encompass the acts which are the subject of third party claims here.

The second way of reaching the same conclusion is as follows. The 1964 Act immunities apply to the sovereign or head of a recognised state at least when he is not acting in a public capacity. That means that he has such immunities at least when he is not acting in a public capacity on behalf of the recognised state. Here, although Sheikh Zayed might well have been acting in a public capacity, vis-à-vis Abu Dhabi, which for this purpose is not a recognised state, he was not acting in that capacity for the United Arab Emirates, therefore the 1964 Act immunities apply with the same result as set out above.

It is not necessary for me to consider the first of these arguments because I am satisfied that Mr Scott is correct in the second. Even if the immunities enjoyed by

a sovereign or head of state when acting in a public capacity on behalf of the state are exclusively those provided under s 14(1) of the 1978 Act, in all other circumstances the immunities are those prescribed under the 1964 Act. Since here it is not asserted that Sheikh Zayed is acting in a public capacity on behalf of the United Arab Emirates, his immunities are those set out in the 1964 Act. The fact that he may be said to be acting in a public capacity in relation to Abu Dhabi is irrelevant for this purpose, because the public capacity referred to in s 14(1) must be a public capacity in relation to the recognised state. Just as the words 'exercise of sovereign authority' in s 14(2)(a) must also refer back to the sovereign authority of the recognised state.

This construction appears to me to be consistent with the underlying purpose of this legislation. In so far as the sovereign or head of state is acting in a public capacity on behalf of that state, he is clothed with the immunity that the state has. When acting in this capacity, the head of state and the state are, to some extent, indistinguishable. On the other hand, when acting in any other capacity, it is sensible that he should have immunity equivalent to that enjoyed by the state's diplomatic staff.

It follows for the reasons I have given that Mr Scott's application succeeds and I will order the third party notice issued against Sheikh Zayed to be set aside.

Order accordingly. Leave to appeal granted.

Celia Fox Barrister.

Re Cosslett (Contractors) Ltd

COURT OF APPEAL, CIVIL DIVISION

EVANS, MILLETT LJJ AND SIR RALPH GIBSON

17, 18, 29 JULY 1997

Company – Charge – Registration – Engineering contract deeming contractor's plant while on site to be property of employer – Contract providing that if contractor went into liquidation or abandoned contract, employer could enter on site and either use plant to complete works, or sell plant and apply proceeds towards satisfaction of any sums due from contractor – Whether employer having legal ownership of plant while it remained on site – Whether employer's contractual rights constituting equitable charge – Whether fixed or floating charge – Whether void for want of registration – Companies Act 1985, s 395.

The company entered into a contract with the local authority to carry out engineering works in a land reclamation project, part of which involved the processing of large deposits of coal-bearing shale. In the course of the work two coal-washing plants were established on the site. Under cl 53(2) of the contract all plant, goods and materials owned by the contractor, while on site, were deemed to be the property of the local authority as employer. Clause 54 made provision for the transfer of property in goods and materials to the local authority prior to delivery to the site in order to secure payment and cl 63(1) provided that if the contractor went into liquidation or abandoned the contract, the local authority could enter on the site and either use the plant and materials which were deemed to be its property under cll 53 and 54 to complete the works, or at any time sell such plant and materials and apply the proceeds towards the satisfaction of any sums due from the company under the contact. Before the works were completed, the company abandoned the site, leaving the coal-washing plants behind. When the local authority refused to comply with the company's administrator's demand to deliver up the plants or pay for their use, the administrator applied to the court for an order requiring delivery up of the plant, contending that the local authority's contractual rights as employer gave it a property interest in the plant which amounted to an equitable security interest in the nature of a floating charge registrable under s 395[a] of the Companies Act 1985, and that since no floating charge had been registered, the local authority's contractual right to retain the coal-washing plants was void as against the administrator. The judge dismissed the administrator's claim, holding that the contract conditions created an equitable proprietary interest in the nature of a specific equitable charge and not a floating charge, so the local authority's rights were unaffected by the lack of registration. The administrator appealed. The local authority contended that the judge had erred in holding that cl 53 had not transferred the legal ownership of the plants to it; alternatively, that by virtue of the power of sale in cl 63, it had a possessory lien with a power of sale and not an equitable charge.

a Section 395, so far as material provides: '... a charge created by a company ... is ... void against the liquidator [or administrator] ... unless the prescribed particulars of the charge ... are delivered to ... the registrar ... for registration ...'

Held – On its true construction cl 53(2) did not pass legal ownership in the coal-washing plants to the local authority, nor did cl 63(1) constitute a possessory lien with a power of sale since the local authority's rights in relation to the plant were exclusively contractual and not attributable to any delivery of possession by the company. Rather, the local authority's power of sale under cl 63(1) was a security interest constituting an equitable charge, and since it was a charge on present and future assets of the company which, in the ordinary course of the business of the company, would be changing from time to time, it was a floating charge for the purposes of s 395 of the 1985 Act and not a fixed charge; that was so notwithstanding that the local authority's contractual rights entitled it to refuse to permit the removal of the plant by the company, even where it was not immediately required to complete the works, since it was not essential to the existence of a floating charge that the chargor should have unfettered freedom to deal with the charged assets, and that restriction on the way the company carried on business did not have any relation to the local authority's security but was imposed to ensure that the company would give proper priority to the completion of the works. Although the failure to register the charge rendered the security created by the power of sale void against the administrator, it did not affect any other right of the local authority which was not a security and which did not require registration, and therefore did not invalidate the local authority's contractual right to retain possession of the plant and materials and use them to complete the works. It followed that since at the date when the writ was issued the works had not been not completed, the local authority's right to retain possession of the plant and use it to complete the works was sufficient to defeat the administrator's claim in the action. Accordingly, the appeal would be dismissed (see p 122 *f j* to p 123 *c g*, p 125 *d j* to p 126 *a d f h*, p 127 *d e h j* and p 128 *d f* to *h* post).

Re Yorkshire Woolcombers Association Ltd, Houldsworth v Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284 applied.

Decision of Jonathan Parker J [1996] 4 All ER 46 affirmed on other grounds.

Notes

For floating charges or security, see 7(2) *Halsbury's Laws* (4th edn reissue) paras 1260–1266.

For registration of charges at the registrar's office, see ibid para 1299.

For the Companies Act 1985, s 395, see 8 *Halsbury's Statutes* (4th edn) (1991 reissue) 475.

Cases referred to in judgments

Beeston v Marriott (1863) 8 LT 690.

Bennett & White (Calgary) Ltd v Municipal District of Sugar City No 5 [1951] AC 786, PC.

Bond Worth Ltd, Re [1979] 3 All ER 919, [1980] Ch 228, [1979] 3 WLR 629.

Brightlife Ltd, Re [1986] 3 All ER 673, [1987] Ch 200, [1987] 2 WLR 197.

Brown v Bateman (1867) LR 2 CP 272.

Fox, Re, ex p Oundle and Thrapston RDC v The trustee [1948] 1 All ER 849, [1948] Ch 407, DC.

Great Eastern Rly Co v Lord's Trustee [1909] AC 109, HL.

Hart v Porthgain Harbour Co Ltd [1903] 1 Ch 690.

Keen & Keen, Re, ex p Collins [1902] 1 KB 555, DC.

Milnes v Huddersfield Corp (1883) 12 QBD 443, CA; *affd* (1886) 11 App Cas 511, [1886–90] All ER Rep 350, HL.
Reeves v Barlow (1884) 12 QBD 436, CA.
Weibking, Re, ex p Ward [1902] 1 KB 713.
Winter, Re, ex p Bolland (1878) 8 Ch D 225.
Yorkshire Woolcombers Association Ltd, Re, Houldsworth v Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284, CA; *affd* sub nom *Illingworth v Houldsworth* [1904] AC 355, HL.
Young v Matthew Hall Mechanical and Electrical Engineers Pty Ltd (1988) 13 ACLR 399, W Aust SC.

Cases also cited or referred to in skeleton arguments

Akron Tyre Co Pty Ltd v Kittson (1951) 82 CLR 477, Aust HC.
Astor Chemicals Ltd v Synthetic Technology Ltd [1990] BCLC 1.
Biggs v Hoddinott, Hoddinott v Biggs [1898] 2 Ch 307, [1895–9] All ER Rep 625, CA.
Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (in liq) [1985] 1 All ER 155, [1985] Ch 207.
Charlesworth v Mills [1892] AC 231, HL.
Church v Sage (1892) 67 LT 800.
Inglefield (George) Ltd, Re [1933] 1 Ch 1, [1932] All ER Rep 244, CA.
Kent and Sussex Sawmills Ltd, Re [1946] 2 All ER 638, [1947] Ch 177.
Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd [1992] BCLC 609, HL.
Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co (1888) 13 App Cas 554, HL.
Molton Finance Ltd, Re [1967] 3 All ER 843, [1968] Ch 325, CA.
Morris v Delobbel-Flipo [1892] 2 Ch 352, [1891–4] All ER Rep 605.
National Provincial and Union Bank of England v Charnley [1924] 1 KB 431, CA.
Noakes & Co v Rice [1902] AC 24, [1900–3] All ER Rep 34, HL.
Orion Finance Ltd v Crown Financial Management Ltd [1996] 2 BCLC 78, CA.
Palmer v Carey [1926] AC 703, [1926] All ER Rep 650, PC.
Palmer v Day [1895] 2 QB 618, CA.
R v Norfolk CC (1891) 60 LJQB 379, DC.
Santley v Wilde [1899] 2 Ch 474, CA.
Seka Pty Ltd v Fabric Dyeworks (Aust) Pty Ltd (1991) 4 ACSR 455, Aust Fed Ct.
Slavenburg's (NV) Bank v Intercontinental Natural Resources Ltd [1980] 1 All ER 955, [1980] 1 WLR 1076.
Standard Manufacturing Co, Re [1891] 1 Ch 627, [1891–4] All ER Rep 1242, CA.
Stoneleigh Finance Ltd v Phillips [1965] 1 All ER 513, [1965] 2 QB 537, CA.
Swiss Bank Corp v Lloyds Bank Ltd [1980] 2 All ER 419, [1982] AC 584, CA; *affd* [1981] 2 All ER 449, [1982] AC 584, HL.
Trendent Industries Pty Ltd, Re (1983) 8 ACLR 115, NSW SC.
Tunbridge (G E) Ltd, Re [1995] 1 BCLC 34.
Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd [1974] 1 NZLR 484, NZ CA.
Welsh Development Agency v Export Finance Co Ltd [1992] BCLC 148, CA.

Appeal

By reamended notice dated 17 June 1997 Ian Clark, the administrator of Cosslett (Contractors) Ltd (the company), appealed from the decision of Jonathan Parker J ([1996] 4 All ER 46, [1997] Ch 23) on 21 December 1995 whereby he dismissed the administrator's application under s 234 of the Insolvency Act 1986 for an order for

delivery up by the respondent local authority, Mid-Glamorgan County Council (now Bridgend County Borough Council) (the council), of two coal-washing plants to which the administrator claimed to be entitled pursuant to a contract between the council and the company. The facts are set out in the judgment of Evans LJ.

Richard Wilmot-Smith QC and *Alan Maclean* (instructed by *Hammond Suddards*, Manchester) for the administrator.

Simon Mortimore QC and *Antony Zacaroli* (instructed by *Edwards Geldard*, Cardiff) for the council.

Cur adv vult

29 July 1997. The following judgments were delivered.

EVANS LJ. The appellant, Ian Clark, claims as the administrator of Cosslett (Contractors) Ltd against Mid-Glamorgan County Council (now Bridgend County Borough Council). I shall call them 'the company' and 'the council' respectively.

By an engineering contract dated 28 January 1991 incorporating the Institution of Civil Engineers (ICE) Conditions of Contract and Forms of Tender, Agreement and Bond for use in connection with Works of Civil Engineering Construction (5th edn, 1973) with some amendments, the company agreed to carry out permanent and temporary works in connection with the Upper Garw Valley Reclamation Scheme (the scheme).

The scheme covered an area of approximately 141 hectares, the majority of which were covered with shale tips associated with the former workings of the Garw and International Collieries. The 'Brief Description of Works' (not part of the contract terms) included this:

> 'Over an estimated period of 4 years the coal bearing shale will be processed through a washing plant and the residue used to raise the valley floors to provide plateaux for possible development and the provision of new river channels for the Nant Garw and Nant Hir. Both realigned rivers will be interspersed with two feature lakes complete with recreation areas and the whole of the newly created land forms will be landscaped in sympathy with the surrounding topography.'

Two coal-washing plants were required for this purpose and they were duly installed on the site. We were told something of separate financial arrangements which enabled the company or one of its associates to purchase the plants, but those arrangements are not relevant for the purposes of the appeal. As will appear below, it was agreed for the purposes of the contract that the washing plants should be regarded as constructional plant which the company brought to the site for the purposes of the contract works.

The first washing plant was installed between June and December 1991 and the second between May and September 1992.

During 1993 disputes arose between the company and the contractor, and early in August 1993 the company left the site. The engineer duly certified on 6 August that the company had abandoned the contract. This gave the council certain rights under cl 63(1) of the ICE conditions (quoted below) including a

right to use the washing plants for the purpose of completing the contract works. This the council, employing another contractor, did.

Soon afterwards, in September 1993, the appellant claimed that the company was entitled to be paid by the council for the continued use which it was making of the plants. Payment was refused and in October/November 1993 he demanded delivery up of the plants, unless the council agreed to pay a rent of £10,000 pw or to purchase the plants for a reasonable sum, being not less than £1,200,000. This too was refused, and the appellant issued proceedings on 1 February 1994, claiming an order for delivery up of the plant as the company's property, under s 234 of the Insolvency Act 1986. After hearing full argument, Jonathan Parker J dismissed the appellant's claim (see [1996] 4 All ER 46, [1997] Ch 23).

The issues

These can be stated in outline as follows. The council does not dispute that the washing plants were purchased by the company, presumably from the manufacturers, and initially became its property. They rely, however, on cl 53(2) of the conditions, by which all plant, goods and materials owned by the company 'shall when on site be deemed to be the property of the employer' ie of the council. Furthermore, they say that in the circumstances which arose when the company left the site cl 63(1) entitled them to use the plants to complete the works and also 'at any time' to sell them and to apply the proceeds towards whatever sums might be due from the company under the contract. The power of sale was never asserted by the appellant but its existence is relevant to the legal issues which arise. These are as follows.

(1) The council says that cl 53 had the effect of transferring legal ownership of the plants to it, at least until the contract works were complete, and therefore they were not the company's property when the appellant made his demand for delivery up.

(2) Alternatively, cll 53 and 63 at least had the effect of creating a charge over the plants in the council's favour, or if not a charge, then a lien based on their continued possession of the plants. In either event, they were entitled to refuse to return them to the company or to the administrator, when the demand for delivery up was made.

(3) The appellant contended in his reply that if the contract conditions created a charge in the council's favour, then it was a floating rather than a fixed charge, and as such was void for want of registration under s 395 of the Companies Act 1985.

(Note the lien contention under (2) above was not raised before the judge and it is not referred to in his judgment.)

Judgment

The judge held, in summary, that the contract conditions did not transfer legal ownership of the plants to the council, but that they had the effect 'of giving the employer an equitable proprietary interest in the relevant plant' which was an interest in the nature of a charge, because of the power of sale contained in cl 63(1). The charge was not a floating charge for the purposes of the statutory registration provisions, and therefore the admitted fact of non-registration did not prevent the council from relying on cl 63(1) in accordance with its terms. The claim for delivery up therefore failed.

The contract conditions

The relevant parts of cll 53 and 63, and of cl 54 which is relied on as affecting the construction of cl 53, are set out in extenso in the judgment ([1996] 4 All ER 46 at 49–52, [1997] Ch 23 at 28–31). Only the following need be quoted here (amendments in italics):

> '53.(1) For the purpose of this clause:—(a) the expression "Plant" shall mean any constructional plant *coal-washing plant* temporary works and material for temporary works but shall exclude any vehicles engaged in transporting any labour, plant or material to or from the Site ...
>
> (2) All plant, goods and materials owned by the Contractor or by any company in which the contractor has a controlling interest shall when on site be deemed to be the property of the Employer. *The washing plant must be owned by the Contractor or by a company in which the Contractor has a controlling interest* ...
>
> (6) No Plant (except hired Plant) goods or materials or any part thereof shall be removed from the Site without the written consent of the Engineer which consent shall not be unreasonably withheld where the same are no longer immediately required for the purposes of the completion of the Works but the Employer will permit the Contractor the exclusive use of all such Plant goods and materials in and for the completion of the Works until the occurrence of any event which gives the Employer the right to exclude the Contractor from the Site and proceed with the completion of the Works ...
>
> 63.(1) If the Contractor shall become bankrupt or have a receiving order made against him ... or if the Contractor shall assign the Contract without the consent in writing of the Employer first obtained or shall have an execution levied on his goods or if the Engineer shall certify ... that in his opinion the Contractor ... (a) has abandoned the Contract ... then the employer may after giving 7 days' notice in writing to the Contractor enter upon the Site and the Works and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer of the Engineer by the Contract and may himself complete the Works or may employ any other contractor to complete the Works and the Employer or such other contractor may use for such completion so much of the Constructional Plant Temporary Works goods and materials which have been deemed to become the property of the Employer ... may at any time sell any of the said Constructional Plant Temporary Works and unused goods and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the contract ...'

General

The issue which the judge found against the appellant, and the only issue raised by his appeal, was whether the charge created by the conditions was a fixed rather than a floating charge; he held that it was a fixed charge, and it followed that the council's rights were unaffected by the lack of registration under s 395. Mr Wilmot-Smith QC therefore was able to present the appeal on the assumptions (1) that the council did not become owners of the plants, and (2) that the

conditions did create some form of charge in the council's favour. He submitted that the charge should properly be regarded as floating over such of the company's assets as were present on the site from time to time, and that those assets included the two washing plants in the circumstances of this case, however immobile or how much like fixed assets they might appear to be. In addition, however, Mr Simon Mortimore QC, for the council, submitted by way of cross-appeal that the judge was wrong to hold that legal ownership of, or 'the general property' in, the plants was not transferred to the council under cl 53(2), and he added the lien contention to which I have referred above. In the result, therefore, we heard argument as to the effects of the conditions generally, including a brief historical survey of decisions starting with *Beeston v Marriott* (1863) 8 LT 690 which were concerned with contractual provisions of this sort.

These authorities show that for more than a century building and engineering contracts have contained clauses which provide that the property in goods and materials and in plant which the contractor brings onto the site shall pass or be 'deemed' or 'considered' to pass to the employer, at least until the works are completed. The underlying reason may well be, as was suggested by Mr Mortimore, that it is in the employer's interests to have the plant, goods and material which are on the site free from all risk that they might be followed and seized by creditors of the contractor. Another factor, which is especially evident in the early cases (and see also, more recently, one in *Re Fox, ex p Oundle and Thrapston RDC v The trustee* [1948] 1 All ER 849, [1948] Ch 407, which was concerned with builder's materials lying on the site, rather than with plant) was that materials which became part of the building as it was constructed, thereupon become the property of the owner of the building, by operation of law, by virtue of being incorporated in it (see *Brown v Bateman* (1867) LR 2 CP 272).

It was also in the employer's interest, if the contractor should default or for any other reason fail to complete the works, that the same plant, goods and materials should remain on the site and be available for the employer or any other contractor whom he might introduce to complete the works to use it for that purpose.

These objects were achieved, so far as the contractual wording was concerned but subject to various legal challenges that were made, by clauses which provided that the property should pass or be deemed or considered to pass to the employer until such time as the works were complete. In *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690 at 695 Farwell J referred to the leading decision in *Reeves v Barlow* (1884) 12 QBD 436 and held:

> 'Applying that statement here, the true view is that the materials have become the property at law of the company subject to this condition; and the condition has not been performed by reason of the default of the contractor.'

Whether the clause had this effect, however, was always a question of construction in the circumstances of the case, and in *Re Keen & Keen, ex p Collins* [1902] 1 KB 555 ownership was not transferred (see Butcher KC arguendo in *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690 at 694: 'It was there decided that the clause as to materials in a building agreement did not vest the property in the owners of the land, because subsequent clauses negatived any such meaning', whereupon he was stopped by the court).

The reason why it was necessary to decide whether the clause was effective to transfer the property, meaning legal or absolute ownership, from the contractor

to the employer varied from case to case. Ownership might be asserted by a judgment creditor of the contractor (see *Brown v Bateman*) or of the employer (see *Beeston v Marriott*). A trustee in bankruptcy of the contractor might assert that the goods etc in question remained in the reported ownership of the contractor, even though legal ownership had been transferred, by virtue of his possession or apparent possession of the site. It was held, however, that appearances were 'ambiguous' in this respect (see *Re Keen & Keen* [1902] 1 KB 555 at 560 and *Re Fox* [1948] 1 All ER 849 at 855, [1948] Ch 407 at 419). And it was alleged that the contracts which separated the legal ownership from equitable interests were bills of sale which were void if not registered under the successive Bills of Sale Acts of 1854, 1878 and 1882. These further issues gave rise to much learning in the judgments to which we were referred.

They do not arise in the present case, although Mr Wilmot-Smith reserved an as yet unpleaded submission that the contract is registrable as a bill of sale.

What the authorities establish, which is relevant to the appeal, is that a contractual provision of this sort can be effective to transfer the ownership of plant, goods and materials to the employer, depending as always on the true construction of the words. Secondly, however, a 'deeming' provision does not necessarily have this effect.

Finally, none of the authorities has been concerned with the floating charge submission made in the present case. They do contain statements, however, of the nature of the interest, legal or equitable, which either remains with the contractor, if legal ownership passes to the employer, or is transferred to the employer, if legal ownership is undisturbed.

This case—construction

I agree with the judge and with Millett LJ that legal ownership did not pass to the council, for the reasons which they have given.

Lien

Logically, Mr Mortimore's next submission is that the council acquired possession of the plants, coupled with a contractual power of sale under cl 63(1), which entitled them to assert a possessory lien in answer to the appellant's demand for delivery up. He relies on *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109. The issue in that case, on which the House of Lords was divided, was whether the railway company had delivered the goods unconditionally to the goods owner so as to lose its carrier's lien. The majority held that it had not done so (see [1909] AC 109 at 112, 114, and 116). The lien which it exercised, therefore, was based on its actual possession as carrier of the goods, which was not destroyed by its contractual arrangements with the receiver or by delivery up of the goods.

The present is the converse case. By cl 53(6) the company had the exclusive right to use the plants. That contractual right ended when it abandoned the site. The plants remained its property, subject to the right given to the council by cl 63(1). Unless the council was already the owner, which in my judgment it was not, it relies on the clause to justify its refusal to deliver them up. It cannot rely on either a delivery of possession or a right to possession, independently of the clause. I agree with the judgment of Millett LJ that for the reasons he gives the council cannot rely on a possessory lien.

Charge

Clause 63(1) gives the council two contractual rights; first to use the plants to complete the contract, and secondly, to sell the plant 'at any time' and to defray the proceeds of sale against sums due to it, etc.

The former right is unaffected, in my judgment, by the requirement of registration under s 395 of the 1985 Act. The council therefore was entitled to retain the plants for the purposes described in the cl 63(1).

The power of sale, however, is a security right which does require registration if it is a floating charge. On this one issue I would disagree with the judge. In agreement with Millett LJ and for the reasons he gives I would hold that the power of sale is a floating charge over the company's property as defined in the clause. Not having been registered, the clause is void against the administrator in that respect.

I would, however, dismiss the appeal.

MILLETT LJ. I have had the advantage of reading in draft the judgment of Evans LJ. I gratefully adopt his recital of the facts.

As appears therefrom, by the present proceedings the administrator of the company claims the delivery up of certain plant as property of the company together with damages for its wrongful retention. The council has refused delivery up in reliance on its contractual rights under the standard form of contract issued by the Institution of Civil Engineers (ICE). Clause 63(1) of this contract grants the council two distinct rights in the event of the company being expelled from the site. One is the right to retain possession of the plant and use it to complete the works without further payment to the company. The other is the right to sell plant on completion of the works as well as plant not required to complete the works and to apply the proceeds of sale towards whatever sums might be or become due from the company under the contract. The administrator contends that these rights constitute a floating charge which is void against him for want of registration under s 395 of the Companies Act 1985. The judge held that the rights in question constitute a fixed but not a floating charge and accordingly do not require registration.

In my judgment, the two rights on which the council relies are distinct rights and must be considered separately. At the date when the writ was issued the works were not complete, and accordingly the council's right to retain possession of the plant and use it to complete the works, if valid, is sufficient to defeat the administrator's claim in the action. The works have, however, now been completed, so that to justify its continued retention of the plant the council must rely on its power of sale. We have been asked to indicate our view whether this power is void as against the administrator, even this if not strictly necessary for the disposal of the appeal, so that future disputes can be avoided.

In my judgment the following questions arise for decision.

(1) Whether cl 53(2) of the contract has the effect of transferring the legal property in the plant to the council? If it does then (i) it was still the property of the council when delivery up was demanded; and (ii) there can be no question of the council's rights in respect of the plant constituting a charge on its own property.

(2) If it does not, whether the council's right to retain possession of the plant and use it to complete the works constitutes an equitable charge?

(3) Whether the council's power of sale arises by way of equitable charge or possessory lien? a

(4) If either right arises by way of charge, whether the charge is a fixed or floating charge?

(5) If so, what are the consequences of the company's failure to register it?

(1) *Does cl 53(2) transfer legal property in the plant to the council?* b

This depends on the terms of the contract and is a pure question of construction (see *Re Fox, ex p Oundle and Thrapston RDC v The trustee* [1948] 1 All ER 849 at 855, [1948] Ch 407 at 419). The authorities show that it may turn on fine distinctions. Where the contract provides that plant and materials brought onto the site 'shall be and become' the property of the employer the words are c given literal effect and the contract is treated as passing legal title to the employer (see *Reeves v Barlow* (1884) 12 QBD 436 at 442 and *Bennett & White (Calgary) Ltd v Municipal District of Sugar City No 5* [1951] AC 786). Where, however, as in the present case the contract provides only that the plant and materials 'shall be deemed' or 'shall be considered' to be the property of the employer, the words are regarded as ambiguous. In such a case other provisions of the contract may d be taken into account in order to decide whether the contract has the effect of passing the legal property in the plant and materials to the employer or whether, as the prima facie meaning of the words suggests, it does not have this effect but merely entitles the employer to act as if the property in the plant and materials had passed to him (see *Brown v Bateman* (1867) LR 2 CP 272, *Re Winter, ex p Bolland* (1878) 8 Ch D 225, *Milnes v Huddersfield Corp* (1883) 12 QBD 443 at 449 and *Re Keen & Keen, ex p Collins* [1902] 1 KB 555). e

Not all the cases are consistent. In *Re Weibking, ex p Ward* [1902] 1 KB 713 a provision that plant and materials brought onto the site should 'be deemed to be annexed to the freehold' was held by Wight J to pass legal title to the employer, but the case was said in *Re Fox* to turn on its own particular facts; while in *Hart v* f *Porthgain Harbour Co Ltd* [1903] 1 Ch 690 Farwell J seems to have thought it immaterial which form of words was used. I cannot think that this is correct. Of course the contract must be construed as a whole, but given that it is susceptible of two possible meanings the actual words of the clause relied on to pass the title must be of great importance.

g

In the present case there are several indicia that the legal ownership of plant and materials brought onto the site does not pass to the council. Such plant and materials are described throughout as 'plant and materials which have been deemed to become the property' of the council, a circumlocution which might well have been dispensed with if they had become the actual property of the h council. The company is prohibited by cl 53(6) from removing plant or materials from the site without the consent of the engineer (a similar clause was said in *Re Keen & Keen* to be unnecessary if the plant and materials belonged to the council). Finally, cl 53(9) exempts the council from liability for loss of or injury to plant or materials brought onto the site (a provision which was also said in *Re Keen & Keen* to be inconsistent with the property having passed to the council). j

I do not find this last consideration persuasive in view of the fact that the contract in the present case, unlike that in *Re Keen & Keen*, contains a revesting provision (cl 53(7)). For its part the council relies on the provisions of cl 53(6) by which the company is granted permission to use the plant to complete the work and cl 53(7) by which the plant and materials revest in the company on

completion of the works or previous removal from the site. The council submits that neither provision would be necessary unless legal title had passed to the council under cl 53(2). In my judgment, there is no substance in this point. The company would need permission to make use of the plant whether legal ownership had actually passed to the council or had only been deemed to pass to it; while cl 53(7) is carefully drawn to provide for a *deemed* revesting, and merely 'undeems' that which is previously deemed.

If there were nothing more I would hold that cl 53(2) is merely a deeming provision which does not have the effect of passing legal title. But the last sentence of cl 53(2) puts the matter beyond argument. It applies the clause indiscriminately both to plant belonging to the company and to plant belonging to its controlled subsidiaries. These are not parties to the contract. In relation to plant which belongs to a subsidiary, the clause is effective in equity as a deeming provision, for the court could order specific performance of the contract by requiring the company to exercise its powers of control over the subsidiary and thus procure compliance with its own contractual obligations. But the clause cannot possibly operate at law to pass title to property owned by a company not a party to the contract.

Accordingly, I agree with the judge that cl 53(2) of the contract does not pass legal ownership in the plant to the council.

(2) *Does the council's right to retain possession of the plant and use it to complete the works constitute an equitable charge?*

In my judgment the council's right to retain possession of the plant and use it to complete the works does not constitute an equitable charge because (i) it does not give the council a proprietary interest in the plant but only rights of possession and use and (ii) it is not by way of security.

It is of the essence of a charge that a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability. This right creates a transmissible interest in the asset. A mere right to retain possession of an asset and to make use of it for a particular purpose does not create such an interest and does not constitute a charge.

But there is an even more fundamental reason why this right of the council in the present case does not constitute a charge. This is that it does not constitute any kind of security interest, since it is not given to the council by way of security. It does not secure the performance of the contract by the company, but merely enables the council to perform the contract in its place. It does not, therefore, secure the discharge of any debt or other legal obligation of the company or of any third party, whether to complete the works or to pay damages for its failure to do so. Completion of the works by the council does not discharge either of these obligations.

This is sufficient to dispose of the administrator's claim in the action.

(3) *Does the council's power of sale arise by way of equitable charge?*

By contrast the council's power to sell the plant and apply the proceeds in or towards discharge of whatever sums might be or become due from the company by reason of its failure to complete the works clearly is a security interest. The council contends that its rights constitute a possessory lien with a power of sale

and not an equitable charge, and cites *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109 in support.

This proposition cannot be accepted. In the *Great Eastern Rly* case there was no dispute that the railway company's power of sale was attached to its lien. The question which divided the House of Lords was whether the lien was contractual or possessory. The majority held that its carrier's lien was not extinguished until the goods were unconditionally delivered up to the consignee and that accordingly it did not need to rely on any contractual right of possession.

There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and a contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor a charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.

In the present case the council's rights in relation to the plant and materials are exclusively contractual, and are not attributable to any delivery of possession by the company. When the company brings plant and materials onto the site they remain in the possession of the company to enable it to use them in the completion of the works. There is no question of the company delivering possession at that stage, either by way of security (ie as a pledge) or otherwise (ie by way of lien). The council comes into possession of the plant and materials when it expels the company from the site leaving the plant and materials behind. But this does not amount to a voluntary delivery of possession by the company to the council. It is rather the exercise by the council of a contractual right to take possession of the plant and materials against the will of the company.

In my judgment, therefore, the council's rights are derived from contract not possession and, in so far as they are conferred by way of security, constitute an equitable charge.

(4) *Is the charge a fixed or floating charge?*

In my judgment the three characteristics of a floating charge which were identified by Romer LJ in *Re Yorkshire Woolcombers Association Ltd, Houldsworth v Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295 are all present. There is no difficulty in regard to the first two characteristics. Plant and materials become subject to the charge as they are brought onto the site and cease to be subject to it as they are removed from the site. Accordingly, the charge is a charge on present and future assets of the company which, in the ordinary course of the business of the company, would be changing from time to time. The dispute has centred on the third characteristic. The administrator submits that, until the council takes steps under cl 63(1) to enter on the site and expel the company therefrom, the company is free to carry on its business in the ordinary way with the plant and materials on the site. The judge accepted the council's submission that this was not so, because of the council's absolute right under cl 53(6) to refuse to permit the company to remove from the site plant and materials immediately required to complete the works, and its qualified right to refuse permission for the removal of plant and materials not immediately required for this purpose provided only that it acts reasonably. I am unable to agree with him.

The judge held that it is of the essence of a floating charge that until the charge crystallises the chargor should retain an unfettered freedom to carry on his business in the ordinary way. He relied for this purpose on two passages, one in the judgment of Vaughan Williams LJ in the *Yorkshire Woolcombers* case (at 294) and the other in the judgment of Slade J in *Re Bond Worth* [1979] 3 All ER 919 at 953, [1980] Ch 228 at 266. The first passage reads as follows:

> 'If *at the will of the mortgagor* he can dispose of [the asset] and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a "specific security".' (My emphasis.)

The second passage reads:

> 'It is in my judgment quite incompatible with the existence of an effective trust by way of specific charge in equity over specific assets that the alleged trustee should be free to use them *as he pleases* for his own business in the course of his own business.' (My emphasis.)

But with respect the converse does not follow. The chargor's unfettered freedom to deal with the assets in the ordinary course of his business free from the charge is obviously inconsistent with the nature of a fixed charge; but it does not follow that his unfettered freedom to deal with the charged assets is essential to the existence of a floating charge. It plainly is not, for any well-drawn floating charge prohibits the chargor from creating further charges having priority to the floating charge; and a prohibition against factoring debts is not sufficient to convert what would otherwise be a floating charge on book debts into a fixed charge (see *Re Brightlife Ltd* [1986] 3 All ER 673 at 676, [1987] Ch 200 at 209 per Hoffmann J).

The essence of a floating charge is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor, and which the chargor has the right to withdraw from the security despite the existence of the charge. The essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the chargee. The question is not whether the chargor has complete freedom to carry on his business as he chooses, but whether the chargee is in control of the charged assets.

The business of the company was to carry out works of civil engineering. In the ordinary course of that business it entered into the contract with the council. In bringing plant and materials onto the site and carrying out the works for the council it was carrying on the ordinary course of its business. It is not to be supposed that its business was confined to the performance of its contract with the council; and if it wished to remove plant or materials from the site and deploy them elsewhere this too would be in the ordinary course of its business. In forbidding the company from removing from the site plant or materials required, whether immediately or not, for the completion of the works, the council was, therefore, placing a restriction on the way in which the company carried on business.

Thus far I agree with the judge. Where I part company from him is that I do not regard this restriction as having any relation to the council's security. The council's purpose in imposing the restriction was not to protect its security but to ensure that the company would give proper priority to the completion of the works. A similar restriction would have been appropriate even if the council had not taken any security interest.

In a case where the plant or materials are not immediately required, the engineer's consent is not to be unreasonably withheld. As Evans LJ pointed out in argument, the fact that the decision is left to the engineer shows that it is to be made on operational grounds. If completion of the works will not be prejudiced or delayed by the removal of an item of plant or materials, then consent to its removal must be given; consent cannot be withheld on the ground that the remaining plant and materials would be insufficient security if the company were in default.

In the course of argument it was pointed out that the council must give seven days' notice before expelling the company from the site, and it was suggested that once such notice has been given and while it has not yet expired the engineer may properly refuse his consent on the ground that the remaining security is insufficient. I do not agree with this; but even if I did it would make no difference. If the council's right to prevent removal on security and non-operational grounds arises only on notice of expulsion, then in my judgment the effect of giving such notice is to crystallise the charge.

Accordingly, and in disagreement with the judge, I hold the charge to be a floating charge.

What are the consequences of the want of registration?

Of all the contractual rights which the council enjoys only one, the power of sale, constitutes a charge of a kind which is registrable under s 395 of 1985 Act. The section provides that the failure to register a charge makes the charge (that is to say the registrable charge) void as a security against a liquidator or administrator of the company. The effect of this is to entitle the liquidator or administrator to deal with the company's assets free from the security created by the charge in question.

In my judgment, therefore, the failure to register the charge renders the security created by the power of sale void as against the administrator, but does not affect any other right of the council which is not a security and which does not require registration. In particular, it does not invalidate the council's contractual right to retain possession of plant and materials and use them to complete the works. But after the completion of the works the council's right to continue in possession is referable to a security which is void against the administrator and cannot prevail against him.

In reaching this conclusion I have derived much assistance from the illuminating judgment of Brinsden J in *Young v Matthew Hall Mechanical and Electrical Engineers Pty Ltd* (1988) 13 ACLR 399 with which I am in full agreement.

Conclusion

I would dismiss the appeal.

SIR RALPH GIBSON. I agree with both judgments.

Appeal dismissed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Bannister v SGB plc and others and other cases

COURT OF APPEAL, CIVIL DIVISION

SAVILLE, BROOKE AND WALLER LJJ

16–18, 21, 25 APRIL 1997

County court – Practice – Striking out – Automatic directions prescribing timetable for action – Automatic strike-out sanction for failure to apply for hearing date within prescribed time – Actions to which automatic directions apply – Computations of time – Application of strike-out rule to cases excepted from automatic directions – Fixing hearing date – Ouster of automatic directions – Effect of ouster – Effect of appeals – Principles for reinstatement of action – Fresh proceedings after automatic strike-out – Principles to be applied – CCR Ord 17, r 11.

Order 17, r 11 of the County Court Rules makes provision for an action to be automatically struck out if there is a failure to apply for a hearing date within a prescribed time after the date when pleadings are deemed to be closed (ie 14 days after the delivery of a defence or 28 days where there is a counterclaim). However, the scheme of Ord 17 does not permit two separate regimes to run side by side in relation to the same plaint. Accordingly, if a plaint contains a cause of action of a type listed in r 11(1), automatic directions do not apply to that action and specific manual directions will have to be sought even though the cause of action exempted from the rule relates only to a small part of the total claim. Furthermore, the automatic directions do not apply to third party or similar proceedings or to counterclaims (see p 137 *h* to p 138 *a e* to *j* and p 139 *c j*, post).

Computation of the time when a defence is delivered is governed by the general law contained in s 7[a] of the Interpretation Act 1978 and the practice direction[b] relating to postal service. Thus the court should adopt the actual date when the defence is delivered to the court office by post when this date is known, since this will represent 'proof to the contrary' of the date when delivery is effected, but if the judge finds that the contrary has been proved the Court of Appeal will not interfere with his finding unless it is clearly wrong (see p 140 *j* to p 141 *e*, post).

For these purposes, the defence in Form N9 or Form N9B, however brief, constitutes a defence, provided it makes it clear that the claim is disputed, and when more than one defendant has been joined or served with the original proceedings, the trigger date is to be calculated from the date of delivery of the last defence to be delivered by the defendant who was originally joined in the proceedings. However, if one or more of the original defendants never delivers a defence, there is no trigger date in that action. Where an action is transferred from the High Court to the county court, in the absence of any express directions

a Section 7, so far as material, provides: 'Where an Act authorises or requires any document to be served by post ... then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

b See [1985] 1 All ER 889, [1985] 1 WLR 489

to the contrary effect, the trigger date occurs automatically 14 days after the date of transfer (see p 143 *f* to *h*, p 144 *f g j* to p 145 *b f g* and p 147 *h*, post).

Where automatic directions have started to apply they may nevertheless be ousted by new directions which are repugnant to the concept contained in r 11(3)(d) or cannot co-exist with the automatic directions, e g directions ordering listing for trial on the joint application of the parties. Furthermore, if the automatic directions are disapplied to any part of the claim, they will cease to apply to the whole action. However, once the automatic directions have been ousted, they will not reapply automatically (see p 155 *f* to *j*, post).

In deciding whether to exercise its discretion under Ord 13, r 4[c] to reinstate proceedings automatically struck out under Ord 17, r 11, the court must be satisfied: (i) that the plaintiff, apart from his failure to request a date for trial, is innocent of any significant failure to conduct the case with expedition (or reasonable diligence) between the trigger date and the guillotine date, having regard to the particular features of the case; (ii) that in all the circumstances his failure to apply for a date is excusable and should be forgiven, e g where he was genuinely and reasonably misled by the court, the defendants or others, although not from his own internal problems such as a change of solicitors; and (iii) that the balance of justice indicates that the action should be reinstated. Each case depends on its own facts. The assessment of the weight or otherwise to be given to the circumstances of the case is a matter for the court concerned in the exercise of its discretion and the Court of Appeal will not interfere with the exercise of the discretion unless the decision is so plainly wrong that it is clear that the court must have failed to apply the general guidelines in the light of the object of the rule. However, where the court reinstates an action in which there is more than one defendant, the action is not reinstated against any defendant who has not been given notice of the action to reinstate (see p 163 *h* to p 164 *a f g*, p 165 *e* and p 167 *d e*, post).

Peters v Winfield, Churchill v Forest of Dean DC [1996] 1 WLR 604, *Downer & Downer Ltd v Brough, Protim Services Ltd v Newcomb* [1996] 1 WLR 575 and *Rastin v British Steel plc* [1994] 2 All ER 641 applied.

The court issued further guidelines for resolving problems occurring in the interpretation of automatic directions.

Notes

For pre-trial review, see 10 *Halsbury's Laws* (4th edn) paras 235–238.

Cases referred to in judgment

AB v John Wyeth & Bro Ltd (1997) 8 Med LR 57, CA; *affg* (1996) 7 Med LR 267.

Allen v Sir Alfred McAlpine & Sons Ltd, Bostic v Bermondsey and Southwark Group Hospital Management Committee, Sternberg v Hammond Group Hospital Management Committee [1968] 1 All ER 543, [1968] 2 QB 229, [1968] 2 WLR 366, CA.

Ashworth v McKay Foods Ltd [1996] 1 All ER 705, [1996] 1 WLR 542, CA.

Birkett v James [1977] 2 All ER 801, [1978] AC 297, [1977] 3 WLR 38, HL.

c Rule 4, so far as material, provides: '(1) Except as otherwise provided, the period within which a person is required or authorised by these rules ... to do any act in any proceedings may be extended ... by the court on the application of any party.

(2) Any such period may be extended by the court although the application for extension is not made until the expiration of the period.'

Carr v Northern Clubs Federation Brewery Ltd (1996) Times, 18 January, [1995] CA Transcript 1738.
Costellow v Somerset CC [1993] 1 All ER 952, [1993] 1 WLR 256, CA.
David v Howe (1884) 27 Ch D 533.
Downer & Downer Ltd v Brough, Protim Services Ltd v Newcomb [1996] 1 WLR 575, CA.
Ever v WT Partnership Construction Management (1997) Times, 9 January, [1996] CA Transcript 1831.
Ferreira v American Embassy Employees Association [1996] 1 WLR 536, CA.
G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.
Gardner v Southwark London BC (No 2), King v East Cambridgeshire CC, Thompson v Wickens Building Group Ltd [1996] 1 WLR 561, CA.
Gayle v House of Copiers plc [1996] CA Transcript 497.
Gleed v Milton Keynes BC [1995] CA Transcript 227.
Gomes v Clark (1997) Times, 27 March, [1997] CA Transcript 365.
Heer v Tutton [1995] 4 All ER 547, [1995] 1 WLR 1336, CA.
Hodgson v Armstrong [1967] 1 All ER 307, [1967] 2 QB 299, [1967] 2 WLR 311, CA.
Hytec Information Systems Ltd v Coventry City Council (1996) Times, 31 December, [1995] CA Transcript 1897.
Jokai Tea Holdings Ltd, Re [1993] 1 All ER 630, [1992] 1 WLR 1196, CA.
Perry v Wong, Sampson v Moon, Jones v Roe Shopfitting Ltd [1997] 1 WLR 381, CA.
Peters v Winfield, Churchill v Forest of Dean DC [1996] 1 WLR 604, CA.
Rastin v British Steel plc [1994] 2 All ER 641, [1994] 1 WLR 732, CA.
Samuels v John Laing Construction Ltd [1996] CA Transcript 1867.
Tanglecroft Ltd v The Hemdale Group Ltd [1975] 3 All ER 599, [1975] 1 WLR 1544, CA.
Tarry v Humberclyde Finance Ltd [1996] 1 WLR 611, CA.
Welply v Buhl (1878) 3 QBD 80, DC; *affd* (1878) 3 QBD 253, CA.
Whitehead v Avon CC (1997) Times, 17 March, [1997] CA Transcript 138.
Williams v Globe Coaches (a firm) [1996] 1 WLR 553, CA.

Cases also cited or referred to

Birch v Tesco Stores Ltd [1995] CA Transcript 547.
Cashmore v Blue Circle Plumbing Fixtures Ltd (t/a Qualcast Bathrooms) [1996] CA Transcript 1083.
Chekalow Ltd v Naturestone [1993] CA Transcript 541.
Computacenter Maintenance Ltd v Intersolv plc [1995] CA Transcript 806.
Deadman v Rumbelows Ltd [1997] CA Transcript 50.
Dowse v Kapell [1996] CA Transcript 1833.
Gardner v Southwark London BC (Note) [1996] 1 WLR 571, CA.
Goodman v Ryvita Co Ltd [1995] CA Transcript 628.
Hackwell v Blue Arrow plc (t/a Extra Staff) (1996) Times, 18 January, [1995] CA Transcript 1675.
Harding v James McNaughton Paper Group Ltd [1994] CA Transcript 1643.
Hawkes v Treasures and Rivers Wyatt [1994] CA Transcript 1345.
Hoskins v Wiggins Teape (UK) Ltd [1994] PIQR P377.
Kramer v Landuyal [1995] CA Transcript 708.
Lightfoot v National Westminster Bank plc [1996] 1 WLR 583, CA.
Meigh v British Steel Corp plc [1994] CA Transcript 1468.
Morris & Lewis (Leeds) Ltd v Modrec Ltd (unreported, 12 March 1996), CA.

Mortimer (Angela) plc (t/a Pathfinder) v Regent Productions Ltd (1995) Times, 22 December.
Moyle v Comr of Police of the Metropolis [1996] CA Transcript 1830.
Noviello v ELE International Ltd [1997] CA Transcript 265.
Otto v Keys [1996] CA Transcript 1814.
Pargeter v Baylis [1996] CA Transcript 325.
Parrott v Jackson [1996] CA Transcript 136.
Reville v Wright [1996] 1 WLR 592, CA.
Rooney v National Solus Sites Ltd [1997] CA Transcript 47.
Russell v Dennis [1995] CA Transcript 1676.
Sadiq v London Buses Ltd [1997] CA Transcript 264.
Segaram v Grant [1996] CA Transcript 1878.
Smith v Cosworth Casting Processes Ltd [1997] CA Transcript 283.
Vallely v British Railways Board [1994] CA Transcript 1580.
Watkins v Toms [1996] CA Transcript 1148.
Webster v Ellison Circlips Group Ltd [1995] 4 All ER 556, [1995] 1 WLR 1447, CA.
Woodall v British Railways Board [1996] CA Transcript 772.
Woodford v Northamptonshire CC [1995] CA Transcript 205.

Interlocutory appeals and applications

The court considered 19 appeals and 2 applications, all of which raised issues as to the proper interpretation of CCR Ord 17, r 11:

(1) *Bannister v SGB plc*, heard in the Kingston upon Hull County Court on 22 August 1995 by Judge Fricker QC;

(2) *Boustead v British Road Services Ltd*, heard in the Newcastle upon Tyne County Court on 12 July 1996 by Judge Crawford QC;

(3) *Burrows v Wigan Metropolitan BC*, heard in the Wigan County Court on 6 January 1997 by Judge Urquart;

(4) *Eagle Star Insurance Co Ltd v Karasiewicz*, heard in the Brentford County Court on 13 June 1995 by Judge Oppenheimer;

(5) *Grafton v Ballard*, heard in the Romford County Court on 26 April 1994 by Judge Hutching;

(6) *Harding v British Airports Authority plc*, heard in the Uxbridge County Court on 12 April 1995 by Judge Elystan Morgan;

(7) *Hume (t/a Benco & Son) v Anderton*, heard in the Southampton County Court on 4 August 1995 by Judge Rudd;

(8) *Kearns v Effluent Services Ltd*, heard in the Liverpool County Court on 4 August 1995 by Judge Marshall Evans QC;

(9) *Leach v Wade Heath & Co*, heard in the Stoke on Trent County Court on 28 April 1995 by Judge Taylor;

(10) *Lee v Hampshire CC*, heard in the Portsmouth County Court on 7 November 1995 by Judge Shawcross;

(11) *Lloyds Bank plc v Gow*, heard in the Slough County Court on 8 June 1995 by Judge Hague QC;

(12) *Loake v Chief Constable of the Norfolk Constabulary*, heard in the Bedford County Court on 20 October 1995 by Mr Recorder Akast;

(13) *Meon Valley Engineering Ltd v Reinforced Plastic Products Ltd*, heard in the Bournemouth County Court on 22 January 1996 by Judge Galpin;

(14) *Moorlite Electrical Ltd v Cripps*, heard in Mayor's and City of London County Court on 20 July 1995 by Judge Simpson;

(15) *National Westminster Bank plc v Hurine*, heard in the Chester County Court on 9 March 1995 by Deputy Circuit Judge Roy Woolley;

(16) *Norman v Jewson Ltd*, heard in the Cambridgeshire County Court on 3 October 1995 by Judge Mellor;

(17) *Pannell v Tesco plc*, heard in the Brighton County Court on 7 June 1995 by Judge Viner;

(18) *Shaw v Translink Joint Venture*, heard in the Folkestone County Court on 28 April 1995 by Judge Ellison Nash and on 10 August 1995 by Judge Peppitt QC;

(19) *Singh v Joshi*, heard in the Willesden County Court on 8 July 1996 by Judge Krikler;

(20) *Smith v Bovis Construction Ltd*, heard in the Uxbridge County Court on 6 March 1995 by Judge Henson;

(21) *Utting v McMurdie*, heard in the Brentford County Court on 21 November 1996 by Judge Oppenheimer.

Timothy Clayson (instructed by *Myer Wolff & Manley*, Hull) for Bannister.
Patrick Limb (instructed by *Whitfield Hallam Goodall*, Dewsbury) for SGB plc.

Toby Wynn (instructed by *Crutes*, Newcastle upon Tyne) for British Road Services Ltd.
Bruce McIntyre (instructed by *Allan Henderson Beecham & Peacock*, Newcastle upon Tyne) for Boustead.

Paul Higgins (instructed by *Peter Rickson & Partners*, Manchester) for Burrows.
Wigan Metropolitan BC was not represented.

Geoffrey Mott (instructed by *J R Jones*) for Karasiewicz.
Michael Buckpitt (instructed by *Bretherton Price Elgoods*, Cheltenham) for Eagle Star.

Matthew Jackson (instructed by *Budd Martin Burrett*, Chelmsford) for Ballard.
Nicholas Stanton (instructed by *Coleman Tilley Tarrant Sutton*, Kingston upon Thames) for Grafton.

Clifford Payton (instructed by *Sohal & Co*) for Harding.
Simon Wheatley (instructed by *Vizards*) for British Airports Authority plc.

John Lofthouse (instructed by *Bolitho Way*, Portsmouth) for Hume.
Paul McCormick (instructed by *Anderton & Co*, Portsmouth) for Anderton.

Mark Turner (instructed by *Daniels*, Macclesfield) for Effluent Services Ltd.
Simon Holder (instructed by *Paul Rooney & Co*, Liverpool) for Kearns.

Edwin Glasgow QC, *Neil Thompson* and *Sam Grodzinski* (instructed by *Grindeys*, Stoke on Trent) for Leach.
David Stockdale QC (instructed by *T H M Tinsdills*, Stoke on Trent) for Wade Heath & Co Ltd.

Roderick Denyer QC and *Glyn Edwards* (instructed by *Warner Goodman & Streat*, Fareham) for Lee.
Derek Marshall (instructed by *Paris Smith & Randall*, Southampton) for Hampshire CC.

Adam Weitzman (instructed by *Barrett & Thomson*, Slough) for Gow.
Martin Hutchings (instructed by *Clarks*, Reading) for Lloyds Bank plc.

Fiona Barton (instructed by *Eversheds*, Norwich and *Heald Nickinson*, Milton Keynes respectively) for the Chief Constable of the Norfolk Constabulary and the second defendant.
Jamie de Burgos (instructed by *Gareth Woodfine & Partners*, Bedford) for Loake.

Gary Self (instructed by *Paris Smith & Randall*, Southampton) for Reinforced Plastic Products Ltd.
Richard Egleton (instructed by *Keeping & Co*, Alton) for Meon Alley Engineering Ltd.

Alan Saggerson (instructed by *Mills & Reeve*, Cambridge) for Cripps.
Edwin Glasgow QC and *Sam Grodzinski* (instructed by *Norrie Waite & Co*, Sheffield) for Moorlite Electrical Ltd.

Mark Le Brocq (instructed by *Fox Hayes*, Leeds) for Hurine.
Geoffrey Pass (instructed by *Slater Heelis*, Manchester) for National Westminster Bank plc.

Roderick Noble (instructed by *Shoosmiths & Harrison*, Northampton) for Jewson Ltd.
Michael Yelton (instructed by *Leeds Day*, St Ives) for Norman.

John Denniss (instructed by *Plumridge & Howell*, Hove) for Pannell.
Stephen Shaw (instructed by *Bunkers*, Hove) for Tesco plc.

Gaurang Naik (instructed by *Thompsons*, Ilford) for Shaw.
James Laughland (instructed by *Kennedys*, Brentwood) for Translink Joint Venture.

Stephen Boyd (instructed by *Louis Glatt & Co*) for Singh.
Ian Croxford QC and *Richard Ground* (instructed by *S D Rosser & Co*) for Joshi.

James Bell (instructed by *Greenwoods*) for Bovis Construction Ltd.
Simon Edwards (instructed by *Iliffes Booth Bennett*, Uxbridge) for Smith.

Monty Palfrey (instructed by *Feldman Nicholls & Co*) for Utting.
The defendants did not appear.

Cur adv vult

25 April 1997. The following judgment[d] of the court was delivered.

SAVILLE LJ.

PREFACE

1 This is the judgment of the court to which all three members of the court have contributed equally. As we will explain, we have chosen these 19 appeals and 2 applications out of more than 100 appeals and applications which were awaiting disposal by the court in March of this year, in order to give us the opportunity of dealing with a very large number of unresolved issues on the proper interpretation of CCR Ord 17, r 11. We are also using the occasion to restate the existing law on this topic in a single judgment. Such is the scale of the difficulties that have been confronting the lower courts that we have asked that a copy of this judgment should be sent immediately to every county court in

d This judgment has been revised by direction of the Court of Appeal: see *Greig Middleton & Co Ltd v Denderowicz* [1997] 4 All ER 181, para 1.3. The seven places where alterations have been authorised are all marked by footnotes.

England and Wales (for distribution to the judges who sit at that court), as well as to all the parties in all the appeals and applications awaiting decisions by this court. The text of this judgment is to be made available immediately on FELIX, the judges' electronic bulletin board and on the Internet (website http://www.open.govuk/lcd/lcdhome.htm). If this country was in the same happy position as Australia, where the administration of the law is benefiting greatly from the pioneering enterprise of the Australasian Legal Information Institute (AUSTLII), we would have been able to make this judgment immediately available in a very convenient electronic form to every judge and practitioner in the country without the burdensome costs that the distribution of large numbers of hard copies of the judgment will necessarily impose on public funds.

2 In this judgment we will be setting out the principles of law to be applied to problems arising under Ord 17, r 11 in the main text of the judgment. We will then apply these principles to the 21 cases we have to decide.

INTRODUCTION

1.1 The title to CCR Ord 17, r 11 is 'Automatic Directions'. The rule sets out the steps which are to be taken to progress an action to trial. It also contains a sanction. The action will be automatically struck out if there is a failure to apply for a day for the hearing within the time allowed. The object of the rule is to set out the steps that must be taken within a prescribed timetable so that actions can progress to trial without undue delay or the need to incur the expense of making applications to the court. The object of the sanction is to reinforce the rule by providing an incentive to claimants to prosecute their claims with reasonable speed. In other words the purpose of the rule and the sanction is to discourage the delays which have bedevilled much county court litigation in the past.

1.2 The evils created by delay in the conduct of litigation were highlighted in 1988 by the report of the Civil Justice Review body, which followed three years of painstaking consultation. The review body seems never to have contemplated the creation of a blunderbuss remedy for these evils, which the automatic strike-out sanction represents. Its recommendations were designed to strengthen the powers of the court, and to increase the resources available to the court, including the provision of appropriate technology, so that it might make suitably tailored orders that would enable it maintain effective control over the timetable of an action. Such orders might, of course, include timetables in a standard form, and they might be made effective by the existence of remedial sanctions which have been carefully developed over the years, to which we refer below.

1.3 The introduction of the automatic strike-out sanction has led to a torrent of new litigation. This litigation has been devoted to two questions. The first involves an inquiry whether the action has indeed been automatically struck out. If the answer is Yes, the second invites the court to consider whether it should be reinstated. This is a species of what the former Master of the Rolls (Bingham MR) has described as 'satellite litigation'. By this phrase he was referring to proceedings which are not concerned with resolving the real dispute between the parties, but with ancillary questions.

1.4 Although the introduction of the rule will unquestionably have had a salutary effect on the working habits of dilatory litigators, the spawning of all this satellite litigation is in total conflict with the original purposes of the rule. Actions have been delayed, sometimes for years, while these questions have been debated through the courts, at great expense to the parties, or to their insurers, or to the taxpayer through the legal aid fund. The number of Court of Appeal

decisions alone runs into dozens, and as we have already said, in March of this year there were still over 100 appeals or applications for leave to appeal awaiting consideration by this court. In short the courts, including the Court of Appeal, have been flooded with extra work which has had the effect of diverting their limited resources from the determination of mainstream litigation. Judge Hague QC spoke for hundreds of judges and district judges up and down the country when he said in one of the appeals before us: 'The application before me today is yet again concerned with the ill-considered, badly drafted and much-litigated CCR Ord 17, r 11.'

1.5 During the course of the present exercise we have identified more than 30 points of general application which still remain unresolved over six years after the introduction of the new automatic sanction. This lamentable history surely provides an object lesson of the reasons why draconian new rules should not be introduced into litigation practice without being first submitted to a widespread and appropriately critical consultation process.

1.6 There is no doubt that the rule requires extensive revision and a new draft is in the course of preparation. This will not, however, help the unfortunate parties in proceedings where such questions have already arisen. The court has therefore decided to bring together a large number of these outstanding appeals and applications for hearing at the same time. Our purpose is to resolve outstanding problems, and also to provide in a single judgment a comprehensive restatement of existing authority. It should then be unnecessary in future to refer to any earlier authorities on this topic. We hope that the adoption of this strategy will bring some order to the chaos which exists at present, and that the guidance we will be giving may help to avoid, or at any rate to reduce, the recurrence of satellite litigation in this field.

THE EXISTING POWERS TO STRIKE OUT AN ACTION

2.1 Long before Ord 17, r 11(9) was included in the County Court Rules, both the High Court and the county court possessed a residual power to strike actions out in certain circumstances before they came to trial. In the High Court the nature and extent of this jurisdiction has been identified and explained on a case by case basis. One line of authority, exemplified by such decisions as *Allen v Sir Alfred McAlpine & Sons Ltd, Bostic v Bermondsey and Southwark Group Hospital Management Committee, Sternberg v Hammond Group Hospital Management Committee* [1968] 1 All ER 543, [1968] 2 QB 229 and *Birkett v James* [1977] 2 All ER 801, [1978] AC 297, is concerned with situations in which a plaintiff's delay has been both inordinate and inexcusable, and where the defendant invites the court, usually after the end of the primary limitation period, to strike the action out for want of prosecution. A second line of authority, recently exemplified by cases like *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, [1992] 1 WLR 1196 and *Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256, is concerned with cases where a party breaches orders made by the court: ultimately an order is made to the effect that if he does not comply with the court's order on this last occasion, his action, or his pleadings, will be struck out. A recent, much more unusual example of the exercise of this jurisdiction may be seen in *AB v John Wyeth & Bro Ltd* (1997) 8 Med LR 57, when this court upheld Ian Kennedy J's decision to strike out the remnants of the ill-starred Benzodiazepine group litigation because its further continuance would represent an abuse of the court's processes.

2.2 In *Hytec Information Systems Ltd v Coventry City Council* (1996) Times, 31 December Lord Woolf MR said that the judgment of Ward LJ should be regarded

as stating the general guidance normally to be applied in the second type of case, subject always to the qualification that each case has to be decided on its own facts. Ward LJ had encapsulated his understanding of the philosophy underlying the proper approach to a strike-out in these terms:

> 1. An 'unless' order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was a party's last chance to put his case in order. 2. Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed. 3. That sanction was a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure. 4. It seemed axiomatic that if a party intentionally or deliberately flouted the order he could expect no mercy. 5. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure. 6. The judge would exercise his discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice. 7. The interests of justice required that justice be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those blights also weighed heavily. Any injustice to the defaulting party, although never to be ignored, came a long way behind the other two.

2.3 In the county court, the equivalent jurisdiction is codified in Ord 13, r 2(2). It is to be exercised in accordance with the same principles, as the notes to that rule in *The County Court Practice* make clear.

THE NEW AUTOMATIC DIRECTIONS (INCLUDING A STRIKE-OUT SANCTION): THE ACTIONS TO WHICH THEY APPLY

3.1 The concept of automatic directions was first introduced in the county court in February 1990 (see r 13 of the County Court (Amendment No 4) Rules 1989, SI 1989/2426). At that time they applied only to personal injuries actions, and the new rule was modelled on the comparable provisions in RSC Ord 25, r 8, which had been in force in the High Court for about ten years. The new Ord 17, r 11 which introduced this limited regime for automatic directions prescribed a timetable for the action, but did not include any automatic strike-out provisions.

3.2 Eight months later the ambit of automatic directions was greatly enlarged when r 14 of the County Court (Amendment No 3) Rules 1990, SI 1990/1764, came into force on 1 October 1990. The newly substituted Ord 17, r 11 extended the scope of automatic directions to all default or fixed date actions except for the 17 types of action or other proceedings originally listed in r 11(1). That list, with one omission and one addition, is still the effective list today. It was this rule which introduced the automatic strike-out sanction, an animal not previously encountered in English litigation practice.

3.3 The new rule applies to all actions commenced in the county court on and after 1 October 1990 and to all actions transferred from the High Court to the county court provided that they, too, were commenced in the High Court on or after 1 October 1990 and transferred to the county court on or after 1 July 1991 (see County Court (Amendment No 3) Rules 1990 and County Court (Amendment No 3) Rules 1991, SI 1991/1328). It does not apply, however, to

actions excluded from the operation of the rule by Ord 17, r 11(1), and the nature and scope of this exception have given rise to difficulties.

3.4 As we have said, the rule applies to any default or fixed date action except those contained in the list in r 11(1). In this context the draftsman of the new rule did not refer to 'causes of action'. He referred to 'actions' which were excepted from the provisions of the rule, and disputes have now arisen over the status of an action which contains one cause of action which is listed in the list of exceptions and one or more other causes of action which are not, or whether the answer is different if the excepted cause of action is pleaded against one defendant alone. A typical example is a landlord's action for possession which also includes claims for rent, mesne profits, damages for breach of covenant and injunctive relief, and might additionally include a claim against another defendant founded on a guarantee. Is this an action for the recovery of land (r 11(1)(i)) which is exempted from automatic directions, or are all the causes of action other than the claim for possession subject to the new automatic directions regime?

3.5 Section 147 of the County Courts Act 1984 defines the word 'action' as meaning, unless the context otherwise requires, 'any proceedings in a county court which may be commenced as prescribed by plaint'. Order 5, r 1 provides that a plaintiff, subject to r 3, 'may in one action claim relief against the same defendant in respect of more than one cause of action' if one of the conditions prescribed in r 1 is fulfilled. Rule 3 provides that if it appears to the court that the joinder of two or more causes of action 'may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials or make such other order as may be expedient'.

3.6 As we have said, the purpose of automatic directions is to prescribe the timetable of events leading up to the eventual trial, so that in theory the parties may arrive at the trial without having to seek any interlocutory directions from the court. In our judgment the scheme of Ord 17 does not permit two separate regimes to run side by side in relation to the same plaint. Either there is an automatic directions regime under r 11, or there is a regime (which we will describe as a 'manual directions' regime) in which specific directions will have to be sought through the arrangements for pre-trial review prescribed in rr 1 to 10. If for any reason one or other of the parties want to have a different directions regime in a hybrid action in relation to those causes of action which would usually be subject to r 11, then it is always open to them to seek a direction for a separate trial and for pre-trial directions which are appropriate for that separate trial, as envisaged by Ord 5, r 3.

3.7 It follows, in our judgment, that if a plaint contains a cause of action of a type listed in r 11(1), even if that cause of action relates to one defendant alone, automatic directions do not apply to that action, and specific manual directions will have to be sought. This principle applies even if the cause of action exempted from the rule only relates to a small part of the total claim.

3.8 Thus automatic directions do not apply to an action which contains a cause of action arising out of a regulated consumer credit agreement (r 11(1)(d)). Nor do they apply to an action which includes a cause of action for the recovery of land, even if the plaint includes an action on a guarantee (r 11(1)(i)): nor to an action which includes at least one cause of action of a kind mentioned in s 66(3) of the County Courts Act 1984 (r 11(1)(h)).

3.9 It was suggested in argument that an action which includes a claim in respect of false imprisonment is not 'an action of a kind mentioned in section 66(3) of the Act (trial by jury)' within the meaning of Ord 17, r 11(1)(h) unless and

until the court directs trial by jury. This in our judgment is not the correct way to interpret that sub-paragraph. Automatic directions either apply to an action or to a set of proceedings from the close of pleadings or they do not, and in our judgment the addition of the word 'trial by jury' in that subrule is purely descriptive of the type of claims which are found in s 66(3) of the Act. They remain actions of a kind mentioned in that subsection even if the court ultimately decides not to direct jury trial in the circumstances described at the end of the subsection. Similarly, if an action excluded from the operation of r 11 is consolidated with an action which is not, automatic directions will cease to apply to the latter action from the date of consolidation. The same principle will apply where a plaintiff combines in a single plaint a cause of action against one defendant which is excepted from the operation of the rule with a cause of action against another which is not.

3.10 Automatic directions do not apply, either, to 'an action on a third party notice or similar proceedings under Order 12' (Ord 17, r 11(1)(p)). Although the use of the word 'action' in this context seems strange (see s 147(1) of the County Courts Act 1984, above), the scope of the exception is tolerably clear. Third party or similar proceedings are parasitic on the original action, and require manual directions, to be shaped to the requirements of the timetable in the main action. The third party proceedings would, for example, continue if the main action was struck out. Such directions will customarily be given when the court grants leave to issue such proceedings (see Ord 12, r 1(3)). Alternatively, if the third party notice is issued without leave before the pleadings are deemed to be closed in an action to which Ord 17, r 11 applies (see Ord 12, r 1(2)), the appropriate directions will be given at the pre-trial review required by Ord 12, r 1(5). The plaintiff must remember that automatic directions will continue to apply to the main action, unless these are overridden by new manual directions, and in a case of any complexity the demands of sensible case management may dictate that a composite manual directions order, omitting the strike-out sanction, should be made in relation to all the proceedings in the action, whether under Ord 12 or otherwise. One of the present appeals demonstrates the untoward results that may occur if a plaintiff overlooks the way in which automatic directions will continue to operate strictly in relation to the main action in cases involving a third party.

3.11 The status of a counterclaim requires separate mention. In a case in which a counterclaim is delivered the pleadings are deemed to be closed 28 days, not 14 days, after the delivery of a defence (see Ord 17, r 11(1)(a)). The scope of the automatic directions contained in Ord 17, r 11(3) to (8) will of course cover the issues raised in the counterclaim, and any pleadings consequential on the counterclaim, in addition to the issues covered in the main pleadings. Rule 11(3)(d), however, makes it clear that it is for the plaintiff to request a date for hearing within six months. There is no comparable obligation placed on the defendant even though he may be in some cases the effective plaintiff by reason of the scale of the counterclaim he is bringing in comparison to the plaintiff's claim. In the same way, r 11(9) imposes the automatic strike-out sanction on the plaintiff and not on a counterclaiming defendant. If the plaintiff's claim is indeed struck out under r 11(9), the counterclaim will not be struck out at the same time (see Ord 21, r 4(2)). In such a case, therefore, the plaintiff must be astute to remember his continuing obligation to request a hearing date under the automatic directions regime even if it is the counterclaim whose consideration is delaying the parties' preparations for trial.

3.12 We should add that because r 11 does not apply to counterclaims, it seems to us that a counterclaim can be in no different position from the other claims excluded under r 11(1). We therefore do not consider that it is even open to a court to try to apply the automatic directions, and the principles applicable to such directions, by express order. In one of the present appeals the plaintiff's claim had been struck out and the court made an order which purported to apply the automatic directions to the counterclaim. We do not consider that such an order can be read as imposing the sanction of automatic strike-out to a counterclaim when the rule does not apply to counterclaims. In any event we do not consider it is open to a court to make an order to which the principles (eg *Rastin v British Steel plc* [1994] 2 All ER 641, [1994] 1 WLR 732) on reinstatement apply, having regard to the existing authorities (eg *Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256) which are applied in cases that are not the subject of the automatic strike-out provisions of CCR Ord 17, r 11.

THE CLOSE OF PLEADINGS (THE TRIGGER DATE)

4.1 The new automatic directions start to run[e] after pleadings are deemed to be closed (r 11(3): 'the trigger date'). So far as actions transferred from the High Court are concerned, from 16 September 1991 onwards the pleadings are deemed to be closed 14 days after the date of transfer (Ord 16, r 6(1A)), provided that the action was commenced in the High Court on or after 1 October 1990 and transferred to the county court on or after 1 July 1991 (County Court (Amendment No 3) Rules 1990, County Court (Amendment No 3) Rules 1991 and County Court (Amendment No 4) Rules 1991, SI 1991/1882). This rule is in surprisingly absolute terms and applies even if there is no pleading in the action prior to transfer other than a generally indorsed writ. Difficulties, to which we will refer below, have arisen over identifying the correct date of transfer.

4.2 In an action commenced in the county court, pleadings are deemed to be closed 14 days after the delivery of a defence in accordance with Ord 9, r 2 or, where a counterclaim is served with the defence, 28 days after the delivery of the defence (r 11(11)(a)). A defence is delivered in accordance with Ord 9, r 2 when it is delivered at the court office (Ord 9, r 2(6)). If all the original defendants deliver a defence the trigger date is calculated from the date the last defence was delivered. The trigger date is not altered if a defence is later amended. We will refer in due course to the difficulties which have arisen when a short defence is delivered in one of the forms prescribed at the back of *The County Court Practice*, often with the rubric 'pleaded defence to follow', or when one of the original defendants does not serve a defence at all.

COMPUTATIONS OF TIME

5.1 Because of the dramatic effect of the automatic strike-out provision, difficulties have arisen over the computation of time in some circumstances. Three examples of such difficulties relate to the time at which a defence is deemed to have been delivered to the court, the time at which the relevant documents in a High Court action are deemed to have been received by the proper officer of the county court, and the time at which pleadings are deemed to have been closed.

5.2 Order 9, r 2(6) provides that a defence is to be delivered at the court office. Because the court office is not a person within the meaning of Ord 7,

e '14 days' omitted in the revised version.

r 1(1), and because the deeming provisions of Ord 7, r 10(3) are only concerned with the service of a default or fixed date summons, the computation of time for delivery of a defence is to be governed[f] by the general law which is to be found in s 7 of the Interpretation Act 1978, read together with *Practice Direction* [1985] 1 All ER 889, [1985] 1 WLR 489, which provides (para 2):

> 'To avoid uncertainty as to the date of service it will be taken (subject to proof to the contrary) that delivery in the ordinary course of post was effected (a) in the case of first class mail, on the second working day after posting, (b) in the case of second class mail, on the fourth working day after posting. "Working days" are Monday to Friday excluding any bank holiday.'

5.2A This practice direction applies to the county court by virtue of s 76 of the County Courts Act 1984. This rule means, of course, that there can be no question of delivery of a defence being deemed to have been effected on a Saturday or Sunday, or on a bank holiday, and in any event the proper officer would not be present to receive the document (see Ord 2, r 5(1)) when the court office is closed. The court should adopt the actual date when the defence is delivered to the court office by post when this date is known (for example from a date stamp which shows the date of receipt), since this will represent 'proof to the contrary' of the date when delivery was effected. If in any case a judge finds that the contrary has indeed been proved by reference to the evidence before him, this court will not interfere with his decision unless it is clearly wrong.

5.3 When an action is transferred from the High Court to the county court, RSC Ord 107, r 2(1A) prescribes that the relevant documents are to be sent by post to the proper officer of the county court (who is identified as the district judge in Queen's Bench Masters' Practice Direction No 9). In our judgment, in any doubtful case the general law is to be applied here, too. We do not consider that in this context the provisions of Ord 7, r 1, which apply to documents 'required to be served on any person', apply naturally to the despatch of documents by post from court to court, or by a party or his solicitor to the court, even if the recipient is identified as the district judge (who is a person) and not the court office (which is not). Moreover, it would in our judgment be desirable if the same regime of deeming provisions applied at this stage of the process as well. Disputes as to the time of delivery to the district judge in these cases are therefore also to be resolved with the aid of s 7 of the Interpretation Act 1978, and not by recourse to any of the provisions of Ord 7.

5.4 The scope for nearly all these disputes would be eliminated if the county court office or the district judge, as the case may be, were to make a practice of imposing a date stamp for the date of receipt on a defence, or on the covering letter attached to the documents in a High Court action, when it arrives, in order to put the actual date of receipt beyond all room for reasonable argument.

5.5 Once the defence has been delivered to the court office, the pleadings are deemed to be closed 14 days thereafter (Ord 17, r 11(11)(a)), unless there is a counterclaim, in which case the relevant period is 28 days. In our judgment, this period starts immediately after the date of delivery of the defence to the court office (see Ord 1, r 9(3) and, for the High Court practice in a case where sensible recourse is to be had to such a rule even where its wording is not strictly apposite, see *Tanglecroft Ltd v The Hemdale Group Ltd* [1975] 3 All ER 599, [1975] 1 WLR

f The following lines (to the end of the paragraph) have been substituted for the original in this revised version; and para 5.2A has been added.

1544). It follows that in the usual case pleadings are deemed to be closed at the end of the fourteenth day after the defence is delivered, and if a date for trial has not been requested within 15 months after that date, the 'guillotine date' (ie the date which the action will be automatically struck out) will be the last day of the 15th month if no inconsistent manual directions have been given: see Ord 1, r 9(3) for the meaning of 'within a specified period'. A request made on the first day of Month 16 will have been made too late. A worked up example would be: defence delivered on 17 March; pleadings deemed closed on 31 March; guillotine date on 30 June: application for hearing date on 1 July too late[g]. Another worked up example would be: defence delivered on 3 March: pleadings deemed closed on 17 March: guillotine date on 17 June: application for hearing date on 18 June too late. Although an application may be made by post (Ord 2, r 5) it must be received by the proper officer at the court office on or before the guillotine date (cf *Hodgson v Armstrong* [1967] 1 All ER 307, [1967] 2 QB 299). If the court office is closed on the guillotine date, the request will have been made in time if it is made on the next day following the guillotine date when the court office is open (see Ord 1, r 9(5)), again applying the pragmatic approach in the *Tanglecroft* case, above.

THE TRIGGER DATE: WHEN DOES IT OCCUR IN AN ACTION COMMENCED IN THE COUNTY COURT?

6.1 As we have already said, if an action, not excepted by r 11(1), has been commenced in the county court, the timetable for automatic directions begins to run from the date when pleadings are deemed to be closed. For the meaning of the close of pleadings, see r 11(11)(a) which refers, incidentally, to the delivery of 'a defence in accordance with Order 9, rule 2'.

6.2 Order 9 is concerned generally with 'Admission, Defence, Counterclaim and Answer'. Rule 17(a) of that order provides that unless the context otherwise requires, 'defence' means any document which shows that the defendant desires to dispute the whole or any part of the plaintiff's claim. In r 2(2), however, a defence is defined for the purposes of rr 2, 3 and 6 of the order to include a counterclaim and to mean 'the relevant form appended to the summons completed according to the circumstances of the case or a defence otherwise than on that form'. Rule 2 is concerned with the requirements for delivery of an admission, defence or counterclaim in any action. Rules 3 and 6 are concerned only with default actions, and r 6, in particular, prescribes the procedure to be followed if a plaintiff desires to enter judgment in default of defence in such an action.

6.3 The form referred to in r 2(2) is a form of a type mentioned in Ord 3, r 3(2)(c), which the proper officer is to annex to every copy of a summons for service in a default or fixed date action. The form currently prescribed for use in default actions pursuant to the County Court (Forms) Rules 1982, SI 1982/586, as amended from time to time, is Form N9B. The present version of this form was introduced in 1995 and is headed 'Defence and Counterclaim'. It contains six boxes to be completed, as appropriate, by the defendant or his solicitor.

6.4 Three difficulties arise under these provisions. The first is whether pleadings are deemed to be closed 14 days after delivery of a defence in Form N9B, even if it is stated expressly on that form, or in a covering letter, that a pleaded defence is to follow. The second is to identify the date when pleadings

g The following sentences (to the end of the paragraph) have been substituted for the original in the revised version.

are deemed to be closed when more than one defendant is joined and served with the original proceedings. The third is to identify the timetable for automatic directions when one or more defendants are added as parties to the action by later amendment, often because the original defendant has blamed them for what happened in its defence.

6.5 There are two examples of the first type of problem in the appeals before us. In the first, the defendants' solicitors delivered to the court a Form N9 (not in fact the correct form, but the one which the court had sent them) which indicated that no element of the plaintiff's claim was admitted. In an accompanying letter to the court they said that their defence would follow in due course. We do not know how the reverse side of the form was completed, since the original is lost and only the front side was copied, although we have been shown what the defendant's solicitor did in a similar, unrelated case. No Form N450 was sent out, and the formal defence, settled by counsel, was delivered to the court five weeks later. The judge said that he had no doubt at all that the defence envisaged by the rules was the Form N9. He drew attention to the many cases in the county court which are defended by litigants in person where what is written on Form N9 is the only defence in the case. He said that a formal defence was merely a fuller expression of what generally appears on the back of Form N9 in the paragraphs that relate to the defence.

6.6 In the other case, the signed Form N9B which was delivered to the court office briefly put in issue, by way of a composite denial, all the allegations contained in the particulars of claim, and continued: 'A full defence drafted by counsel will be filed ... in due course'. On receipt of this form, Form N450 was sent out to the parties, and a full defence was delivered about a month later. Here, too, the judge accepted the submission made by counsel for the defendants that the defence in Form N9B amounted to a defence within the meaning of Ord 9, r 2 and that it would, inter alia, prevent the plaintiff from entering judgment in default of defence.

6.7 In our judgment both judges interpreted the rules correctly. The defence in Form N9 or Form N9B, however brief, constitutes a defence for the purposes of Ord 9, r 2, and the trigger date will follow 14 days after it is lodged at the court, unless it is accompanied by a counterclaim. Any hardship which might flow from the application of this rule in particular cases must be mitigated, if at all, when applying the guidelines for reinstatement. Provided that the form delivered to the court makes it clear that the claim is disputed, it constitutes a defence within the meaning of Ord 9, r 2, and the court need not be astute to inquire whether every relevant box has been completed.

6.8 The second difficulty to which we have referred has been partly resolved by the judgment of this court in *Peters v Winfield, Churchill v Forest of Dean DC* [1996] 1 WLR 604. There the court ruled that the trigger date is to be calculated from the date of delivery of the last defence to be delivered by a defendant who was originally joined in the proceedings. Bingham MR reached this conclusion after rejecting a contention that there might be different trigger dates for different defendants. He said that it was impossible to find any answer which provided a solution to all the possible problems which could arise, but added (at 610):

> 'I am however satisfied that on the whole the effective conduct of proceedings, and the fair treatment of those involved, will be best served by recognition of a trigger date calculated from the date of delivery of the last defence to be delivered by a defendant named in the proceedings as

originally issued. In a case where any party, plaintiff, defendant, added defendant or third party, finds himself embarrassed by the operation of the rule, then a necessary step is for such a party to seek a variation of the automatic timetable from the court. Any problem, any unfairness or any difficulty must in such circumstances be resolved by recourse to the court itself for an order appropriate to meet the requirements of justice in all the circumstances. Such a procedure is, or may be, obviously indicated in a case where a defendant not named in the proceedings as originally issued is thereafter joined. There should, I think, be little difficulty in that since the matter will come before the court anyway.'

6.9 One of the present appeals provides a good example of the difficulties that can arise in this field. The plaintiff originally obtained judgment in default of defence against the only defendant he sued, who was his original employer. He then appears to have accepted that the identity of his employer had been changed by statute. The default judgment was set aside by consent, and the second putative employer was added by amendment. In amended particulars of claim the plaintiff asserted that if the second defendant accepted that it was the relevant employer, he would discontinue against the first defendants. The second defendants did accept such responsibility, but in their defence they blamed independent contractors for creating the hazard which had caused the plaintiff's accident. At the same time they issued a third party notice against the contractors. The plaintiff's solicitors had probably agreed with the first defendants' solicitors that they need not serve a defence pending the delivery of the second defendants' defence, and eight months after the delivery of that defence the plaintiff joined the contractors to his action by amendment. He also formally discontinued the action as against the first defendants at that time.

6.10 So long as the default judgment was in force, automatic directions could not have started to run. Once it was set aside, there were two defendants. We are of the clear view that if one or more of the original defendants (a phrase to which we will return below) never delivers a defence, there will never be a trigger date in that action, because it would be intolerable to leave the timetable in a state of limbo against the chance that a defence finally eventuates from the laggard defendant or, once it becomes clear that no further defence will be forthcoming, for the timetable to spring into being with retrospective effect from the last-delivered defence of an original defendant. There may be any number of reasons why a defendant does not deliver a defence. It may be that he has not been or cannot be served; or that the plaintiff agrees that he need not serve a defence, either at all or for the time being; or that the action is struck out against him pursuant to Ord 9, r 10; or that the plaintiff obtains a default judgment; or that the plaintiff discontinues the action against him; or that he is made bankrupt and the plaintiff does not obtain leave to continue the proceedings against him. At one time we thought it might be possible to fill the gaping hole left by the rulemaker to construct a regime whereby if any of these possibilities resulted in some kind of certainty that a defence would not in fact be forthcoming, the trigger date would be calculated back to the defence most recently delivered. However, the idea of resurrecting a timetable retrospectively is wholly alien to the philosophy of the rule, and it would in our judgment be impossible to come to any other answer to this problem which would not lead the way open to a great deal of undesirable satellite litigation. We would accordingly answer the question left unanswered by Bingham MR in *Peters v Winfield* [1996] 1 WLR 604

at 610 by saying that if a defence is not forthcoming for any reason whatsoever from any of the original defendants there is no trigger date and any of the other defendants who wish the action to proceed in accordance with a timetable must apply to the court for appropriate directions. We must make it clear that if before any defence is served by any defendant there is either a substitution of defendants or a joinder of new defendants, our reference to 'original defendants' will mean the defendants in the action at the time the first defence is delivered.

6.11 So far as the third difficulty is concerned, if the trigger date has in fact been finally determined for the action as originally constituted (following the setting aside of any default judgment, if relevant), we are of the clear opinion that the rules make no provision for automatic directions to start running completely afresh each time a further defendant is joined to the action by later amendment. A timetable has now been set for the action, and since a plaintiff has to obtain an order from the court pursuant to Ord 15, r 1 if an additional party is to be added or substituted, that is the occasion when a prudent plaintiff will seek an order amending the original timetable. Alternatively, such a direction may be obtained at any time before the guillotine date. This is the procedure which was clearly envisaged by this court in *Peters v Winfield*, where its observations to this effect did not form part of its decision, and in our judgment it is clearly right. Otherwise time would start to run afresh automatically as soon as any newly joined defendant served a defence, without any occasion for the court to be able to exercise any control over the timetable. We cannot believe that this is what the draftsman of the rule intended.

THE TRIGGER DATE: WHEN DOES IT OCCUR IN AN ACTION TRANSFERRED FROM THE HIGH COURT?

7.1 We have observed that where an action, not excepted by r 11(1), has been commenced in the county court, the timetable for automatic directions begins to run from the date when pleadings are deemed to be closed. If an action was commenced in the High Court before 1 October 1990, automatic directions did not apply when it was later transferred to the county court (see *Tarry v Humberclyde Finance Ltd* [1996] 1 WLR 611). For actions commenced in the High Court on and after 1 October 1990 which are subsequently transferred to the county court, since 16 September 1991 the pleadings have been deemed to be closed for the purposes of Ord 17, r 11 14 days after the date of transfer (see Ord 16, r 6(1A)).

7.2 Different judges have adopted different approaches to the identification of the date of transfer, a question which now comes to us for decision. According to one school of thought the date of transfer is the date the High Court order directing transfer was sealed. Others believe that the date of transfer is related to the date when the appropriate papers arrive at the county court, but there are mixed opinions as to the date to be preferred. Is it the date the papers actually arrive (or are presumed to have arrived), or the date the county court issues a formal notification of transfer, or some other date (and if so what)?

7.3 Section 40 of the County Courts Act 1984 gives the High Court the power or, in certain circumstances, the duty, to order the transfer of any proceedings before it to be transferred to the county court. Section 7 of the County Courts Act 1867 created similar powers, and it has been long established that the High Court retains jurisdiction over such cases until such time as the requisite administrative action has been taken to lodge the papers (including the High Court order) in the county court. It is at this point that the county court assumes

jurisdiction over the action (see *Welply v Buhl* (1878) 3 QBD 80, 253 where the Divisional Court's ruling was affirmed by the Court of Appeal; and *David v Howe* (1884) 27 Ch D 533). a

7.4 It was submitted to us, however, that changes made to the statutory provisions for transfer when the Courts and Legal Services Act 1990 came into effect altered the position completely, so that from that time onwards the action was transferred to the county court at the moment the High Court order was sealed. This argument ran along the following lines. In the 1867 Act the power to order transfer and the administrative requirements for making the transfer were both included within the provisions of the statute (see the 1867 Act, s 10), and this arrangement was carried forward into s 40 of the County Courts Act 1984 as originally enacted (see the 1984 Act, s 40(1), (7) and (8)). Section 2(1) of the 1990 Act, however, substituted an entirely new s 40 of the 1984 Act, which was only concerned with the new duty to transfer, or the power to transfer, as the case might be. The administrative arrangements for transfer were now prescribed by statutory instrument (RSC Ord 107, r 2(1A) and CCR Ord 16, r 6), supplemented by practice directions (currently, a 1991 practice direction by the Lord Chief Justice (see [1991] 3 All ER 349, [1991] WLR 643) and Queen's Bench Masters' Practice Direction No 9). Reliance was then placed on RSC Ord 42, r 3(1), which creates the general rule that a judgment of the court takes effect from the day of its date. Thus, it was argued, an order that an action be transferred means that it is transferred as at that date, and that all the other provisions, which are not now underpinned by the strength of primary legislation, are mere machinery: nothing in the working out of the machinery can whittle down the strength of the order. b c d e

7.5 We do not accept this submission which does not even recognise all that was provided for under the old regime. It is noticeable, for instance, that although ss 7 and 10 of the 1867 Act contained double-barrelled provisions relating to both the power of transfer and the machinery for transfer, s 8 of that Act, which related to the transfer of proceedings in the High Court of Chancery, contained merely the power of transfer. The difference between these sections was pointed out to Bacon V-C by counsel for the plaintiff in *David v Howe* (1884) 27 Ch D 533 at 535 in support of a submission that the High Court no longer had any jurisdiction over the action following the order for transfer, but Bacon V-C rejected this contention, saying: f g

> 'I have no doubt that where an order has been made for the transfer of that action to a County Court, until the transfer is actually completed by the necessary steps being taken for that purpose the jurisdiction of the Superior Court still remains.'

h

7.6 In our judgment that is still the position today. Primary legislation now contains the duty or the power to transfer, and secondary legislation contains the machinery for transfer (in so far as this prescribed machinery is not supplemented by practice directions) but the effect remains the same. Notwithstanding that the order for transfer has been sealed, the High Court will retain jurisdiction over the action until it is transferred to the county court at the time the relevant documents are received by the proper officer of the county court. j

7.7 It follows that in one of the present appeals the judge was wrong to identify the date of sealing the High Court order as the date of transfer, since the county court did not possess any jurisdiction over the action until it was actually transferred to it in accordance with the High Court order.

7.8 CCR Ord 16, r 6 governs the procedure to be followed in the county court when a case is transferred from the High Court. It reads, so far as is material:

> '(1) Where by an order of the High Court—(a) any proceedings are to be transferred to a county court ... the proper officer of the county court, on receipt of the relevant documents, shall either refer them to the district judge for directions or shall enter the proceedings ... in the records of the court and fix a day for the hearing of the proceedings ... or, if he thinks fit, a day for a pre-trial review and give 21 days' notice thereof to every party. In this paragraph "the relevant documents" means—(a) the writ (or a copy thereof) (b) the order transferring the proceedings to the county court (or a copy thereof) (c) all pleadings and affidavits filed in the High Court, and (d) any documents required by the order for transfer to be filed in the county court.
>
> (1A) Nothing in paragraph (1) shall require the proper officer to fix a day in an action to which Order 17, rule 11 applies unless—(a) before it was transferred to a county court the action had been set down for hearing in the High Court; or (b) a request for a day to be fixed is made pursuant to directions under Order 17, rule 11, and, where the proceedings are transferred down from the High Court, the pleadings shall, for the purposes of the said rule 11, be deemed to be closed 14 days after the date of transfer ...'

7.9 By r 6(2) the party lodging the relevant documents is also obliged to file certain other information at the county court, such as a statement of the names and addresses of the parties and their solicitors.

7.10 We have no doubt that the date of transfer is the date when the relevant documents are first received by the proper officer of the county court in compliance with the requirements of r 6(1). It is at this point that jurisdiction over the case is transferred from the High Court to the county court, and the obligations of the proper officer of the county court under that rule begin. We have already explained how this date is to be ascertained in the event of any dispute, and we have pointed out the desirability of county courts using an office date stamp to pinpoint the date of receipt. In cases to which Ord 17, r 11 applies, Ord 16, r 6(1) requires the proper officer either to place the documents before a district judge for directions, or to enter the proceedings in the records of the court and fix a day for a pre-trial review: in either case the county court customarily sends a notice of transfer to the parties together with any directions that may have been given.

7.11 In the absence of any express directions to contrary effect, the trigger date occurs automatically 14 days after the date of transfer. Needless to say, any High Court directions that continue to have effect following transfer will have the effect of overriding the automatic directions in so far as they are inconsistent with them.

7.12 Two of the cases before us give examples of the difficulties to which we have referred. In the first, the order for transfer was sealed in a district registry. When the identification of the precise date of transfer became important, inquiries were made which established that the relevant documents were sent to the county court by second class post from the district registry a week later. Counsel for the defendants relied on s 7 of the Interpretation Act 1978 to support his argument that delivery by post should be deemed to have been effected on the fourth working day after posting. The formal notice of transfer was not,

however, sent to the parties by the county court until about four weeks after the documents were posted, and no other evidence was available to show that the proper officer of that court had received the documents on any earlier date. The judge held that the presumption created by the Interpretation Act had been displaced by the evidence of the formal notice of transfer, coupled as it was by a letter from the county court to the district registry on the same day, acknowledging receipt of the documents. This was a conclusion he was entitled to reach on the evidence before him, and this is not the type of finding this court would disturb.

7.13 In the other case, the plaintiff's solicitors posted the relevant documents to the county court two weeks after the order for transfer was sealed. About two weeks later the proper officer of the county court wrote to them, giving the action a temporary case number. However, he also asked if there were any moneys held by the Court Funds Office on a district registry ledger, adding that until they provided this information the action could not be transferred in. The plaintiff's solicitors delayed for nearly five months before replying that there was in fact no money in court. By this time the county court office appears to have mislaid the papers, and chasing letters from the plaintiff's solicitors went unanswered until they lodged a second bundle of relevant documents with the court nearly five months after they wrote their letter about funds in court. This elicited, at long last, a formal notice of transfer. In this case the date of transfer within the meaning of Ord 16, r 6(1A) occurred when the proper officer of the county court first wrote to the plaintiff's solicitors, since by that time it was clear that he had received all the documents required to be lodged. Since no money had in fact been paid into the High Court, the plaintiff's solicitors were not obliged to file a copy of notice of payment in pursuant to Ord 16, r 6(2)(d), and in any event the proper officer's duties commence when the documents referred to in r 6(1) are received by him. He should have accepted that the action had been effectively transferred into his court at that stage, and he should not have said that his requisitions for further information from the plaintiff's solicitors delayed the date of transfer.

THE EFFECT OF COUNTY COURT FORM N450

8.1 County Court Form N450 (entitled 'Notice that automatic directions apply') is a form sent out by the administrative staff of a county court when the court receives a defence in a case to which automatic directions apply. It explains the effect of the directions, and the existence of the automatic strike-out sanction is mentioned in note 3 at the end of the notice. The form ought to be dated at the top, and it contains a sentence to the effect that the timetable begins to run 14 days after 'the date given above', or 28 days if a counterclaim was filed with the defence. 'The date given above' has often been later than the date on which the defence was delivered at the court office.

8.2 If the sending out of form N450 (whether or not it is properly completed and whether or not it includes a date) involves no exercise of judicial discretion, so that there is no judicial intention to vary the timetable, it cannot alter the mandatory effect of the rule, and the trigger date is still calculated from the actual date of delivery of the defence at the court office. We will be referring later to the principles which a court will apply when deciding whether to reinstate an action when it is satisfied that a party was genuinely and reasonably misled by information contained on such a form.

THE EFFECT OF PARTICULAR COUNTY COURT PRACTICES

9.1 We should add that the practice adopted in some county courts of routinely ordering a pre-trial review on receipt of a request to fix a hearing date does not of itself take an action out of the automatic directions regime, so that an expectation that an order of this kind may in due course be made does not excuse the parties from complying with automatic directions until such an order is made.

APPLICATION OF ORD 17, R 11 TO CASES FALLING OUTSIDE THAT RULE

10.1 In a number of cases the courts have purported to make orders applying Ord 17, r 11 to cases to which that rule does not apply.

10.2 The problem that arises in these cases is whether such orders (which are in such terms as 'the automatic directions are to apply' or 'directions in the same form as Order 17, rule 11 to apply', or 'directions as Order 17, rule 11 to run from [a specified date]') and which in one case at least referred to and attached Form N450 to the order, have the effect of applying the automatic strike-out provisions of the rule. If the answer to this question is that they do, the further problem arises whether the principles for reinstatement are those set out in this judgment, or whether the principles in such cases as *Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256, *Hytec Information Systems Ltd v Coventry City Council* (1996) Times, 31 December and *Birkett v James* [1977] 2 All ER 801, [1978] AC 297 should be applied instead.

10.3 In our judgment it is not open to the court to apply the automatic striking out provisions of Ord 17, r 11 to actions which are expressly excepted by that rule or to which the rule does not apply (for example counterclaims which we have already considered earlier in this judgment), or (in cases of transfers from the High Court) where the action was commenced before 1 October 1990 or transferred before 1 July 1991 and so are outside the rule by virtue of the County Court (Amendment No 3) Rules 1990 or the County Court (Amendment No 3) Rules 1991.

10.4 As to the last of these, this was the decision of a two-judge division of this court in *Gleed v Milton Keynes BC* [1995] CA Transcript 227, approved in *Tarry v Humberclyde Finance Ltd* [1996] 1 WLR 611. As to the first, it seems to us that the same reasoning applies with even greater force. The rule itself stipulates that it does not apply to the excepted cases. In those cases the principles for the striking out of actions and for their reinstatement have been stated and settled in the cases to which we have referred and are (subject to later authorities) as discussed in the notes to Ord 13, r 2 in *The* (current) *County Court Practice 1997*, p 229. The argument has been advanced that since the introduction of Ord 17, r 11, and bearing in mind the object of the rule, it is now permissible and indeed proper for the courts to adopt a similar regime in all cases, but the short answer to this submission is that it simply ignores the fact that in para (1) the actions there listed are expressly excepted from its provisions. As to counterclaims, the wording of the rule is in our view quite inappropriate to apply to a counterclaim, whether or not the action in which it is made has ceased to exist.

10.5 There remains the question whether such orders have any effect at all. On balance we consider that with one exception that they do, since they can (just) be read and understood as shorthand for applying the relevant directions (as opposed to the sanctions) that are to be found in Ord 17, r 11, particularly those in para (3). However we are bound to say that in our view this form of shorthand is highly undesirable. If the rule does not apply to the action, it is only confusing to say that it does. The exception relates to the case of counterclaims, for such

shorthand would involve having to read the word 'plaintiff' as meaning 'defendant' and in our view even the most purposive construction cannot, in the context of the rule, overcome this hurdle, especially in the light of other rules, as for example Ord 17, r 12(5)(a). In the future, court orders must spell out plainly and precisely what the parties are to do and when they are to do it and this form of shorthand must not be employed. In such cases we emphasise that the principles governing the orders that can be made and the sanctions for failure to comply with them are not those in Ord 17, r 11 but are governed by the general law (e g *Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256 and *Hytec Information Systems Ltd v Coventry City Council* (1996) Times, 31 December).

EXTENSIONS OF TIME

11.1 A problem has arisen over orders for an extension of time under the rule. In essence, the question is whether such orders should be read and understood as fixing a period for making a request for a date for trial, or as fixing a period on the expiry of which the action will be automatically struck out if a date for trial has not been requested.

11.2 The reason for the problem lies in the words in brackets in para (9). That paragraph provides:

> 'If no request is made pursuant to paragraph 3(d) within 15 months of the day on which pleadings are deemed to be closed (or within 9 months after the expiry of any period fixed by the court for making such a request), the action shall be automatically struck out.'

11.3 Rule 11(3)(d) requires the plaintiff to request the proper officer to fix a day for the hearing within six months of the trigger date.

11.4 It follows from this wording that if the court is treated as fixing a period within which a request must be made, the action is not struck out at the expiry of that period if no request has been made, but only if the failure to make a request continues for a further nine months, whereas if the court is treated as having extended the guillotine date or having otherwise fixed a new guillotine date, then the further nine month period will not apply and the action will be automatically struck out on the expiry of the period fixed by the court if there has been no request for a date.

11.5 The problem has given rise to conflicting decisions of two-judge courts dealing with applications for leave to appeal.

11.6 The sort of orders that give rise to the problem are those which give an extension of time for setting the action down for trial, or an extension of time within which to comply with the automatic directions (with the extension either expressed to run from the date of the order or to a specified date), such as orders amending or extending 'the automatic directions', 'the timetable', 'time limits', or 'the automatic timetable', or simply extending the time for 'setting down' or for requesting a date for the trial. On their face orders such as these could be read either as fixing the period within which a request must be made, or as extending or fixing the guillotine date.

11.7 In some cases it is possible, by examining the context in which the order is made (including the time when it is made and the wording of the application for an extension etc) to be able to discern with more or less confidence what the court must have intended. For example, where an extension is sought during or soon after the six month period, and one is granted for a period which expires before the original guillotine date, it can hardly have been the intention of the

court to truncate the original guillotine date so that it operated at the end of the extended period, rather than after a further nine months after the expiry of the extension. On the other hand, when an application is made when the guillotine date is imminent, it can be said with force that in the context what the court must have been ordering was an extension of the guillotine date itself, rather than a period of extension plus nine months. These are, however, two extreme cases and there are likely to be many where it is not easy or even possible to work out from the context what the court must have intended. Furthermore, if the context is taken into account in this way the result will be that identically worded orders will have a completely different effect depending upon the context. More importantly, perhaps, to adopt this method of construing orders would in our view be to frustrate the object of the rule by encouraging satellite litigation, for time and money will be spent (as it has in the past) on debating whether in the circumstances the order should have the one effect or the other.

11.8 In these circumstances it seems to us that there should be one simple rule, namely that orders for an extension of time should be treated as fixing the period within which a request for a date should be made, unless the order itself makes plainly and expressly clear that the guillotine date is being extended or a new guillotine date is being fixed. Thus orders extending the time for setting down the action, or for requesting a date, whether done by reference to the date of the order, or by reference to a date in the future, by reference to the automatic directions or timetable, or by some other means, will not be read as extending the guillotine date to the expiry of the period of the extension, but as bringing into effect the words in brackets in para (9), so that the guillotine date will be nine months after the expiry of the extended period for requesting a date. We fully appreciate that in some cases this may produce a result that, in context, it can be said neither the parties nor the court could have intended, but the result will be certainty on the face of the order and as to the future, it is for the courts, if they wish to do so in appropriate cases, to specify the guillotine date in clear and express terms in their orders. This indeed is already what is being done in a large number of courts. For the avoidance of doubt we should make it clear that where there has been more than one extension, the same rule applies to all extensions, so that the guillotine date, in the absence of clear and express language to the contrary, will be nine months from the expiry of the last extension.

FIXING THE HEARING DATE: WHAT CONSTITUTES REQUESTING A DATE FOR HEARING?

12.1 Order 17, r 11(3) provides that unless a day has already been fixed the plaintiff shall within 6 months request the proper officer to fix a day for the hearing, and by r 11(8) the plaintiff is required to file with the request a note, if possible agreed with the other parties, giving an estimate of the length of the trial and the number of witnesses to be called. No fee was payable on requesting a hearing date when the new r 11 was first introduced in 1990. By art 7 of the County Court Fees (Amendment) Order 1994, SI 1994/1996, a fee of £50 was made payable at this stage of an action, and since 15 January 1997 this fee has been £100: see the County Court Fees (Amendment) Order 1996, SI 1996/3189. Article 3(2) of the County Court Fees Order 1982, SI 1982/1706 as amended, has the effect of requiring the fee to be paid by the person requesting the hearing date, and it must be paid before the date is requested..

12.2 Order 1, r 3 defines the expression 'the proper officer' as meaning 'the district judge or (a) in relation to any act of a formal or administrative character which is not by statute the responsibility of the district judge ... the chief clerk or

any other officer of the court acting on his behalf in accordance with directions given by the Lord Chancellor'.

12.3 At first sight one might think that the request for a hearing date related to an act of a formal or administrative character which is not by statute the responsibility of the district judge. Indeed in *Perry v Wong, Sampson v Moon, Jones v Roe Shopfitting Ltd* [1997] 1 WLR 381 at 387 Bingham MR attached significance to this fact when he said that in this context the expression 'the proper officer' should be interpreted as meaning the chief clerk or other officer of the court acting on his behalf. There would therefore appear to be a lot to be said for the view expressed by Judge Rudd in one of the current appeals to the effect that a plaintiff could not make a valid request for a hearing date otherwise than to the proper employee within the administration of the court, after first paying the requisite fee. But for successive decisions of this court, which we will describe below, one might think the process of requesting a hearing date for hearing could be simply expressed as the administrative step of paying the fee to the responsible employee at the county court, and then asking him to fix a hearing date, while filing at the same time the note required by Ord 17, r 11(8). This approach to the interpretation of the rule would have the advantage of certainty. It would also assist the efficient administration of the court because the requisite fee would have to be paid first, and the information required for listing purposes would have to be provided at the same time as the request for the hearing date was made. If more time was needed, the plaintiff would have to apply to the appropriate judicial officer of the court, namely the district judge, for a judicial decision pursuant to Ord 13, r 4 extending the time in which he might make his request.

12.4 This court, however, has never been inclined to be too strict in relation to what constitutes a request. In May 1995, for example, a division of this court (Bingham MR, sitting with Peter Gibson and Saville LJJ) refused leave to appeal from a judge's decision in *Gayle v House of Copiers plc* [1996] CA Transcript 497, holding that a request without a proper reference number which had been rejected by the county court for that reason was still a request within r 11(3)(d). Bingham MR said that there might come a stage when a request was so defective or so incomplete or so unclear that it would not be regarded as a request, but if a judge with greater familiarity with the procedure of the county court regarded the request as one that an ordinary person would see as valid, he would not dissent.

12.5 Next, in June 1995 this court held in *Ferreira v American Embassy Employees Association* [1996] 1 WLR 536 that an application to a judicial officer of the court for an extension of the 15-month period, if issued before but heard after the expiration of the 15-month period allowed by the automatic directions regime, by implication contains in the alternative an application to a proper officer of the court to fix a hearing date (in the event that the application for an extension of time is refused). It appears that in that case counsel conceded that the absence of a fee and of the note required by r 11(8) did not mean that the application was not a request, and Roch LJ observed (*Ferreira*'s case, at 540) that there was no particular form in which a request for a hearing date had to be made.

12.6 The decision of this court in *Ferreira*'s case and indeed *Carr v Northern Clubs Federation Brewery Ltd* (1996) Times, 18 January which followed it, are binding on us. In November 1995 this court went on to hold in *Ashworth v McKay Foods Ltd* [1996] 1 All ER 705, [1996] 1 WLR 542 that a request made within the 15-month period where there had been no compliance with r 11(3), and when the

plaintiff was not in fact ready for trial and could not comply with r 11(8), nevertheless did not constitute an abuse of the process of the court. Thus the request was a valid request. An attempt to nullify the effect of *Ashworth*'s case by arguing that if no request had been made to extend the six month period, an application which was made after six but before 15 months was invalid, failed in *Perry v Wong* [1997] 1 WLR 381. And finally in December 1996 in *Ever v WT Partnership Construction Management* (1997) Times, 9 January an application 'to set the matter down for trial on the first open day after 56 days from the date of this order', on which no order was made, was approved as a request for a hearing date. That decision once again approved the concept that a district judge could be a proper officer for this purpose and that the inability of the plaintiff to comply with r 11(8) was irrelevant. In our view, there has already been sufficient chaos in this area of the law over the last six years to dissuade us from adding to it by being willing to consider afresh whether a stricter test of what constitutes a request for hearing date might not be appropriate.

12.7 While we were hearing the present appeals, we were obliged to consider just how far the decision in *Ferreira*'s case went as a matter of logic. First, it seemed to us that any application to extend time for requesting a hearing date must carry with it the implied request, and not just a request to extend the 15-month guillotine date. Secondly, no other applications, for example to extend time or appeals from orders during the currency of the automatic timetable, would seem to carry any such implied request. The logic of the implication relates simply to the hearing date request, and the fact that automatic strike-out will occur in the absence of such a request. Thirdly, if an application to extend time for requesting a hearing date always carries with it by implication a request for a hearing date itself, this must logically be the effect of making the application whether it is ultimately refused or granted. This interpretation of the rule, however, would result in our being unable to give any effect at all to the words 'or within 9 months after the expiry of any period fixed by the court for making such a request', which appear in brackets in r 11(9), where the court fixes a date different from that originally prescribed by r 11(3)(d). These words contemplate the automatic strike-out provisions continuing to apply in relation to the new date.

12.8 It is not easy to reconcile this obvious intention of the rule-maker with the decision in *Ferreira*'s case. It appears to us that the only way in which to achieve a logically consistent interpretation which gives effect to the words in brackets in r 11(9) is to hold that the implied request for a hearing date carries with it the further implication that if the application is granted in whole or in part, the request is withdrawn and of no effect. It appears to us that the position thus can be put as follows:

(i) An express request for a hearing date can be made in any form, e g orally to the district judge, and without compliance with the formalities of paying a fee or complying with r 11(8). Whether an express request is an effective request will essentially be a question of fact for the judge.

(ii) An application for an extension of time for requesting a hearing date (or an extension to the guillotine date) by implication contains a request to fix a hearing date, but if that application is granted (in whole or in part) the implied request is treated as withdrawn and of no effect. No other applications, e g to extend the other or automatic directions or to appeal against interlocutory orders while the timetable is running, carry with them any such implied request.

(iii) Any request can be withdrawn and thereby nullified. The implied request identified in *Ferreira's* case is withdrawn by any grant of an extension. Other requests can be withdrawn and it is essentially a question of fact whether that has happened. If, for example, an application for an extension of time was clearly withdrawn or abandoned, that would be an example of a withdrawal of the request. If an applicant for an extension of time simply failed to appear on the return date of the application through an oversight, that would not be an abandonment and withdrawal of the request. Nor would an adjournment of such an application. The decision as to whether the request was withdrawn or abandoned would essentially be one of fact for a judge.

(iv) For the avoidance of doubt, and since the argument was raised in the course of the appeals before us, the questions whether an application for summary judgment, or for an interlocutory judgment (for example on an admission), or for an order for the trial of a preliminary issue constitutes requests for a hearing date do not arise. This is because in all these situations the automatic directions regime, as we will be explaining below, would have been ousted. A fortiori, whether the request for a hearing of the preliminary issue once such a hearing has been ordered is a request for a hearing date is also a question which does not arise[h].

(v) If an application for an extension of time is refused, the judge would be wise to go on to appoint a hearing date in response to the implied application to that effect, thereby ensuring that the matter is not left in limbo with no hearing date fixed.

12.9 In the High Court, the Rules of the Supreme Court refer to orders which fix a period within which a plaintiff is to set down an action for trial: see, for example, RSC Ord 34, r 2(1), or, for automatic directions in personal injuries actions, RSC Ord 25, r 8(1)(f). Pleadings are not filed at the court in the High Court, and RSC Ord 34, r 3(1) therefore requires rather more of a party setting an action down for trial than is required by the equivalent county court rule. Notwithstanding this difference, practitioners in the county court do regularly use the language of 'setting down' although this expression is not used at all in the county court (see its absence from the index to *The County Court Practice*). It is inapposite language, but an order requesting an action to be set down is clearly a request for a day for the hearing within the meaning of the rule.

FIXING A HEARING DATE: WHO CAN APPLY TO FIX THE DATE?

13.1 In *Ever v WT Partnership Construction Management* (1997) Times, 9 January Aldous LJ, when referring to the combined effect of rr 11(3)(d) and 11(8), said (echoing Bingham MR in *Rastin v British Steel plc* [1994] 2 All ER 641 at 646, [1994] 1 WLR 732 at 740) that this step—

> 'concerns the plaintiff alone. He, not later than six months after the start of the timetable, must write to the court requesting that a date be fixed for trial (unless the court has set a date already) and tell the court how long [he] thinks the case will last and how many witnesses he and the other party will have at the trial' (See [1997] CA Transcript 1831.)

13.2 If no date has already been fixed by the court of its own motion or on the application of any other party, it is therefore the plaintiff who must fulfil the obligation required of him by r 11(3)(d) if he is to prevent the automatic strike-out

h The following sub-para (v) has been added in the revised version.

sanction taking effect under r 11(9). In one of the applications before us this request was made by the plaintiff personally, despite the fact that a solicitor was on the record as acting for him. In our view such a request suffices to satisfy the rule, provided that it is not subsequently withdrawn. A plaintiff may also make a request for the purposes of r 11(3)(d) through a defendant or third party provided he properly authorises them as his agents to make the request on his behalf and the court is informed that the plaintiff has so authorised them.

13.3 The rule does not, of course, prevent either a defendant or a third party from applying for a hearing date to be fixed. If their request is granted, then a date will indeed have been fixed and the plaintiff will have been relieved from his obligation under r 11(3)(d). But unless a date is so fixed, it is right that the obligation to apply for the date should rest with the plaintiff, as the rule requires. In one of the current appeals the third party applied with the support of the plaintiff for a hearing date to be fixed, but this application was then adjourned by consent and never restored. At no stage did the third party profess itself to be acting on behalf of the plaintiff, and the plaintiff himself made no request for a hearing date at any time before the guillotine fell. This example shows why it is so important, if a hearing date is not in fact fixed by some other means, that the obligation to request a date does remain with the plaintiff. The only safe course for a plaintiff to take is to issue his own application, or to send the court a letter making the request, even if the matter is then taken forward by another party's solicitor in the interests of saving costs.

ONCE AUTOMATIC DIRECTIONS START TO APPLY, HOW MAY THEY BE OUSTED OTHER THAN BY AN EXPRESS MANUAL DIRECTION TO THAT EFFECT?

14.1 Once the pleadings are deemed to be closed in an action to which Ord 17, r 11 applies, automatic directions will apply unless they are ousted. It is now well established that the thrust of those parts of the rule which recognised that directions given by the court might exclude the automatic directions is to keep the automatic directions applicable unless the court otherwise directs. But it is clear that the automatic directions cease to apply in two situations.

14.2 First, if any new directions are repugnant to the concept contained in r 11(3)(d), as in *Downer & Downer Ltd v Brough* [1996] 1 WLR 575, where the directions ordered listing for trial on 'the joint' application of the parties.

14.3 Second, if any new directions simply cannot co-exist with automatic directions (as in *Protim Services Ltd v Newcomb* [1996] 1 WLR 575, the case heard with *Downer*), in which under the new directions a timetable for the exchange of witness statements expired only a day or so before the guillotine date, and a trial date was directed to be fixed in terms which were inconsistent with the automatic directions, namely 'the action be listed for trial for hearing before a judge on a date to be fixed on application certifying readiness for hearing and subject to agreed time estimate'.

14.4 The same principles will apply whether the directions were given originally in the High Court and continue to apply on transfer, or whether they are given for the first time in the county court. Furthermore, if the automatic directions are disapplied to any part of the claim, eg as between one defendant and the plaintiff, they will cease to apply to the whole action. Once automatic directions have been ousted, they will not reapply automatically. It is easy to recognise how unfair this would be if one contemplates a situation in which an order ousting automatic directions was successfully reversed on appeal, with the result that automatic directions were reinstated retrospectively with a guillotine

date having already come and gone. There are certainly circumstances, in our view, where the court can manually reapply equivalent directions, including the automatic strike-out sanction, but such an order would have to spell out expressly the trigger date and guillotine date anew.

14.5 If a new order simply grants an extension of time for fulfilling one of the obligations referred to in r 11(3)(a), (b) or (c), that is not of itself going to disapply the automatic directions (including the obligation to request a hearing date with the draconian consequences for failure). However, if a direction of the court makes compliance impossible, or if an order of the court is simply inconsistent with the automatic directions continuing to apply, the approach of the Court of Appeal has not been to attempt to remould or suspend their implementation for a period of time, or something of that nature, but to declare that they do not apply. Where directions are given which might impinge on the automatic directions, it is preferable for the order to deal expressly with the operation of the automatic directions, so that people's minds can be concentrated on the question whether they are to be disapplied or not. This is a practice which we believe is now happening, and is greatly to be encouraged[1].

OUSTER: REFERENCE TO ARBITRATION

14A.1 By Ord 17, r 11(1)(c) 'proceedings which are referred for arbitration under Order 19' are excluded from the ambit of Ord 17, r 11. Proceedings can be so referred either automatically under Ord 19, r 3, or on the application of one of the parties under Ord 19, r 9. Where the matters in issue actually go to arbitration under either of these rules, Ord 17, r 11 clearly does not apply.

14A.2 A question could arise, however, as to whether Ord 17, r 11 applies to proceedings automatically referred under Ord 19, r 3, if the district judge then orders a trial in court under r 3(3). In our view, since the action has already been referred to arbitration automatically, it is within the exception contained in Ord 17, r 11(1)(c), and it remains within that exception. If a trial is then ordered in court, the district judge must give manual directions, and in our view because the action has been excluded from Ord 17, r 11, it is not open to the court to apply the automatic directions, or to give manual directions to which the strike-out principles inherent in automatic directions will apply: in other words, the guidance we give in para 10.5 above is apposite in this context.

14A.3 The position in relation to an application to refer a matter to arbitration would appear to us to be different. Consistently with the views we will be expressing in relation to applying for summary judgment or applying for an order for the trial of a preliminary point (see paras 17.1 to 18.5 below), the *application* to refer the matter for arbitration will take the action outside the ambit of the automatic directions. If, however, that application is withdrawn, abandoned, not proceeded with for any reason or refused, the court will be entitled to give manual directions. So long as the action is one to which Ord 17, r 11 would otherwise have applied, these manual directions could be in terms equivalent to automatic directions, with both a trigger date and guillotine date clearly expressed, to which the principles applicable to automatic directions would apply. We have described manual directions of a similar type at para 11.8 above. In this context, too, it may be preferable to fix a date for trial towards which the parties will be directed to work: see para 23.1 below.

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i The original para 14.6 has been deleted, and an entirely new section (14A) substituted in the revised version.

OUSTER: INTERLOCUTORY JUDGMENTS AND STAYS

15.1 In recent months this court has held that automatic directions are ousted if an interlocutory judgment is entered on all the issues of liability in the action (see *Gomes v Clark* (1997) Times, 27 March), or if an order is made staying the action, even if it is likely that the stay will only be a temporary one (*Whitehead v Avon CC* (1997) Times, 17 March). In *Gomes v Clark*, where interlocutory judgment was entered for damages to be assessed in a personal injuries action, Lord Woolf MR said that the language of Ord 17, r 11 seemed to be inconsistent in its entirety with the idea that the rule should continue to apply once a judgment had been entered. Similarly in *Whitehead v Avon CC*, where a stay had been directed in another personal injuries action pending the examination of the plaintiff by a psychiatrist, Waller LJ said that an order for a stay was inconsistent with the automatic directions.[j]

OUSTER: APPLICATIONS FOR SUMMARY AND INTERLOCUTORY JUDGMENT

(i) *Ouster: applications for summary judgment*

16.1 We would now go rather further than it was necessary to go in *Gomes v Clark*. An application for summary judgment cannot be said to constitute a request for a hearing date within the meaning of r 11(3)(d), but this kind of application against any defendant takes the whole action outside the ambit of automatic directions, since automatic directions are concerned with taking the action forward to a full trial. Order 9, r 14 (4) seems to us to have been framed in a way which shows that as soon as an application for summary judgment has been made there is no immediate scope for the continuing application of any of the provisions of Ord 17, whether automatic or manual. We stress that the application will take the action outside the automatic directions regime whatever its subsequent fate. Thus, if it is dismissed or withdrawn or struck out for want of attendance, it will still be necessary for the court to give manual directions.

16.2 If the application for summary judgment is determined by a decision granting the defendant leave to defend, Ord 9, r 14(4) provides that 'the court may treat the hearing as a pre-trial review and Order 17 with the necessary modifications shall apply accordingly'. Since it is difficult to contemplate that a document 'purporting' to be a defence (see Ord 9, r 14(1A)) will not in fact have constituted a defence for the purposes of Ord 17, r 11, manual directions should always be given.

16.3 When any manual directions are given following the disposal of an application for summary judgment, provided the action is one to which Ord 17, r 11 would otherwise have applied, it will be open to the court to reapply directions equivalent to automatic directions, with a trigger date and guillotine date clearly expressed, to which the principles applicable to automatic directions would apply. Elsewhere in this judgment we have advocated fixing a date for trial at an early stage which avoids the automatic strike-out. Nothing we say here should be regarded as detracting from that view.

(ii) *Ouster: applications for interlocutory judgment*

16.4 Much of Ord 9 is concerned with actions which are not destined to go forward to a full trial, either because a defendant has admitted liability in full, or because he has admitted liability for part of a claim and the plaintiff is willing to

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j The original sections 16 and 17 have been deleted, the original section 18 renumbered 17, and the following new sections 16 and 18 substituted in the revised version.

accept the part admitted in full satisfaction of the whole claim or, in a default action, because no defence is delivered. In such cases judgment may be obtained by an administrative procedure, and there is no question of Ord 17, r 11 applying, even if there is an ongoing dispute about time for payment. If in a fixed date action judgment is obtained in respect of a partial admission or in default of defence (under rr 4 and 4A), manual directions must be given in respect of any part of the claim that is still outstanding.

16.5 Even if the action proceeds against other defendants, Ord 17, r 11 will not apply for the reasons we have set out in para 6.10 above. We have already rejected the idea of trigger dates operating retrospectively in cases where one or more defendants do not, in the end, deliver a defence for whatever reason, and one of the reasons for such non-delivery might be that an admission of liability by such a defendant obviates the need for a defence; and it would be chaotic if there were to be one regime in cases where an admission of liability by one defendant precedes the delivery of other defendants' defences, and a different regime in cases where one of the defences is delivered before an admission (which disposes of the claim as against that defendant) is forthcoming from one of his co-defendants.

16.6 It follows that if a default judgment is entered against one of several defendants it will be necessary for the court to give manual directions. If that judgment is subsequently set aside it may then be necessary to give further manual directions in order to adjust the earlier timetable. This question does not arise if a default judgment is entered against the only defendant in the action, and if that judgment is subsequently set aside, we see no reason why automatic directions should not apply, since a defence must then be delivered, and there will be no difficulty in identifying a trigger date, calculated from the time when the only defence in the action is delivered.

16.7 Order 9, r 3(6) is concerned with a situation in which the defendant has admitted part of the plaintiff's claim and the plaintiff notifies the proper officer that he does not accept the amount admitted. Order 17, r 11(1)(o) expressly excepts an action to which Ord 9, r 3(6) applies, but we would emphasise, as one of the cases we have decided shows, that this subrule only applies when both its requirements are met. In other words there must be both a partial admission and a notification by the plaintiff to the proper officer that he does not accept the amount admitted.

16.8 In cases where an application to a judicial officer of the court is required before judgment may be entered on an admission (for example, under Ord 11, r 3(7)(b), or where there is a dispute as to whether an admission has been made, and the court declines to allow judgment to be entered by administrative process), the making of such an application must in our view have the same effect as an application for interlocutory judgment, and manual directions will be required for the conduct of the balance of the action.

16.9 If a defendant makes an application under Ord 9, r 2(4) to withdraw an admission of a type which has allowed or would allow one of the procedures for obtaining interlocutory judgment to be put in train so as to dispose of the action (at any rate so far as liability is concerned), and the court permits him to do so, manual directions will once again be required. We are not here concerned with an application to withdraw an admission which is simply part of a defence in an action to which Ord 17, r 11 already applies, because there is no reason why the automatic directions should not continue to apply whether or not such an admission is allowed to be withdrawn.

16.10 When we refer in this section to manual directions, provided that the action would otherwise be within Ord 17, r 11, there is no reason why manual directions should not be given equivalent to the automatic directions, with a trigger date and guillotine date clearly spelt out, to which the principles applicable to automatic strike-out would apply. If this course is adopted, a form of words such as 'Directions in the same form as Ord 17, r 11(3)' should not be used, because this could lead to the court ignoring the need to consider the timetable which would be appropriate for the particular action at the time when such directions are being given. Once again, we would strongly encourage the giving of directions which will include the fixing of a date for trial from the outset to which everyone can work.

OUSTER: DIRECTIONS FOR THE TRIAL OF A PRELIMINARY ISSUE

17.1 In our view the existence of an order for the trial of a preliminary issue, together with any directions that may have been given for the trial of that issue, will be inconsistent with the continuing application of automatic directions to any part of the action, whether or not that issue is subsequently tried. The trial of a preliminary issue, a limitation issue, for example, will need its own set of manual directions. The court may direct a timetable for discovery and/or the exchange of witness statements or affidavits limited to that issue. Alternatively, it may simply direct the trial of that issue without discovery or witnesses. In either event it would be absurd to contemplate the continued application of automatic directions to the action as a whole.

17.2 In the two appeals before us in which this point fell to be decided, counsel for each defendant suggested that even if the other automatic directions were inapposite, r 11(3)(d), which creates the obligation to request a hearing date within six months, should continue to apply. At the forefront of their submissions, however, was the argument that the hearing for which the plaintiff was bound to request a hearing date was not the hearing of the preliminary issue, but the full trial. They pointed out, for instance, that CCR Ord 20, which is entitled 'Hearing of the cause or matter', makes no provision at all for the trial of a preliminary issue, and RSC Ord 33, r 3, which applies by analogy in the county court by virtue of s 76 of the County Courts Act 1984, treats the trial of a preliminary issue as something different from the 'trial of the cause or matter', which they said was the hearing referred to in Ord 17, r 11(3)(d).

17.3 Curiously enough, it was the strength of this submission, which we accept, which convinced us that the regime that must follow an order for the trial of a preliminary issue is wholly inconsistent with the continuing application of automatic directions whose purpose is to prepare the ground for the trial of the main action. The purpose of ordering the trial of an issue is to eliminate or reduce greatly the number of issues that may remain if the issue is decided in a particular way. It would be absurd if a procedure designed to avoid or reduce the cost of the eventual hearing was accompanied by a continuing, quite pointless, obligation on the plaintiff to request a date for the hearing of the main action, whether within 6 or 15 months, in circumstances in which he could not usefully comply with his obligation to file the note prescribed by r 11(8).

17.4 Although this matter was not argued on this basis, we think that the absurdity of requiring full discovery, witness statements and requesting a date for the hearing of the full trial is as obvious once an application is issued for an order for the trial of a preliminary issue as it is when the order itself is made. Accordingly, in our view the application itself ousts the automatic directions.

17.5 In our judgment, for these reasons an application for, and, a fortiori, an order for the trial of a preliminary issue has the same effect as an application for interlocutory or summary judgment or an order for a stay. Such steps or orders are wholly inconsistent with the continuing application of the automatic directions regime to any part of the action. This regime, therefore, will come to an end, and it will have to be replaced, where relevant, by appropriate manual directions. In this area, too, provided the action is one to which Ord 17, r 11 would have applied, the court would have the power to reapply directions equivalent to the automatic directions, with a trigger date and guillotine date clearly expressed, but once again it is likely to be better to fix a trial date for the parties to work towards rather than to contemplate automatic strike-out.

THE EFFECT OF OUSTER: PRACTICAL CONSIDERATIONS[k]

18.1 We believe that we need to stress, although it will be quite obvious from this judgment, that there will be many occasions when the provisions of Ord 17, r 11 will have been ousted in actions which might otherwise have been thought to fall within that rule. Both district judges and circuit judges will have to be diligent in ensuring that such actions are not left directionless.

18.2 We realise that a burden will also be imposed on court staff who will have to identify the cases in which the issuing of an application has taken the action outside the automatic directions regime, so that all such cases may be brought to the attention of the district judge. Where, for example, an application for summary judgment, albeit later withdrawn, has taken a case outside the automatic directions regime, that case will become directionless unless appropriate action is taken. In order to make the present rule work, administrative procedures will have to be set up for identifying and referring to the district judge all the cases in which relevant applications have been made, for example, applications for reference to arbitration, for summary or interlocutory judgments, or for orders for the trial of preliminary points.

18.3 If this cannot be done, and if it is still impossible nine years later to implement recommendation 41 of the 1988 report of the review body on Civil Justice, 'computer facilities for the management of lists and individual cases should be made available as a matter of priority', then a rule which is only really appropriate for simple single-defendant actions which have no significant interlocutory excursuses, should be changed without delay.

THE EFFECT OF APPEALS

19.1 One reason why it would, in our view, be unfair if the automatic directions continued to apply even though an application has been made for summary judgment or an order has been made for a preliminary issue to be tried, is that appeals from any such orders may take matters well beyond the guillotine date. It would be wholly unsatisfactory if an additional outcome of such an appeal were to be that the plaintiff's action was automatically struck out. But it is right to emphasise that, in our view, it cannot be reasonably suggested that in some way or other the automatic directions timetable is suspended or extended while appeals on other interlocutory matters, such as discovery, are pursued in an action to which the automatic directions would otherwise apply.

k See footnote j above.

FIXING A DATE

20.1 An application to fix a date can be made by any party, and if a date is fixed at any time (even after the six months have expired under r 11(3)(d), but before the 15 months have expired under r 11(9)), the plaintiff will be released from his obligation to request the fixing of a hearing date under r 11(3)(d), and will no longer be subject to the sanction of automatic strike-out under r 11(9). If the hearing date were for any reason vacated, we still consider that a date would have been fixed so as to release the plaintiff from his obligation under that rule, but it would be within the control of the court either to refix a date or to reimpose the obligation on the plaintiff to apply to fix a further date if this was thought to be the appropriate course. In the latter event, provided the action was one to which the automatic directions applied originally, it would seem to us to be open to the court to impose a new guillotine date to which the principles applicable to Ord 17, r 11 would apply, so long as it did so in clear and express terms.

20.2 It is clear that there is room for argument as to what constitutes the 'fixing of a day'. In one of the present appeals the judge ruled that a direction by the court on a form sent with the defence that 'the hearing of this action will take place on a date during the week commencing Monday, 11 October 1993' did not constitute the fixing of a hearing date. No argument on this point was addressed to us during the appeal, but we are bound to say that we consider that a direction from a proper officer, whether a district judge or an administrative officer of the court, that a case should come on for hearing during a defined period does fix a date for trial, and that in such an event the plaintiff's obligation under r 11(3)(d) of the automatic directions timetable accordingly ceases or never starts to arise. This can be contrasted with the different direction given in another case to the effect that there would be a hearing at a particular date to be fixed. This does not amount to fixing a date.

REINSTATEMENT

21.1 *Rastin v British Steel plc* [1994] 2 All ER 641, [1994] 1 WLR 732 established that the court has power, under CCR Ord 13, r 4, retrospectively to extend the time for applying for a date for trial and thus to reinstate proceedings automatically struck out under Ord 17, r 11.

21.2 The existence of this power has not been seriously questioned in subsequent cases (nor in our view could it be) but the debate has rather been about the criteria to be applied by the courts when deciding whether or not to reinstate the action.

21.3 The first and most important point to be borne in mind is that such decisions are made in the exercise of a discretion vested in the court. It follows from this that the Court of Appeal will not interfere with the way in which the court below has exercised its discretion unless persuaded that the conclusion reached by the judge was plainly wrong: see *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647. As that case emphasises, the fact that this court might itself have reached a different conclusion is insufficient; for what must be shown is that the result falls outside the generous ambit within which reasonable disagreement is possible.

21.4 There are two main categories of case.

21.5 The first of these applies unless the plaintiff can bring himself within the second category. *Rastin v British Steel plc* itself gave guidance on how the discretion should be exercised in the first category. The court made clear that the principles developed to deal with other procedural defaults and with striking out

for want of prosecution were inapplicable in the present context; and it set out special guidelines to be applied to this category. The reason for this special approach lies in the object of the rule which, as we have already stated, is to set out the steps to be taken so that actions to which the rule applies can progress to trial without undue delay and to provide the sanction of automatic striking out as an incentive to plaintiffs to prosecute their claims with reasonable speed.

21.6 In this category the overall conduct of the case by the plaintiff, a word, which includes those advising the plaintiff, is clearly relevant and forms the first of the general guidelines. The reason for this is, of course, the object of the rule which we have stated above. Thus if (apart from the failure to request a date for trial) the plaintiff fails to satisfy the court that he is innocent of any significant failure to conduct the case with expedition, having regard to the particular features of the case, then it would be plainly wrong to reinstate it, for to do so in such circumstances would be to frustrate the object of the rule.

21.7 In view of the wording of the rule it is clear that the obligation to get on with the case commences with the trigger date and continues until the guillotine date. The plaintiff will accordingly have to show that during this period he was innocent of any significant failure to conduct the case with expedition, having regard to the object of the rule, which here of course includes the timetable stipulated in the rule.

21.8 In considering whether the plaintiff has satisfied the court that he is innocent of any significant failure to conduct the case with expedition (which is described in the cases as the 'reasonable diligence' guideline), the judge is entitled to consider all the aspects of the litigation.

21.9 Difficulties and delays in progressing a case arise for a myriad of reasons. For example, the case may be complex and the automatic directions for that or other reasons not really appropriate. The defendants may be unco-operative or indeed actively seek to delay matters. These are the sort of factors that can be taken into account when assessing whether the plaintiff is innocent of significant failure to conduct the case with expedition, but they are not in themselves necessarily conclusive, since in the end it is for the plaintiff to get on with his claim. Where such difficulties and delays arise or can reasonably be foreseen, often the obvious remedy is to seek the assistance of the court, either for an extension of time or special directions, or to put pressure on the other parties to the action; and a failure to do so in appropriate circumstances might make it difficult to satisfy a court that the plaintiff had nevertheless been prosecuting the case with expedition. Furthermore, where the action has been started late (for example just before the expiry of the limitation period) the expedition required of a plaintiff during the relevant period may well be greater than if the action had started soon after the events giving rise to it.

21.10 If (and only if) the court is satisfied that the plaintiff (apart from his failure to request a date for trial) is innocent of any significant failure to conduct the case with expedition, bearing in mind the object of the rule, should it turn to consider the second general guideline, which is concerned with the reason for the failure to apply for a date for trial.

21.11 In *Rastin v British Steel plc* [1994] 2 All ER 641 at 647, [1994] 1 WLR 732 at 740 it was stated that the plaintiff must satisfy the court that the failure is '*excusable*'. This expression has given rise to much debate, but looking at the cases as a whole it means simply whether in all the circumstances what is ex hypothesi an unjustifiable failure is of such a kind that it should not of itself preclude reinstatement; in other words that it should be forgiven. Thus a failure by

solicitors to have any or any adequate system for monitoring compliance with the automatic directions, with the result that the guillotine date arrives and passes without any action, is very unlikely indeed to be regarded as excusable, as compared with, for example, an isolated clerical error in entering the relevant date in a computerised system. Again, delay in applying for reinstatement after the guillotine date can be a material factor. A test suggested by some of the cases (including *Rastin*'s case) is whether an extension of time would have been granted had it been applied for prospectively. If this would be likely to have happened, it can be weighed in the balance in favour of the plaintiff. Another test is whether the failure to apply for a date for trial has contributed in a significant way to delay in getting the matter to a hearing. These tests are not exhaustive and do not form part of the general guideline but may, depending on the circumstances, be employed as useful tools for assessing excusability. The passing or failing of these tests does not necessarily or automatically entail that there is or is not an excusable failure. For example, the fact that time has passed since the guillotine date because there has been a reasonable but unsuccessful appeal on the grounds that the action has not been automatically struck out at all may, again depending on all the circumstances, be treated as something which goes towards explaining a delay which otherwise would militate against excusability.

21.12 However the matter is approached, the court should always have in mind the object of the rule and accordingly should be wary of finding too readily that a failure to apply for a date is excusable, for to do so would once again be to frustrate that object.

21.13 If (and only if) the court is satisfied that the plaintiff has met the requirements of the first and second guidelines should it turn to the third guideline, which is the interests of justice generally. As the court pointed out in *Rastin v British Steel plc* [1994] 2 All ER 641 at 647, [1994] 1 WLR 732 at 740–741, here the position of the parties and the balance of hardship can be considered. If reinstatement would cause significant prejudice to the defendant which would not have been suffered if the plaintiff had applied for a date for trial in due time, that would be likely to be a conclusive reason for refusing reinstatement, though the absence of such prejudice is not a potent reason for ordering reinstatement. Factors such as the existence or otherwise of an alternative remedy for the plaintiff if reinstatement is not ordered, whether or not the limitation period has expired, and whether or not there has been an admission of liability or payment into court can also be taken into consideration. All these are examples of factors which may tip the scales of justice the one way or the other and do not represent an exhaustive list. What can be regarded as just will turn on the circumstances of the particular case, once again bearing in mind the object of the rule.

21.14 In summary, therefore, the guidelines to be applied, bearing the object of the rule in mind, are these. (i) Has the plaintiff satisfied the court that (apart from his failure to request a date for the trial) he is innocent of any significant failure to conduct the case with expedition between the trigger date and the guillotine date, having regard to the particular features of the case? If he has not, then reinstatement should be refused. (ii) Has the plaintiff satisfied the court that in all the circumstances his failure to apply for a date is excusable, ie should be forgiven? If he has not, then again reinstatement should be refused. (iii) Has the plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not then once again reinstatement should be refused.

21.15 What must be emphasised is that each case depends on its own facts; and what may strike a judge as of particular significance in one set of

circumstances may well be reasonably regarded as of little or no significance in another.

21.16 What is quite illegitimate is to conduct a trawl through the decided cases, or the present cases, in an attempt to demonstrate that the one factor or the other (or the application of one or other of the suggested tests for any of the guidelines), was in another case applied to one guideline rather than another, or was given special weight or was discounted or ignored when considering any particular guideline, and then to seek to challenge the exercise of the discretion by showing that the court in the instant case did not adopt the same approach.

21.17 For example, attempts have been made to argue that since the cases have indicated that the question of reasonable diligence should be measured against the timetable laid out in the rule, any failure to comply with that timetable automatically entails that there has been a significant failure to conduct the case with reasonable expedition, whatever the other circumstances may be. As Lord Woolf MR pointed out in *Samuels v John Laing Construction Ltd* [1996] CA Transcript 1867, this is not the correct approach. Certainly the court must bear in mind the timetable stipulated in the rules, but if there is a departure from that timetable it does not necessarily follow that there was a significant failure to proceed with reasonable expedition, since the departure may not have resulted in any significant delay or may have been wholly reasonable and sensible in all the circumstances, ie. likely to have been sanctioned by the court had an application in that regard been made. Thus although (except where the rule otherwise expressly provides) the parties cannot by agreement change the timetable, ie for discovery or for requesting a date (and for reasons given elsewhere cannot extend the guillotine date) a sensible and reasonable agreement or understanding that the court would be likely to have sanctioned had it been asked to do so can be taken into account in assessing whether the guidelines have been met.

21.18 If the court has directed itself properly in accordance with the general guidelines and with the object of the rule in mind, then the way in which it chooses to resolve the matter depends upon all the circumstances of the case in question and the assessment by the judge of the weight which he considers should be given to the factors relied upon by the parties. The fact that the judge does not recite the guidelines or the object of the rule in the judgment is not, in itself, automatic proof that he failed to have these matters in mind when reaching his decision. This court will only interfere with the exercise of the discretion if the decision is so plainly wrong that it is clear that the court must have failed properly to apply the general guidelines in the light of the object of the rule.

21.19 The second main category of case is where the failure to apply for a date for the trial has been caused by something that has genuinely and reasonably misled the plaintiff or his advisers. Again the reason for the existence of this second category lies in the object of the rule. Since the sanction of automatic striking out is there to provide an incentive to plaintiffs to prosecute their claims with reasonable speed, it is hardly just to apply that sanction where the failure to meet the timetable arises through no fault on the part of the plaintiff.

21.20 For this reason *Williams v Globe Coaches (a firm)* [1996] 1 WLR 553 lays down a different guideline. That case was concerned with an error on the part of the court administration, but there is no reason in principle why this category should not extend to any case where the plaintiff is genuinely and reasonably misled, whether by the court, the defendants or others. Equally, it seems to us that this second category is not limited to cases where the plaintiff was misled into

believing the wrong guillotine date, but would include cases where he was misled into genuinely and reasonably believing that there was no guillotine date at all.

21.21 What must be emphasised, however, is that in order to rely upon this ground for reinstatement, the plaintiff (a word which again includes his advisers) must satisfy the court that he was genuinely and reasonably misled into failing to apply for a date for trial. In other words, the plaintiff must satisfy the court that had he not been so misled, he would have requested a date for the trial before the guillotine date. Thus, for example, where the plaintiff was misled into believing that the guillotine date was 1 June whereas it was in fact 1 May, but failed to apply for a date until after 1 June, it could not be seriously suggested that he could bring his case within this category, since by failing to meet the latter date he has demonstrated that he was not reasonably and genuinely misled into believing that he had until the latter date to apply for a date for trial.

21.22 What must also be emphasised is that this category is not available to relieve plaintiffs from their own internal problems. If, for example, the plaintiff changes solicitors, and those now acting for him do not have the information which was possessed or which should have been possessed by their predecessors, which would have made it clear that what the new solicitors are being told is or may be inaccurate, and as a result the new solicitors are led to believe that the guillotine date is later than it in fact is, the plaintiff cannot successfully seek reinstatement under this category. The reason for this is that in such cases the true reason why the guillotine date is missed is not because the plaintiff has been genuinely and reasonably misled, but because (for whatever reason) there has been an internal failure properly to investigate the position or to pass on relevant information.

21.23 Finally, we must state once again that the assessment of the weight or otherwise to be given to the circumstances of the case is a matter for the court concerned in the exercise of its discretion. Again it is illegitimate to trawl through the cases to seek to demonstrate to this court that the court below has not adopted the same weighting as in other cases. For example, in *Williams v Globe Coaches (a firm)*, the judge at first instance considered that the plaintiff was genuinely and reasonably misled by the court administration sending out a second Form N450 giving the wrong trigger date. In another case, however, a judge might conclude that those acting for the plaintiff should have realised that the date was or might be wrong and should have made further inquiries. The judge in the latter case could not be criticised for reaching a different view, if the matter is within the generous ambit within which reasonable disagreement is possible, any more than he could if he reached the same view as the earlier judge, as was pointed out in *Samuels v John Laing Construction Ltd.* As with the first category, this court will only interfere if satisfied that the decision is so plainly wrong that the court must have failed properly to apply the guideline applicable to this category, namely that bearing the object of the rule in mind it must be satisfied that the failure to apply for a date was because the plaintiff was genuinely and reasonably misled.

21.24 When considering whether or not an action should be reinstated the court should, of course, also bear in mind that it would defeat the object of the exercise to indulge in a lengthy or complicated investigation into the facts of the case, so that care should be taken to ensure that unless the interests of justice clearly indicate otherwise, prolonged argument, extensive examination of documents, or the calling of witnesses for cross-examination etc should be strongly discouraged.

21.25 Elsewhere in this judgment we consider the situation when the automatic directions are ousted by some application or order of the court in actions to which they would otherwise apply. For the reasons we have given, we conclude that the court can manually reapply directions equivalent to the automatic directions in such cases. If the action is struck out for failure to meet the guillotine date in such circumstances, then the case can only be reinstated if the plaintiff can bring himself within one or other of the categories we have described.

21.26 At this stage it is convenient to consider whether, as was argued in one of the cases, there should be a third category for reinstatement, namely actions where the parties have so conducted themselves in their dealings with each other that it would be inequitable for the defendant to assert that the action had been struck out or to oppose reinstatement; and where the plaintiff can also satisfy the court that the balance of justice indicates that the action should be reinstated. Thus where shortly before (but probably in ignorance of) the guillotine date the plaintiffs wrote to the defendants asking for details of witnesses so that there could be an application for a hearing date with an agreed estimate of length, and where the defendants at their request were given more time to respond but did not do so before the guillotine date (of which probably they too were ignorant) it was urged on us that it would be inequitable for the defendants to oppose an application for reinstatement and only just to reinstate the action.

21.27 We are unpersuaded that there should be any such additional category for reinstatement.

21.28 It is clear from *Rastin v British Steel plc* [1994] 2 All ER 641 at 646, [1994] 1 WLR 732 at 739 that the rule is not to be construed as sanctioning the traditional delay-causing method of proceeding, where the parties (particularly their advisers) expressly or implicitly are content to let matters drift rather than driving the case forward to trial. It is also clear from *Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336 that the parties cannot by agreement between themselves extend the guillotine date, either prospectively or retrospectively, for that would be to emasculate the rule and deprive it of its intended beneficial effect.

21.29 In the light of these considerations we can see no basis for suggesting that agreements or understandings between the parties should provide a separate basis for reinstatement, with or without the suggested further requirement that the court must be persuaded that it would be just to order reinstatement. As we say above, sensible and reasonable agreements or understandings might, of course, assist in showing that the plaintiff was innocent of any significant failure to conduct the case with expedition; if he was, whether the failure to apply for a date was excusable; and if the failure was excusable whether justice indicated that the action should be reinstated. In the case before us, however, the plaintiff had not acted with reasonable diligence and it could not be suggested that the conduct relied upon assisted in showing that he had established an excusable failure to apply for a date; the former because the conduct came right at the end of the relevant period, and the latter because the plaintiff was unaware that there was a guillotine date to be met.

21.30 In this connection we should add that we deprecate any attempt to reformulate (as opposed to restate) the guidelines in the two categories we have discussed. Formulations such as 'whether the failure to set down was causative of any significant delay in bringing the matter to trial' do not in our view properly reflect the way the law has developed in dealing with this rule and (if adopted) would be likely to cause confusion and difficulty.

21.31 A further question which has risen in the context of reinstatement is whether, once a guillotine date has passed, an action may be reinstated if a court makes an order giving new manual directions for its future timetable when both the court and the parties are oblivious of the fact that the guillotine has fallen. In our judgment, such an order cannot have that effect. In *Rastin v British Steel plc* it was made plain that the object of the new rule was to enable the court, not the parties, to maintain control over the timetable, and that a retrospective application to extend time should not succeed unless the plaintiff could show to the court that he had prosecuted his case with at least reasonable diligence. In the situation we have postulated, the plaintiff has not demonstrated this to the court, so that the order the court has made does not have the effect, without more, of reinstating the action. An express application must be made in which it is made clear to the court that the request for reinstatement forms a part of what is being applied for, before an order made after a guillotine date will have this effect. There is no reason why such an application should not be made with the defendant's consent, if this is forthcoming. This is not to say that the original order is not final and conclusive between the parties (see s 70 of the County Courts Act 1984). It is simply that the order cannot bind the hands of the court.

21.32 In conclusion on this topic we should state that it is our clear view that where the court reinstates an action in which there is more than one defendant, the action is not reinstated against any defendant who has not been given due notice of the application to reinstate and who accordingly has been deprived of the opportunity to respond to it. It is also our clear view that if a court declares an action to be struck out, that order will continue in full force and effect until it is set aside or there is an order for reinstatement.

FRESH PROCEEDINGS AFTER AN AUTOMATIC STRIKE-OUT

22.1 In *Gardner v Southwark London BC (No 2)*, *King v East Cambridgeshire CC*, *Thompson v Wickens Building Group Ltd* [1996] 1 WLR 561 the court decided that in the absence of exceptional circumstances a plaintiff whose action has been automatically struck out may bring fresh proceedings if still within the limitation period. The reason for this decision was that a failure to apply for a date for trial by the guillotine date could not be equated with the sort of conduct which would lead a court in other cases to apply the extreme sanction of prohibiting fresh proceedings, especially since there is nothing in the rule to indicate that such an extreme sanction should be applied. Of course, as was pointed out in *Gardner (No 2)*, the court might well exercise its discretion to stay the subsequent proceedings until the plaintiff had paid any costs he had been ordered to pay in the struck out action, but the extreme sanction can only be applied if over and above his failure to comply with the automatic directions, the plaintiff has so conducted himself that it can be said that the new proceedings amount to an abuse of the processes of the court.

CONCLUSION

23.1 It will be apparent from this judgment that the ill-thought out introduction of an automatic strike-out sanction has caused very great difficulties for many who are involved in the conduct of county court litigation. Many courts are now departing entirely from the automatic strike-out approach to the management of litigation by fixing a date for the trial at an early stage in appropriate cases. This means that these courts have taken it upon themselves in effect not to leave the fixing of a date to the plaintiff and to take a proactive role

in managing the action. This is of course the approach advocated by Lord Woolf in his proposed reforms of the civil justice system and by his predecessor, now Lord Bingham, at the end of his judgment in *Ashworth v McKay Foods Ltd* [1996] 1 All ER 705 at 714, [1996] 1 WLR 542 at 552, when he encouraged the Judicial Studies Board to consider whether it was practicable or desirable to recommend a national practice along these lines. In our judgment this alternative approach, reinforced by the much tougher approach of the courts to pardoning delays in the run-up to the date fixed for trial, has a very great deal to commend it. We certainly cannot go on as we are.

THE DECISION IN THE INDIVIDUAL CASES BEFORE THE COURT

Bannister v SGB plc and ors

The writ in this personal injuries action was issued in the Kingston upon Hull District Registry in May 1991, a few days before the expiry of the limitation period. On 21 December 1992 an order transferring the action to the Kingston upon Hull County Court was sealed in the High Court. On 4 January 1993 the plaintiff's solicitors wrote to the county court lodging the documents required pursuant to Ord 16, r 6. On 21 January 1993 the proper officer of the county court replied to them, informing them of the temporary reference number allocated to the case, and asking them to inform the court of any moneys held by the Court Funds Office on a district registry ledger to enable him to transfer the funds to the county court. He said that 'until this information is provided the case cannot be transferred in'. On 17 June 1993 the plaintiff's solicitors replied that there were no funds in court, and said that they would be obliged if the case could be transferred to the county court as soon as possible. This request was repeated by letters dated 30 July, 20 August and 29 November 1993, all of which went unanswered. On 7 December they spoke to an official of the court on the telephone and ascertained that the court file has been mislaid. They therefore enclosed a duplicate set of documents. On 16 December the county court issued a notice of transfer, which included a direction that there would be a hearing at the Combined Court Centre in Hull on a date to be fixed. The plaintiff's solicitors did not receive this notice, but on 1 August 1994 they wrote to the court notifying it that, subject to transfer to the county court, the case was ready for trial. The court responded on 10 August 1994, informing them that notification of the transfer had been sent to them on 17 December 1993, and enclosing a copy of the notice.

On 19 April 1995 District Judge Evans held that the date of transfer from the High Court, for the purposes of CCR Ord 16, r 6(1A), was the date on which the High Court order was sealed, 21 December 1992, so that the guillotine date was 4 April 1994. Since no request for a hearing date had been made before that date, he ruled that the action had been struck out. He also refused the plaintiff's application to reinstate, and made a wasted costs order against the plaintiff's solicitors in respect of the costs of the defendants' application. On 22 August 1995 Judge Fricker QC dismissed the plaintiff's appeal, and made a further wasted costs order against the plaintiff's solicitors in respect of the costs of the appeal. The plaintiff now appeals from all aspects of Judge Fricker's order.

For the reasons we have given in the main judgment, the date of transfer in this case is to be taken as 21 January 1993, so that the action was struck out on 4 May 1994. Counsel for the plaintiff submitted that the action should be reinstated on *Williams v Globe Coaches* principles. We are of the view that it should be reinstated. It seems to us on the material we have been shown that the plaintiff's

solicitor was genuinely and reasonably misled into believing that the case had not been transferred when it had and accordingly was misled into believing that there was no question of the trigger date being calculated from 21 January 1993. Accordingly the appeal is allowed, and it is common ground that in this event the wasted costs orders made against the plaintiff's solicitors must also be quashed.

Boustead v British Road Services Ltd

In this appeal the defendants seek to challenge the decision of Judge William Crawford QC in the Newcastle upon Tyne County Court to the effect that the plaintiff had brought himself within the guidelines of the first of the categories for reinstatement discussed in the main judgment. In particular, it was submitted that the judge had erred in treating the failure to apply for a date for trial as excusable. We are not convinced on the material shown to us that the judge was so plainly wrong that he must have failed properly to apply the guidelines, which he carefully set out in his judgment. Accordingly this appeal is dismissed.

Burrows v Wigan Metropolitan BC

This is a personal injuries action proceeding in the Wigan County Court. The 'trigger date' was 16 August 1995, and the 'guillotine date' therefore 16 November 1996. The plaintiff had solicitors on the record in the litigation, but he chose to bypass them by delivering a letter from himself to the county court in late August 1996, requesting that the matter be set down and enclosing the requisite £50 fee. On 19 September 1996 the county court telephoned the solicitors to find out what was happening. The solicitors said that the case was not ready to be set down. The county court reported this to the plaintiff by letter dated 19 September 1996 and sent the fee of £50 back to him. The guillotine date passed on 15 November 1996, and on 19 November 1996 the district judge declared the action to have been automatically struck out. On 6 January 1997 Judge Urquhart allowed the plaintiff's appeal and granted leave to set the matter down.

The defendant has sought leave to appeal from Judge Urquhart's order, suggesting that two points are properly arguable. First, it is submitted that the plaintiff cannot make a request for a hearing date personally when he has solicitors on the record. As we have indicated in the main judgment, we cannot see why not. Secondly, it is said that it is arguable that the request was withdrawn. In the strange circumstances that existed, we do not think that there is sufficient evidence that the solicitors withdrew the request or of an acceptance by the plaintiff that the request which he had made personally should be treated as withdrawn. We therefore consider that there is no reasonable prospect of success on an appeal, and we dismiss the application.

Eagle Star Insurance Co Ltd v Karasiewicz

In this possession case from the Brentford County Court, District Judge Gerlis ordered 'automatic directions to apply' in a case to which they would not otherwise have applied by virtue of Ord 17, r 11(1)(i). The only question, as in *Utting v McMurdie* (p 180, post), is whether the effect of this order was to apply the sanction of automatic striking out if the plaintiff failed to request a hearing date within 15 months of the close of pleadings. On 18 May 1995 District Judge Henson held that the action had not been automatically struck out, even though the guillotine date had come and gone, on the ground that the original order had not spelled out that the strike-out sanction was to apply. On 13 June 1995 Judge

Oppenheimer dismissed the second defendant's appeal, and she now appeals to this court.

For the reasons we have given in the main judgment this appeal is dismissed.

Grafton and ors v Ballard and anor

This is a personal injuries case from the Romford County Court. The question that arises on this appeal is whether a request for a hearing date made by a third party can be a request within r 11(3)(d) so as to prevent the sanction that would otherwise apply under r 11(9).

The defendant and the third party in one action were the drivers of two cars which collided. The plaintiffs in that first action were passengers in the third party's car. In a second action the defendant driver in the first action sued the third party driver. It is only the first action with which the court is concerned. An order was made on 30 June 1992 that the automatic directions applied to the 'main suit', ie that between the plaintiffs and the defendant; manual directions were given in relation to the third party proceedings as required by r 11(1)(p). The 'trigger date' was 7 May 1992, and the 'guillotine date' therefore 7 August 1993. On 19 March 1993 the third party's solicitors applied in the first action for an order that 'this matter be set down for trial after 56 days ...' to be heard with the second action. They also wrote to the plaintiffs' solicitors on 4 June 1993 asking them to consent to the third party's application at that stage, which was due to come on for hearing on 23 June 1993. On 15 June the plaintiffs' solicitors replied that they did consent and that their letter could be produced to the Romford County Court. In the event the third party and the defendant compromised the second action, and agreed between themselves that the hearing on 23 June 1993 should be adjourned, to which adjournment the plaintiffs' solicitors in the first action consented. In the result nothing was ever communicated to the court by anyone about the plaintiffs' views on the matter, save their consent to this adjournment.

Some six weeks after that adjournment, the guillotine date came and went without any further material developments. Seven months after the guillotine date, on 7 March 1994, the defendant applied for costs against the plaintiffs, on the ground that the action had been automatically struck out. The plaintiffs responded on 11 March 1994 by applying to restore the adjourned applications. On 30 March 1994 Deputy District Judge Perry found that the action had been struck out, refused to restore the applications, and awarded costs to the defendant. On 26 April 1994 Judge Hitching allowed the plaintiffs' appeal. The defendant now appeals to this court.

As we have said in the main judgment, the obligation is on the plaintiff to request a hearing date. This does not prevent any other party to the action applying and fixing a date, but only if a date is then fixed is the plaintiff relieved of the obligation under r 11(3)(d). If of course the plaintiff appoints another party as his agent to apply, and that is made clear in the application, a request as an agent would constitute a request by the plaintiff. Simply consenting to an application does not appoint another party an agent. It is not placing any great burden on a plaintiff to write his own letter requesting a hearing date even where another party is also applying. This case demonstrates why it is important that the obligation remains on the plaintiff to request a hearing date even if a request has been made by another party but no date has in fact been fixed. We would therefore allow this appeal.

Harding v British Airports Authority plc

This personal injuries action was commenced by default summons in the Uxbridge County Court. The defendants' solicitors delivered a signed copy of Form N9B to the court on 11 August 1993. They had ticked the box which showed that they disputed the full amount of the claim, and in answer to the question in section 4 of the form—'If you dispute the claim for reasons other than payment, what are your reasons?'—they wrote: 'Negligence, breach of statutory duty, causation, loss and damage and the Plaintiff's claim in its entirety is denied. A full defence drafted by counsel will be filed on behalf of the first and second defendants ... in due course.' Four weeks later, on 9 September 1993, they lodged a defence settled by counsel.

On 12 December 1994 the plaintiff's solicitors applied for an extension of time for 'requesting a date for trial' which, by virtue of *Ferreira v American Embassy Employees Association* [1996] 1 WLR 536 incorporated an implied request for a hearing date. On 16 December 1994 the defendants cross-applied for a declaration that the action had been automatically struck out. If the filing of Form N9B counted as the delivery of a defence for the purpose of Ord 17, r 11, then the trigger date was 25 August 1993 and the guillotine date 25 November 1994, meaning that the action had already been struck out when the plaintiff's implied request was made. Conversely, if delivery of the form did not amount to delivery of a defence, then the guillotine date was 23 December 1994, so that the application was made in time to stop the action being automatically struck out.

On 8 February 1995 Deputy District Judge Williams heard both parties' applications together, and declared that the action had been automatically struck out. However, she allowed the plaintiff to amend his application to seek reinstatement, and ordered that the action be reinstated. The defendants appealed and the plaintiff cross-appealed. On 12 April 1995 Judge Elystan Morgan allowed the defendants' appeal but dismissed the plaintiff's cross-appeal. He held that the action had been automatically struck out and he refused to reinstate it, on the grounds that the case was covered by *Rastin v British Steel plc* [1994] 2 All ER 641, [1994] 1 WLR 732, not *Williams v Globe Coaches (a firm)* [1996] 1 WLR 553, and that the plaintiff had failed to satisfy the *Rastin* threshold criteria for reinstatement. The plaintiff now appeals from Judge Elystan Morgan's order.

For the reasons we have given in the main judgment the judge was correct to hold that the guillotine date was 27 November 1994. It was not suggested that he was plainly wrong in concluding that the plaintiff had failed to show that the case had been prosecuted with reasonable diligence and accordingly the plaintiff fails to bring the case within the first of the categories for reinstatement. The plaintiff sought before us to bring himself within the second category on the grounds that he was genuinely and reasonably misled by the date on the defence settled by counsel. We are not persuaded by this argument. There had been a change of solicitors and it was not shown that the former solicitors were unaware of the true guillotine date. For the reasons stated in the main judgment, it follows that the plaintiff cannot establish that he was genuinely and reasonably misled. The appeal is accordingly dismissed.

Hume (t/a Benco & Son) v Anderton

This is a contract case from the Southampton County Court. The plaintiff's solicitor wrote to the court on 25 November 1994 requesting a hearing date, but failed to pay the fee of £50 required by the County Court Fees Order. The court wrote back on 7 December 1994 (despite having no obligation to do so) asking for

the fee to be paid, but the solicitors failed either to reply or to pay the fee. On 19 January 1995 the court wrote again with a reminder about the fee. Again, nothing was forthcoming. On 3 March 1995 the guillotine date passed. On 15 June 1995 the plaintiff finally paid the fee, but the defendant nevertheless applied on 26 June 1995 for a declaration that the action had been struck out. On 4 August 1995 Judge Rudd declared that the action had been struck out. The plaintiff now appeals from that order.

As we have indicated in the main judgment, we have considerable sympathy for the views expressed by Judge Rudd, but for the reasons we have given in that judgment, this appeal must be allowed.

Kearns v Effluent Services Ltd

This is a personal injuries case from the Liverpool County Court. The 'trigger date' was 15 March 1993, and the 'guillotine date' was therefore 15 June 1994.

On 15 March 1993 (ie right at the outset of the action) the Liverpool County Court in accordance with their practice, which is to be commended for the reasons we have given in the main judgment, initially fixed a date for hearing the whole action. That, as we see it, would have relieved the plaintiff in any event from requesting a hearing date under r 11(3)(d). On the application of the defendants dated 2 March 1993, however, it was ordered on 23 April 1993 that the issues relating to limitation should be tried as preliminary issues, that the date for trial of those issues should be in the week commencing 11 October 1993, and that discovery should be limited to those preliminary issues. It appears that the parties were not ready for that trial, and on 5 October 1993 they submitted a consent order for an adjournment and for the refixing of a date in 1994. The district judge would not deal with the matter, quite rightly, in the absence of the parties and adjourned the application for hearing inter partes to 28 October 1993. Due to a misunderstanding no order was made on 28 October 1993 relisting the matter. The case then went to sleep, with no further developments until 16 March 1995, nine months after the guillotine date, when the plaintiff applied for discovery. The defendant took the point that the action had been automatically struck out, and on 9 May 1995 District Judge Johnson held that it had been struck out. However, on 4 August 1995, Judge Marshall Evans QC allowed the plaintiff's appeal. The defendant now appeals to this court.

Various points were argued in front of the judge, including the question whether the directions that a date for the full trial should be in the week commencing 11 October 1993, fixed a date for the trial. That point was not argued before us, but it is right to say that we take the view that a date was thereby fixed. The main issue on which the appeal was argued was the effect of an application, and the order, for the trial of a preliminary issue. On that aspect it is fair to say that the issue joined in the skeleton arguments was as to whether the request for the hearing of a preliminary issue constituted a request to fix a day for the hearing. However, when it became apparent that the point on which we required assistance was on the question whether a direction that there should be a preliminary issue took the whole action outside the automatic directions, counsel for the defendants, albeit taken by surprise, made powerful and helpful submissions to the effect that such a direction should not have that effect.

As appears from the main judgment, however, the force of his submission to the effect that r 11(3)(d) referred not to a request for the hearing of a preliminary issue but to the hearing of a full trial, reinforced what seemed to us to be the correct approach, ie that once a direction is made for a preliminary issue, the

automatic directions certainly cease to apply to the action. In our view, for the reasons given in our main judgment, they would have been ousted earlier by the application for a trial of a preliminary issue. For reasons which are different from those given by the judge, we would dismiss this appeal.

Leach v Wade Heath & Co

This is a personal injuries case from the Stoke on Trent County Court. On 14 April 1993 an order was made transferring this action from the High Court to the county court. No issue has arisen as to the correct date for transfer and the 'trigger date' has been treated as 28 April 1993, and the 'guillotine date', therefore, as 28 July 1994. Prior to the transfer, however, on 15 July 1992 an order had been made by the district judge that the question of limitation be tried as a preliminary issue before the issues of 'liability and quantum', with those matters to be tried subsequently if they remained live 'as may be directed by the trial judge'. On 14 April 1993, under the order transferring the action from the High Court, it was ordered that the preliminary issue be listed for trial on the first available date.

On 21 September 1993 that issue was determined in favour of the plaintiff, but no directions were given as to the further conduct of the action, and no directions were subsequently sought by any party. On 10 March 1995 the district judge refused the defendant's application for a declaration that the action had been automatically struck out. On 28 April 1995 Judge Taylor allowed the defendant's appeal. The plaintiff now appeals to this court.

The judge decided that a request for a date for the hearing of a preliminary issue was not a request for the fixing of a date for the hearing under r 11(3)(d). There is no indication that he was asked to consider the question now raised by the appellants, namely whether once a direction is given for the trial of a preliminary issue, this takes the action outside the automatic directions. For the reasons given in the main judgment, we consider that such an order does take the action outside the automatic directions. Indeed in our view, as in *Kearns v Effluent Services Ltd* (p 172, ante) the application itself would have taken the matter outside the automatic directions. We would therefore allow the appeal, but on a basis which, so far as we can tell, was not raised before the judge.

Lee v Hampshire CC and ors

The plaintiff, who was a caretaker at Fareham Tertiary College (Fareham), commenced an action for damages for personal injuries in the Portsmouth County Court against the Hampshire County Council (Hampshire), whom he believed to be his employers, and on 8 June 1993 he obtained a judgment against them in default of defence. This judgment was set aside by consent on 3 November 1993, when the court also made an order joining Fareham as second defendants and granting the plaintiff leave to serve amended particulars of claim. In this pleading he averred that he would discontinue proceedings against Hampshire if Fareham accepted in their defence that by the operation of a new statute they were the plaintiff's employers at the relevant time. On 11 January 1994 Fareham delivered a defence accepting such responsibility, but blaming Herbert E Drew & Sons Ltd (Drew), their independent contractors, for creating the relevant hazard. At the same time they issued a third party notice against Drew. The plaintiff apparently obtained an order by consent giving him leave to join Drew as a third defendant, and on 15 September 1994 he served reamended particulars of claim, in which he adopted as part of his own case the allegations Fareham had made against Drew in the third party proceedings. On the same

date he discontinued his proceedings as against Hampshire, who had never served a defence, presumably by agreement with the plaintiff. Drew delivered its defence on 1 November 1994. During the following year, when a question arose concerning the timetable of the action, Drew contended that the action had been automatically struck out on 25 April 1995, on the basis that the trigger date was 25 January 1994, 14 days after the delivery of Fareham's defence. The plaintiff countered by applying on 21 July 1995 for a declaration that the action had not been struck out. On 3 October 1995 District Judge Baehr agreed with the plaintiff, finding that the relevant defence had been delivered on 1 November 1994, giving a trigger date of 15 November 1994 and a guillotine date of 15 February 1996. On 7 November 1995, however, Judge Shawcross allowed Drew's appeal, holding that the guillotine date was 25 April 1995. He also rejected an alternative submission by the plaintiff, which has not been pursued before us, that an implied request for a hearing date had been made before the guillotine fell.

For the reasons we have given in our main judgment, automatic directions never applied to this action at all, since the first defendants never delivered a defence. The judge was correct in holding as he did on the arguments which were raised before him, but because automatic directions never applied at all, we would allow this appeal.

Lloyds Bank plc v Gow and ors

In this action in the Slough County Court, a lender with a charge over the borrower's land sought, by means of a single county court summons (1) an order for possession of the charged land; and (2) money judgments on the personal covenants under the loan instrument and on a guarantee, both of which debts were secured by the relevant charge. It is accepted that the action was subsequently struck out automatically to the extent, if any, that automatic directions applied to it. The short point in this case is whether automatic directions did in fact apply to the debt aspect of the action (or, at least, to the claim under the guarantee), in view of the fact that CCR Ord 17, r 11(1)(i) excludes its application from actions 'for the recovery of land', without explicitly mentioning actions for debts secured upon land.

On 12 January 1995, on the plaintiff's application for directions, Deputy District Judge Goldsmith refused to make an order, on the ground that the action had been automatically struck out over a year and a half earlier. On 5 April 1995 District Judge Burgess took a different view, and on 8 June 1995 Judge Hague QC dismissed the defendants' appeal from District Judge Burgess, declaring that the action had not been automatically struck out. The defendants now appeal to this court.

For the reasons we have given in the main judgment, automatic directions did not apply to this action, and we would dismiss this appeal.

Loake v Chief Constable of the Norfolk Constabulary and anor

This action in the Bedford County Court included a claim for damages for false imprisonment. The pleadings were closed on 20 December 1993. No request for a hearing date, and no application for jury trial, were made before the guillotine date. Nevertheless, on 15 August 1995, several months after the guillotine date, Deputy District Judge Brar refused the defendants' application for a declaration that the action had been automatically struck out, on the grounds that the exclusion from the automatic directions regime of 'an action of a kind mentioned

in section 66(3) of the [County Courts Act 1984] (trial by jury)' encompassed all actions which might potentially be tried by a jury (including false imprisonment actions), irrespective of whether an application for jury trial has in fact been made in a particular case. On 20 October 1995 Mr Recorder Akast upheld the deputy district judge's order. The defendants now appeal to this court.

For the reasons we have given in the main judgment, we would dismiss this appeal.

Meon Valley Engineering Ltd v Reinforced Plastic Products Ltd

This is an appeal by the defendants from an order of Judge Galpin in the Bournemouth County Court reinstating an action which had been automatically struck out. The judge concluded that the plaintiffs had failed to prosecute the action with due diligence but nevertheless reinstated the action. It was common ground that the case did not fall within either of the categories for reinstatement discussed in the main judgment. The circumstances which led the judge to reinstate the action are summarised in the main judgment where we have considered and rejected the submission made in this case that there should be a third category for reinstatement. We should add that we have also considered in the main judgment the question of the precise date when the guillotine falls, a matter which was considered by Judge Galpin, but our conclusions in that regard do not assist the plaintiffs in this case. It follows that this appeal is allowed.

Moorlite Electrical Ltd v Cripps

This action for the price of goods sold and delivered was commenced in the Sheffield District Registry on 6 January 1993. An order that the case be transferred to the Mayor's and City of London County Court was sealed in the High Court on 27 September 1993, and the relevant documents were sent by second class post to that county court by the Sheffield District Registry on 4 October 1993. On 3 November 1993 the proper officer of the county court sent the parties notice of the transfer and wrote to the Sheffield District Registry acknowledging receipt of the documents. On 26 January 1995 the plaintiff requested a hearing date. The defendant applied for a declaration that the case had been automatically struck out, on the ground that the date of transfer was 27 September 1993, so that the guillotine date was 11 January 1995.

On 20 July 1995 District Judge Samuels refused the defendant's application, on the basis that the date of transfer was the date on which the county court issued the formal notice of transfer. On 30 August 1995 Judge Simpson dismissed the defendant's appeal. He held that the date of transfer was the date of receipt, and found as a fact that the date of receipt was 3 November 1993. Despite the lack of any explanation for the four-week delay between the date of posting and the date of receipt, the judge held that the fact that the notice of transfer and the letter acknowledging receipt of the documents from the district registry were both dated 3 November rebutted the statutory presumption that documents sent by second class post are received four working days after posting. The judge expressed himself satisfied that this solution promoted certainty for the parties, in that the only date actually notified to them was the one stamped on the notice they received. The defendant now appeals from Judge Simpson's order.

For the reasons we have given in the main judgment, the judge was correct to hold that the date of transfer was the date of the receipt of the documents by the proper officer of the county court. He was entitled to conclude on the evidence

that the documents were received on 3 November, and we would not disturb this finding. This appeal is therefore dismissed.

National Westminster Bank plc v Hurine and anor

In this action, which was transferred from the Manchester County Court to the Chester County Court, the plaintiff bank claimed against the two defendants sums totalling £131,553·85 on a loan account and £4,324 as the outstanding overdraft on a current account, together with interest. It was accepted that the second of these liabilities arose out of a regulated consumer credit agreement within the meaning of the Consumer Credit Act 1974. The first defendant, who was bankrupt, apparently played no part in the proceedings, and the second defendant delivered a defence and counterclaim in Form N9B on 4 June 1993. There were two issues in the case. The first was whether, and if so to what extent, the automatic directions regime applied, in that a small part of the claim (about 3% by value) arose out of the regulated consumer credit agreement (being an action excepted from the provisions of Ord 17, r 11 by virtue of CCR Ord 17, r 11(1)(d)). The second was whether, on the assumption that automatic directions applied to part of the claim, the issuing of the plaintiff's application for summary judgment on 23 September 1994, shortly before the guillotine fell, amounted to a request for a hearing date or ousted the automatic directions regime for some other reason. At the adjourned hearing of the plaintiff's application for summary judgment on 8 February 1995 District Judge Harrison ordered that summary judgment be entered for the plaintiff, rejecting the second defendant's argument that the action had been automatically struck out. The second defendant appealed from so much of the judgment which related to sums which did not accrue due under a regulated consumer credit agreement, but on 9 March 1995 Roy Woolley, sitting as a deputy circuit judge, dismissed her appeal on the grounds that automatic directions did not apply to the action at all. He went on to hold that if directions equivalent to automatic directions which were issued by the court of its own motion had any effect, the trigger date under those directions was 16 July 1993 and the application for summary judgment 14 months later rendered those directions no longer effective. She now appeals to this court.

For the reasons we have given in the main judgment, the judge was correct to hold that automatic directions did not apply to this action by reason of the effect of Ord 17, r 1(1)(d). He was also correct to hold that if they had applied, the issuing of the application for summary judgment would have terminated their effect, for the reasons we have also given in the main judgment, although the trigger date would in fact have been 2 July 1993, 28 days after the defence and counterclaim in Form N9B was delivered. In the circumstances we do not have to go on to consider a further point, which was not considered in argument at all, which might have arisen out of the failure of the bankrupt first defendant to deliver a defence at all, a very difficult question we have also discussed in the main judgment.

The appeal will therefore be dismissed.

Norman v Jewson Ltd

In this personal injuries case in the Cambridge County Court the guillotine date was 6 July 1994. Oblivious of the fact that the action had been automatically struck out, the plaintiff's solicitors subsequently applied for a new set of manual directions, including a direction that the matter be set down on both parties filing certificates of readiness. The defendant's solicitors, equally oblivious of the fact

that the guillotine date had passed, indorsed their consent on the application, and on 26 September 1994 District Judge Barker duly made a consent order in the terms sought. A reamended statement of claim (sic) was served, and witness statements were exchanged a month later in pursuance of this order. On 28 November 1994 the defendants' solicitors contended for the first time that the action had been struck out, and on 20 March 1995 District Judge Temple made an order to this effect. On 3 October 1995 Judge Mellor allowed the plaintiff's appeal on the basis that by analogy with *Ferreira v American Embassy Employees Association* [1996] 1 WLR 536 District Judge Barker's order was to be treated as having the effect of reinstating the action pursuant to an implied request to that effect. He went on to refuse a very belated application by the defendant for leave to appeal out of time against that consent order. The defendant now appeals from both these decisions. Counsel for the plaintiff concedes, for his part, that if the *Rastin* approach to reinstatement had been adopted, then the action would have stood no prospect of being reinstated.

For the reasons we have given in the main judgment, we consider that the judge was wrong to hold that the consent order had the effect of reinstating the action. The action therefore remained struck out, and was not reinstated. We will therefore allow the appeal and reinstate the order of District Judge Temple. We would add, for the sake of completeness, that the judge's refusal to grant leave to appeal against District Judge Barker's order so long after it was made was clearly right, but this consideration does not, of course, affect the outcome of the appeal, since the action stands struck out.

Pannell v Tesco plc

This is a personal injuries case from the Brighton County Court. The pleadings closed on 30 July 1992. The guillotine date would therefore, in the ordinary course of things, have been 30 October 1993. However, on 27 October 1993 Deputy District Judge Radcliffe ordered 'that the time limit for setting the action down for trial be extended until 29th October 1994'. On 4 October 1994 the plaintiff applied ex parte for the time limit for setting down the action under the automatic directions to be extended by six months to 29 April 1995. On 14 October 1994 Deputy District Judge Thompson dealt with that application by ordering that 'the time limit for setting down the action be extended by a period of four months from today'. On 21 October 1994, when the defendant's solicitors had said that they were considering an appeal from that order, the plaintiff's solicitors asked them to confirm as a matter of urgency whether such an appeal would be launched, on the ground that 'if you were successful in appealing against the order and your appeal is heard after the 29 October there is clearly the prospect that our client will be prejudiced in that our claim will be effectively struck out'. On 22 February 1995, four months and eight days after the order of 14 October 1994, the plaintiff wrote to the court requesting that the case be 'set down'. On 7 March 1995 the court wrote back to say that the action had been automatically struck out. On 10 March 1995 the plaintiff applied for a declaration that the action had not been struck out or, in the alternative, an order reinstating it. On 2 May 1995 Deputy District Judge Peat refused both aspects of this application, finding in relation to reinstatement that, applying *Rastin*'s case, the action had not been conducted with due diligence. On 7 June 1995 Judge Viner QC dismissed the plaintiff's appeal. The plaintiff now appeals from Judge Viner's order.

For the reasons given in the main judgment this appeal is allowed, since the effect of Deputy District Judge Thompson's order was that the guillotine date was now nine months after the expiry of the four-month extension ordered. We were wholly unpersuaded by the submission that the circumstances were such that it would be unjust to allow the plaintiff to rely on this point.

Shaw v Translink Joint Venture

This personal injuries action was originally commenced in the Romford County Court by default summons on 8 December 1992. With the summons the court sent the defendant's solicitors Form N9, which is not the form prescribed for use in default actions, and on 23 December 1992 the defendant's solicitors wrote to the court, enclosing this form duly completed. They observed that this was the only form which had been served with the summons, and said that the defence would follow in due course. The form was not enclosed with the papers when the action was transferred to the Folkestone County Court, and it has now been lost. A photocopy of the front side of the form has survived, from which it is clear that the defendant's solicitors did tick the relevant box to indicate that they did not admit any of the claim. There is no surviving copy of the reverse side, on which the question 'What are your reasons for disputing the claim?' would have appeared. This form was received by the county court on 29 December 1992, but it did not send out any Form N450 as a consequence.

The defendant's litigation manager has sworn an affidavit in which he says that in a totally separate action in which he filed a Form N9 in the same county court some three months later, he answered the relevant question on the second page with the words 'defence to follow'. In that unrelated case, the proper officer of the court wrote to him stating that the form N9 in that case 'constitute[d] a defence, and accordingly automatic directions were issued. We await the filing of your full defence in due course'.

In the present case there followed correspondence between the parties' solicitors in which a short extension of time for serving the defence was granted, and the defendants' solicitors then had to issue an application to the court for a further extension of time. On 4 February 1993, however, before that application was heard, they filed and served a defence settled by counsel. If Form N9 counted as the defence, then the trigger date was 12 January 1993, and the guillotine date 12 April 1994. If the formal defence settled by counsel counted as the defence, then the guillotine date was 18 May 1994. The plaintiff's request for a hearing date was made on 22 April 1994. The district judge held that Form N9 did not constitute a defence, and that the action had, accordingly, not been struck out. On 28 April 1995, however, Judge Ellison Nash allowed the defendant's appeal on this point, and, on 10 August 1995, Judge Peppitt QC refused the plaintiff's application to reinstate. The plaintiff appeals from the orders of both judges.

For the reasons we have given in the main judgment, Judge Ellison Nash was correct to hold that the guillotine date was 12 April 1994. On the question of reinstatement, we are not persuaded that Judge Peppitt QC was plainly wrong in concluding that the plaintiff had not prosecuted the case with reasonable diligence and so fell outside the first category. As to the second category, the judge described the failure to apply for a date as 'excusable'. The relevant guideline, however, is whether in all the circumstances the plaintiff was genuinely and reasonably misled by the service of the defence settled by counsel into believing that the guillotine date was later than in fact was the case. We have therefore been entitled to consider the matter afresh, and we conclude that he has

brought his case within this guideline. Accordingly the appeal from the order of Judge Nash is dismissed and that from the order of Judge Peppitt QC allowed.

Singh v Joshi

In this action in the Willesden County Court, a landlord sued his tenant in August 1992 for possession, arrears of rent, mesne profits and damages for wrongful failure to pay utility bills. The tenant promptly delivered a defence and counterclaim, seeking recovery of overpaid rent and damages for breach of the covenant to repair. On 5 November 1993 an 'unless' order was made, requiring the plaintiff to file a defence to counterclaim and list of documents within 21 days. The plaintiff did not comply with this order, and in due course the plaintiff's claim was struck out and the defendant was permitted to enter judgment on his counterclaim. On 4 August 1994 District Judge Morris ordered: '(1) judgment set aside (2) reply to defence and defence and counterclaim 7 days (3) Directions as Order 17 rule 11 to run from 11.8.94.' The reply and defence to counterclaim were duly served, but the action went back to sleep for another year and a half. On 3 May 1996, upon the defendant's application, District Judge Steel ordered that unless the plaintiff serve his witness statements at 12 noon on 17 May 1996 at the defendant's solicitor's office, the plaintiff be debarred from calling witnesses. The plaintiff's solicitors wrote on 10 May 1996 complaining that they had just received a copy of District Judge Steel's order that day, and seeking a sealed copy of the order and an extension of time until 28 May 1996. The plaintiff applied for an extension of time, which District Judge Steel refused on 13 June 1996. The plaintiff appealed to Judge Krikler and at the same time sought a declaration that the counterclaim had been automatically struck out, on the ground that no request for a hearing date had been made within 15 months of 11 August 1994, the trigger date mentioned in District Judge Morris's order of 4 August 1994. On 8 July 1996 Judge Krikler refused this application, but allowed the plaintiff's appeal against District Judge Steel's order, granting the plaintiff 14 further days for the filing of witness statements. Part of the grounds relied on by the judge appeared to have been that that the effect of District Judge Morris's order was to reinstate the plaintiff's claim. The plaintiff now appeals to this court.

For the reasons given in the main judgment we do not consider that there was any power to apply the automatic directions to the counterclaim, whether the plaintiff's claim was reinstated or not. Moreover it is impermissible for the reasons we have explained even to use the reference to the automatic directions as shorthand to bring into play directions equivalent to the directions set out in r 11(3). In our view the judge was accordingly right in the view he took. We consider that the claim of the plaintiff was not in fact reinstated, but the history was not put before the judge with great clarity, which was why he may have taken a different view. In any event what appears to have been his initial view that the automatic directions simply cannot be applied to a counterclaim, was right, and this appeal is dismissed.

Smith v Bovis Construction Ltd

This is a personal injuries case from the Uxbridge County Court. Pleadings were deemed to be closed on 2 June 1993, with the consequence that the guillotine date would ordinarily have been 2 September 1994. On 7 February 1994 District Judge Jolly ordered, upon the plaintiff's application, that '[t]he time be extended for setting this matter down for a hearing up to & including 27th May

1994'. On 8 August 1994 District Judge Henson made a consent order that 'the time for setting this matter down for trial be extended up to 30 September 1994 inclusive as leave is being sought from the Companies Court to continue proceedings against the second defendants, who are in liquidation'. On 8 September 1994 the second defendant company were dissolved. No request for a hearing date having been made by 30 September 1994, the defendants applied for a declaration that the action had been automatically struck out. On 6 March 1995 District Judge Henson refused this application, declaring that the action had not been automatically struck out. On 1 May 1995 Judge Bishop dismissed the defendants' appeal. The defendants now appeal to this court.

For the reasons given in the main judgment this appeal is dismissed. The effect of the order of 8 August 1994 was that the guillotine date was nine months from 30 September 1994.

Utting v McMurdie and anor

In this action conducted by a litigant in person in the Brentford County Court, the district judge made an order, before the defendants had even delivered a defence, stating 'Directions in the same form as Order 17, r. 11 to apply (copy attached)'. Automatic directions would not otherwise have applied to the case, since it contained a claim for recovery of land, and therefore fell within a category excluded by CCR Ord 17, r 11(1). It is admitted that, if this order validly applied the automatic strike-out sanction to the case, then the guillotine date passed without any request for a hearing date being made, with the consequence that the action was automatically struck out. The only question, therefore, is whether the order did validly introduce the strike-out sanction. On 10 October 1996 District Judge Henson held that the action had not been struck out, following Judge Oppenheimer's earlier decision in *Eagle Star Insurance Co Ltd v Karasiewicz* (p 169, ante). On 21 November 1996 Judge Oppenheimer dismissed the defendants' appeal against District Judge Henson's decision, reaffirming his own earlier decision in *Eagle Star*. The defendants now seek leave to appeal from Judge Oppenheimer's order.

For the reasons given in the main judgment this application is refused.

Orders accordingly.

Mary Rose Plummer Barrister.

Greig Middleton & Co Ltd v Denderowicz Olaleye-Oruene v London Guildhall University and other appeals

COURT OF APPEAL CIVIL DIVISION
SAVILLE, BROOKE AND WALLER LJJ
22 MAY, 4 JULY 1997

COURT OF APPEAL, CIVIL DIVISION
BROOKE AND WALLER LJJ
22 MAY, 4 JULY 1997

County court – Practice – Pre-trial review – Automatic directions – Automatic strike-out of action – Defendant admitting part of claim – Whether reference to arbitration by the court – Whether automatic timetable applicable – Whether action automatically struck out – CCR Ord 9, r 3(6), Ord 17, r 11(1)(c)(o), Ord 19, r 2(3).

Court of Appeal – Time for appeal – Extension of time – Discretion – Exercise of discretion – Factors to be considered – Change in law since losing party decided not to appeal decision at first instance – Principles to be applied when deciding whether to grant extension of time for appealing.

In the first case, the plaintiffs brought an action in the county court against the defendant claiming over £10,000. The case was subsequently transferred to another county court, which erroneously issued a notice stating that the action had been referred to arbitration under what was now CCR Ord 19, r 3(1) and that there would be a preliminary hearing. Thereafter, the court issued a further notice stating that the automatic directions under Ord 17, r 11 applied and replaced the preliminary hearing. After the proceedings began, the defendant sent a cheque to the plaintiffs for the amount he admitted was due, which they accepted as a payment on account, but failed to notify the proper officer that the amount had not been accepted as satisfying the claim as required by Ord 9, r 3(6). The deputy district judge later decided that the action had not been automatically struck out and his decision was affirmed on appeal. The defendant appealed to the Court of Appeal. Following a change in the law in Ord 17, r 11 cases, the plaintiffs sought to uphold the judgment on the additional ground that the action fell outside the provisions of Ord 17, r 11, because: (i) r 11(1)(o) excepted 'an action to which Ord 9, r 3(6) applies (admission of part of the plaintiff's claim)'; and (ii) r 11(1)(c) excepted proceedings referred to arbitration under Ord 19 and such a reference had to have been made by the district judge pursuant to Ord 19, r 3(1).

In the second case, the plaintiff brought an action against the defendant alleging racial discrimination. On 24 September 1992 the district judge directed that the trial be set down on a joint certificate of readiness signed by both parties. The plaintiff's subsequent application to set down the action for trial on 2 August 1994 was successfully opposed by the defendants on the ground that the action had been automatically struck out, and on 16 May 1995 the district judge's decision to that effect was upheld on appeal. Thereafter the plaintiff instructed

her present solicitors, who, following a change in the law, applied for legal aid, which was later granted for the purpose of taking counsel's opinion as to whether the order of 24 September had taken the action outside the automatic directions under Ord 17, r 11. In August 1996, some 15 months after the decision in the action, the plaintiff applied for leave to appeal.

Held – (1) In order for Ord 19, r 3(6) to apply, two conditions had to be satisfied, namely that the defendant admitted part of the plaintiff's claim and that the plaintiff notified the proper officer that he did not accept the amount admitted. In the first case, however, the proceedings did not become 'an action to which Ord 9, r 3(6) applies' because the plaintiffs had failed to notify the proper officer that they did not accept the defendant's cheque as satisfying the claim. Moreover, the provision in Ord 19, r 3(1) that proceedings in which the sum claimed exceeded a specified limit should 'stand referred for arbitration by the district judge' identified the person who was to arbitrate, not the person who was to refer the matter to arbitration; it also made it clear that, provided the proceedings fell within the stipulated description, the reference to arbitration was automatic. Since the amount claimed in the instant case exceeded the specified limit, the proceedings did not fall within the stipulated description and therefore there could be no automatic reference to arbitration. Further, the notice issued by the county court was not a notice of any judicial determination that the matter should be referred to arbitration; it was merely an error on the part of an officer of the court. It followed that the appeal would accordingly be allowed (see p 186 *d f j* to p 187 *e*, post).

(2) An application for an extension of time for appealing a decision at first instance, following a change in the law in relation to Ord 17, r 11, was likely to be successful on the basis of special circumstances where the applicant could show that he did not appeal immediately in reliance on reasonable advice and that if an extension of time for appealing were granted his appeal was likely to succeed. However, an extension of time for appealing would not be given automatically in Ord 17, r 11 cases following a change in the law where: (a) there was an inexcusable delay in applying for an extension of time; (b) the respondent could demonstrate (i) that any third party might be affected by the reopening of the litigation, or (ii) that he or his insurers had acted reasonably on the basis that the claim was at an end or if prejudice had been suffered in any other way; or (c) the plaintiff had actually pursued a second action, causing the respondent to incur costs defending it. In the result, the application in the second case would be dismissed in view of the plaintiff's delay in issuing the application for leave (see p 195 *b* to p 196 *b j* to p 197 *b*, post).

Notes

For pre-trial review, see 10 *Halsbury's Laws* (4th edn) paras 235–239.

For extension of time for appealing, see 37 *Halsbury's Laws* (4th edn) para 684, and for cases on the subject, see 37(3) *Digest* (Reissue) 163–167, *3822–3845*.

Cases referred to in judgment

Bannister v SGB plc [1997] 4 All ER 129, CA.

Berkeley, Re, Borrer v Berkeley [1944] 2 All ER 395, [1945] Ch 1, CA.

Brett v Northern Foods Ltd [1997] CA Transcript 948.

Bourne v British Telecommunications plc (7 May 1997, unreported), CA.

Craig v Phillips (1877) 7 Ch D 249, CA; *affg* (1876) 3 Ch D 722.

Dennis (a bankrupt), Re [1994] CA Transcript 158.
Downer & Downer Ltd v Brough, Protim Services Ltd v Newcomb [1996] 1 WLR 575, CA.
Edmondson v Scottish and Newcastle Breweries plc (1997) Times, 21 June, [1997] CA Transcript 952.
Esdaile v Payne (1889) 40 Ch D 520, CA.
Ferreira v American Embassy Employees Association [1996] 1 WLR 536, CA.
Khela v Pone [1997] CA Transcript 1253.
Norwich and Peterborough Building Society v Steed [1991] 2 All ER 880, [1991] 1 WLR 449, CA.
Noviello v Ele International Ltd [1997] CA Transcript 265.
Pearson v Export Packaging Services (14 May 1997, unreported), CA.
Property and Reversionary Investment Corp Ltd v Templar [1978] 2 All ER 433, [1977] 1 WLR 1223, CA.
Rajah v Garner [1997] CA Transcript 811.
Rastin v British Steel plc [1994] 2 All ER 641, [1994] 1 WLR 732, CA.
Sadiq v London Buses Ltd [1997] CA Transcript 264.
Seagaram v Grant [1996] CA Transcript 1878.
Sebag-Montefiore, Re, Sebag-Montefiore, v Alliance Assurance Co Ltd [1944] 1 All ER 672, [1944] Ch 331.
Sharma v Knight [1986] 1 WLR 757, CA.
Smithson v Palmer & Harvey Ltd (15 May 1997, unreported), CA.
Tredgold, Re, Midland Bank Executor and Trustee Co Ltd v Tredgold [1943] 1 All ER 120, [1943] Ch 69.
Twycross v Grant (1877) 2 CPD 469, CA.
United Scientific Holdings Ltd v Burnley BC [1977] 2 All ER 62, [1978] AC 904, [1977] 2 WLR 806, HL.
Van Stillevoldt (C M) BV v El Carriers Inc [1983] 1 All ER 699, [1983] 1 WLR 207, CA.
Ward v James [1965] 1 All ER 563, [1966] 1 QB 273, [1965] 2 WLR 455, CA
Wigfull (J) & Sons Ltd v J Jackson & Son Ltd [1916] 1 Ch 213; *application for leave to appeal dismissed* sub nom *Re J Wigfull & Sons' Trade Marks* [1919] 1 Ch 52, CA.
Williams v Globe Coaches (a firm) [1996] 1 WLR 553, CA.

Interlocutory appeal and application

Greig Middleton & Co Ltd v Denderowicz

The defendant, Napthali Denderowicz, appealed with the leave of a single Lord Justice, from the decision of Judge Cartlidge on 14 March 1995 dismissing the defendant's appeal from the decision of Deputy District Judge Dodds in the Gateshead County Court on 1 February 1995 whereby he held that the action brought by the plaintiffs, Greig Middleton & Co Ltd, against the defendant claiming some £10,000 in relation to transactions they had handled for him on the Stock Exchange had not been automatically struck out. The facts are set out in the judgment of the court.

Olaleye-Oruene v London Guildhall University

The plaintiff, Taiwo Olaleye-Oruene, applied for leave to appeal from the decision of Judge Quentin Edwards QC on 16 May 1995 upholding the decision of District Judge Litchfield in the Central London County Court on 17 March 1995 that her action against the defendants, London Guildhall University, alleging racial discrimination had automatically been struck out. The facts are set out in the judgment of the court.

Mr Denderowicz appeared in person.
Mark James (instructed by *Simmonds Church Smiles*) for Greig Middleton & Co.

William Panton (instructed by *Moss Beachley & Mullem*) for Ms Olaleye-Oruene.
Thomas Linden (instructed by *Ashurst Morris Crisp*) for the university.

Cur adv vult

4 July 1997. The following judgment of the court was delivered.

SAVILLE LJ.

1 *Introduction*

1.1 This is the judgment of the court, to which all three members of the court have contributed equally. We were invited to sit together for seven weeks after Easter this year in order to dispose of more than 100 appeals or applications for leave to appeal which had accumulated in connection with the operation of CCR Ord 17, r 11. At the end of the third week of this period we gave a composite judgment entitled *Bannister v SGB plc* [1997] 4 All ER 129 in which we restated the existing law and resolved a large number of outstanding issues when deciding 19 appeals and two applications of this kind. Copies of our judgment in *Bannister* were sent to all the parties in the outstanding appeals and applications, and as a result, a large number of them were resolved by agreement without the need for a court hearing. In order to dispose of the remainder, we sat for the next 3½ weeks in a series of two-judge divisions of the court, mainly consisting of Brooke and Waller LJJ. On 22 May we reconstituted ourselves as a three-judge division to hear the three remaining cases in our list. In one of these cases the appeal as against one of the defendants has now been resolved without any need for a formal judgment, but because a novel point was suddenly being taken for the first time as against the other, we adjourned that part of the application in order to hear argument from both sides. Two of us (Brooke and Waller LJJ) have now heard argument inter partes in that case. This judgment contains our judgments on the two cases we have decided as a three-judge court, and some additional comments which are designed to take further forward the effort we undertook in our judgment in *Bannister*, in order to make it easier for judges and practitioners to operate this difficult rule.

1.2 These last three cases were selected for special treatment because they raised points on which we were able to reconsider certain obiter dicta contained in our judgment in *Bannister*. The present judgment affords us the opportunity of correcting or clarifying those points. Two of them also raise an important new issue, following *Bannister*, in relation to cases where applicants are seeking to appeal out of time. This relates to the proper approach the court should adopt where such applications are lodged out of time because the law has now been authoritatively held to be different from what it was thought to be when the losing party originally decided not to appeal against a judgment. Brooke and Waller LJJ had already heard, but reserved judgment in, four other applications of this type. In this judgment of the full court we will therefore state the principles which should be followed, and we will then go on to apply them to the application we have decided as a three-judge court in which these issues arose.[a]

1.3 We authorised two versions of our judgment in *Bannister* to be published, one in hard copy transcript form and one on the Internet. Because the page numbering of these two versions differed and because those who downloaded

the judgment from the Internet are likely to have different paging systems, we have inserted paragraph numbering into the main text of the original judgment (as opposed to its schedules).[b] It also seemed to us that it would be very much more convenient if we were to incorporate into the original text of our judgment the corrections and clarifications we have mentioned, and we have directed that it is this revised version of our judgment in *Bannister*, as clarified and corrected, which should appear in any official law report. We have also directed that the text of the judgment which currently appears on FELIX, the judges' electronic communications system, and on the Internet on the website of the Lord Chancellor's Department should be replaced by this revised version, and copies of this revised version should be sent to court administrators for distribution to judges as before. In addition, this judgment should itself be distributed on FELIX and the Internet, and to court administrators for distribution to judges.

1.4 We also believed that it would be helpful to practitioners if we were to include in our present judgment a summary of the new points decided by two-judge divisions of this court during the four weeks which followed our judgment in *Bannister*. Most of the cases they heard raised no new points of general interest, but a few of them did, and we are including a summary of these in the final part of this judgment.

1.5 We have accordingly designed the present judgment along the following lines. In sections 2 to 5 we will clarify or correct some of the things we said in our judgment in *Bannister*. In section 6 we will give our judgment in *Greig Middleton & Co Ltd v Denderowicz*. In section 7 we will state the general principles this court will apply when it considers an application to extend the time for appealing in cases arising under Ord 17, r 11 where there has been an authoritatively stated change in the law since the date of the judgment now under challenge. In section 8 we will apply those principles to *Olaleye-Oruene v London Guildhall University*. In section 9 we will summarise the new points that have been decided by two-judge divisions of the court since *Bannister*.[c]

[The court then set out in sections 2 to 5 the amendments to their judgment in *Bannister* [1997] 4 All ER 129, which is reported as revised, and continued:]

6 Greig Middleton & Co Ltd v Denderowicz

6.1 In this action, started in the Westminster County Court, the plaintiffs, who are stockbrokers, claimed over £10,000 from one of their customers in relation to transactions they had handled for him on the Stock Exchange. The defendant completed Form N9B in which he admitted that £204·50 was owing to the plaintiffs, but he otherwise denied the claim and stated that a fully pleaded defence was to follow. It was common ground that this form was received by the court by, at the latest, 30 April 1992.

6.2 The case was transferred to Gateshead County Court under Ord 9, r 2(8). On 15 May 1992 that court erroneously issued a notice to the effect that the action had been referred to arbitration under Ord 19, r 2(3) (whose current, amended, equivalent is Ord 19, r 3(1)) and that there would be a preliminary hearing on 14

a Annexes to this judgment of the reserved judgments of Brooke and Waller LJJ in the four other cases to which the court referred, and also their judgment in the case which was adjourned on 22 May for an inter partes hearing do not call for report.

b The schedule to the judgment does not call for report.

c The annex to this judgment setting out the reserved judgments of Brooke and Waller LJJ in the outstanding cases of *Cosshall v Harris*, *Kavia v Stavrinos*, *Anderson v Glyde* and *Raven v Curry*, and their reserved judgment in *King v C H Financial Services* does not call for report.

July. Shortly afterwards the court issued a further notice to the effect that the automatic directions applied and that these replaced this preliminary hearing. On 23 July the defendant delivered a defence settled by counsel. a

6.3 There then followed a long history of applications to the court. For reasons that will become apparent it is not necessary to go through this history. Suffice it to say that on 1 February 1995 Deputy District Judge Dodds decided that the action had not been automatically struck out, on the grounds that the plaintiffs had applied for an extension of time before the guillotine date. The defendant unsuccessfully appealed to Judge Cartlidge and now, with the leave of a single Lord Justice, appeals to this court. b

6.4 In the light of our decision in *Bannister*, the appeal was resisted on only two grounds.

6.5 First it was argued that the part admission in Form N9B (which is to be treated as the defence for the purpose of calculating the trigger date (see *Bannister* para 6.8) meant that the action fell outside the provisions of Ord 17, r 11, since r 11(1)(o) excepts from that rule 'an action to which Order 9, rule 3(6) applies (admission of part of plaintiff's claim)'. c

6.6 Order 9, r 3(6) on its face applies 'where the defendant admits part of the plaintiff's claim and the plaintiff notifies the proper officer that he does not accept the amount admitted'. In that event the rule prescribes an automatic transfer to the defendant's home court and a special procedure for a pre-trial review or the fixing of a day for the hearing of the action. This is the reason why, when the paragraph applies, the automatic timetable in Ord 17, r 11 is expressly displaced. In its context the paragraph is dealing with a case where the plaintiff is not prepared to accept an admitted sum in full satisfaction of his claim, in contrast to the earlier parts of Ord 9, r 3, which deal with cases where the plaintiff is so satisfied. d e

6.7 In the present case the defendant sent a cheque to the plaintiffs for the amount he admitted was due shortly after the proceedings began. They accepted this as a payment on account, but they failed to notify the proper officer that the amount was not accepted as satisfying the claim. In those circumstances the proceedings did not become 'an action to which Order 9, rule 3 (6) applies' for the simple reason that one of the two conditions for the application of this paragraph was not fulfilled (see, now, para 16.7 of the revised version of *Bannister*). f g

6.8 The plaintiffs' second ground for resisting the appeal was that the matter had been referred to arbitration by the court. This meant, they said, that the action fell outside the provisions of Ord 17, r 11, being 'proceedings which are referred for arbitration under Order 19' (see r 11(1)(c) for the relevant exception).

6.9 Order 19, r 2(3), as it then read, provided that any proceedings in which the sum claimed or amount involved did not exceed £1,000— h

> 'shall stand referred for arbitration by the district judge upon the receipt by the court of a defence to the claim, but the district judge may, on the application of any party, refer the proceedings for arbitration by the judge or by an outside arbitrator.' j

6.10 The argument advanced to us was to the effect that this paragraph (now to be found in Ord 19, r 3(1) but with the higher limit of £3,000) required the district judge to refer the matter to arbitration, and that this must have happened in the present case, so that there was by judicial act a reference to arbitration under Ord 19, r 2(3), which accordingly took the action out of Ord 17, r 11.

6.11 The short answer to this argument is that the words 'the district judge' identify the person who is to arbitrate, not the person who is to refer the matter to arbitration. Were this not so, then the rule would not identify the arbitrator at all. The words 'shall stand for arbitration' make it clear that provided the proceedings fall within the stipulated description, the matter will be arbitrated by the district judge without the need for an order to that effect, unless the district judge refers the proceedings to another arbitrator. In other words, in such cases the reference to arbitration is automatic, although later parts of Ord 19, r 2 (as it then was) made provision for such a reference to be rescinded in certain circumstances.

6.12 In the present case the proceedings did not fall within the stipulated description, since the amount claimed was in excess of £1,000. Accordingly, there could be no automatic reference to arbitration. The notice issued by the county court was not notice of any judicial determination that the matter should be referred to arbitration. It was simply an error on the part of an executive officer of the court who for some reason thought that there had been an automatic reference, an error which was corrected a few days later. It was not, and could not be, suggested that such an error could have the effect of referring the action to arbitration, whether under r 2(3) or otherwise. It follows that these proceedings were not referred for arbitration under Ord 19, so that the action was not excepted for this reason from Ord 17, r 11.

6.13 The judge considered that the action had not been automatically struck out for reasons which cannot now be sustained, as the plaintiffs accepted. Since we have rejected the only two grounds on which the plaintiffs now seek to uphold the judge's judgment, it follows that this appeal is allowed.

7 Principles relating to extensions of time for appealing following a change in the law in Ord 17, r 11 cases

7.1 In *The Supreme Court Practice 1997* vol 1, para 59/4/4 it is said, correctly, that it is entirely in the discretion of the court to grant or refuse an extension of time. Some of the decided cases which touch on different aspects of the exercise of this discretion may be helpful (subject to what we say below) in identifying the principles which the court should apply on an application to extend time, so as to bring about a measure of consistency. As the note says, the factors which are normally taken into account are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appeal is extended; and (4) the degree of prejudice to the potential respondent if the application is granted. The original modern authority for these propositions is *C M Van Stillevoldt BV v El Carriers Inc* [1983] 1 All ER 699, [1983] 1 WLR 207, to which we will refer again below. The point we wish to emphasise at this stage is that the extent to which a defendant may be entitled to rely on the fact that an appeal is now to be reopened will depend on the facts of the individual case. If a decision has been made not to appeal, and the defendant is told of this, the fact that he may later have to face an appeal that he thought was not to be pursued is a factor of considerable weight to put in the balance in his favour.

7.2 We are here concerned with the exercise of the court's discretion in relation to granting an extension of time for appealing where, following a decision at first instance, the applicant originally decided not to appeal. In each of the cases we have had to consider, either as a two-judge division or a three-judge division, the law has subsequently been clarified so as to demonstrate either that the original ruling was wrong or, at the very least, that there is a strong

argument that it was wrong. We have therefore been referred principally to a line of cases concerned with applications to extend time for appealing following a later decision of an appellate court which demonstrates that the first decision was wrong, or may well have been wrong. It should be remembered in this context that judicial attitudes can change over the years, and at the end of the day each case will depend on its own facts. We would deplore the citation of authority designed to show the way in which other courts in the past have carried out the necessary balancing exercise on different facts, since the facts in no two cases are the same. Statements of principle are, however, important, and we are therefore setting out below the way in which this court has developed the relevant principles over the years.

7.3 In *Craig v Phillips* (1877) 7 Ch D 249 in the days when 12 months were allowed for an appeal against a final judgment, the plaintiff was seeking leave to appeal from a decision given against him on 4 April 1876. That was a final judgment disposing of the whole suit, and as Jessel MR put it (at 251):

> 'No fund remained in Court, there were no accounts to be taken, the whole litigation was at an end. If the Plaintiff meant to appeal, his appeal ought to have been brought within a year ... Thereupon, subject to the judicial discretion of the Court of Appeal to enlarge the time for appealing, the right of the Defendant under the judgment of the Vice-Chancellor was complete.'

7.4 A judgment was then given in the Court of Appeal in a different case on 2 June 1877 (*Twycross v Grant* 2 CPD 469) in which one member of the court, Lord Cockburn CJ, described the judgment of Bacon V-C in *Craig v Phillips* (1876) 3 Ch D 722 as erroneous (see at 539). After referring to the lack of unanimity in that court, Jessel MR then said (7 Ch D 249 at 251–252):

> 'But even going further, and supposing that there had been an unanimous opinion of the Court of Appeal in accordance with the view of the Lord Chief Justice, I think it would have made no difference with regard to the present application. It would only have come to this, that more than a year after the decision in *Craig* v. *Phillips* the Court of Appeal had come to a different decision on a vexed point of law. In my opinion that is not sufficient ground, in the absence of very special circumstances, to deprive a man of a judgment which has been given in his favour. I can understand a different view being taken in cases where the time limited for appeal is very short, as in appeals under the Winding-up Acts, and where accounts are still pending and the assets undistributed; in such a case a creditor whose proof had been refused might be allowed further time to appeal; but the same considerations do not apply to a case like the present. There are no special circumstances at all in this case; and it does not appear to me that the rights of the Defendant ought to depend on the accident that this vexed point of law was differently decided after the expiration of the year allowed for appealing.'

7.5 At the end of his judgment he also referred to the plaintiff's delay following the judgment of the Court of Appeal, and said (at 252):

> 'That is sufficient to dispose of this application. But I think it ought also to fail on the ground of the applicant's delay in making it. The judgment in *Twycross* v. *Grant* was delivered in June, 1877, after the year for appealing had already expired. That judgment was not delivered secretly or in an

> unimportant case. On the contrary, it was immediately reported in the public journals, and it must have been known to every member of the profession who took an interest in the subject. I cannot therefore leave out of consideration the time which elapsed between the delivery of that judgment and the present application. I do not think the Plaintiff has shewn due diligence in coming to the Court on the 15th of December, on account of a decision delivered on the 2nd of June; and of course any person who comes to ask the Court to relax the provisions of the rules in his favour, must shew great diligence, and not unnecessary delay, in doing so.'

7.6 Baggallay and Thesiger LJJ agreed with him, and both used the language of the necessity for 'very special circumstances' to be shown before exercising the court's judicial discretion to enlarge the time.

7.7 In *Esdaile v Payne* (1889) 40 Ch D 520 the situation, in broad terms, which faced this court was that some defendants had appealed against the decision of the judge at first instance and others had not. Those that appealed lost in the Court of Appeal but then succeeded in the House of Lords. Following their success in the House of Lords, some of the others sought leave to appeal. Cotton and Bowen LJJ originally granted leave on the basis that it would be most unjust for the defendants who had not appealed to have to pay the tithes which were the subject of the litigation when in that very litigation it had been decided that they were in fact not so liable. But before their order was drawn up, the matter was re-argued when a further defendant who had not so far appealed applied for leave, and when some further evidential material had become available. This new evidence demonstrated that third parties had probably acted vis-à-vis the defendants who had not appealed on the basis that they were not going to appeal. This possible change of circumstance was enough to lead the court, now composed of Cotton, Lindley and Lopes LJJ, to refuse leave to appeal. In refusing leave, however, Cotton LJ said he was not sure that the first decision was right, now that fuller argument had been heard, and Lindley LJ added (at 534–535):

> 'It may appear harsh that these Defendants should be bound by a decree which the House of Lords has decided to be wrong, but the more I consider the matter, the more I think it just. Suppose an action for tithes brought against six holders of property, and a decree made against them all. Five out of the six submit and allow the time for appealing to expire. It is important that a state of things so brought about should not lightly be disturbed. The sixth Defendant is bolder; he appeals; and at last he obtains from the House of Lords a decision in his favour. The other five then naturally wish to appeal. What ought to be done? In my opinion it is for the interest of the public that litigants should know as soon as possible when certainty has been reached, and that if people have deliberately elected to let the time for appealing go by, the Court should not give them leave to appeal without special circumstances. I make these remarks because I wish that there should be no doubt as to the general principle.'

7.8 In *J Wigfull & Sons Ltd v J Jackson & Son Ltd* [1916] 1 Ch 213 Neville J at first instance had rectified the register, removing the respondents' trade mark. Three years later the Court of Appeal dissented in a different case from the view that that judge had adopted in relation to the construction of the Trade Marks Act 1905. The plaintiffs then applied for leave to appeal out of time (see sub nom *Re J Wigfull & Sons' Trade Marks* [1919] 1 Ch 52). Although the earlier cases were

cited to him, Swinfen Eady MR (at 59) stated the relevant test in the following simple terms: '... the Court has power to enlarge the time for appealing if it is just that, under the circumstances, an order enlarging the time should be made.'

7.9 He then referred to the fact that others might have used the mark in reliance on Neville J's original decision over the three years since that decision was made, and to the fact that the only excuse for not appealing at the time was that a relevant decision of the Court of Appeal had been given later. The court refused leave, Eve J (at 60) referring to the well-settled rule that 'the mere fact that a subsequent opinion of this Court shows that a judgment of an inferior Court was wrong gives no ground for enlarging the time'.

7.10 In *Re Berkeley, Borrer v Berkeley* [1944] 2 All ER 395, [1945] Ch 1, a slight softening of approach may be detected. In May 1943 Cohen J decided that on the basis of a recent judgment of Simonds J (*Re Tredgold, Midland Bank Executor Co Ltd v Tredgold* [1943] 1 All ER 120, [1943] Ch 69) an annuity in favour of Lady Berkeley was payable free of tax. No appeal was brought in time. In 1944 this court overruled Simonds J's decision in the earlier case (see *Re Sebag-Montefiore, Sebag-Montefiore v Alliance Assurance Co Ltd* [1944] 1 All ER 672, [1944] Ch 331), and in October of that year an application for leave to appeal out of time was made by beneficiaries of the will who might receive nothing if Lady Berkeley received her annuity without deduction of tax. Lord Greene MR cited *Re Wigfull & Sons' Trade Marks* and put the matter in this way ([1944] 2 All ER 395 at 397, [1945] Ch 1 at 4):

> 'I find no difficulty in reconciling the statement that the different decision is not necessarily a ground for enlarging the time with the statement that the court can enlarge the time if it is just in the circumstances to do so. It seems to me that the principle to be extracted is that it is not sufficient for a party to come to the court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The court will say to him: "That bald statement is not enough. What are the facts? What is the nature of the judgment? Who are the parties affected? What, if anything, has been done under it?" and so forth. In other words, the whole of the circumstances must be looked at. If the court in the light of those circumstances, considers it just to extend the time, then it will do so.'

7.11 In *Ward v James* [1965] 1 All ER 563, [1966] 1 QB 273 Sellers and Russell LJJ granted leave to appeal out of time in November 1964 from an order made by Roskill J in July 1963 directing trial by jury in a personal injuries action. The defendants did not seek to appeal against the order when it was originally made, but they did so after three decisions of this court had cast doubt on the proposition that it was right to order trial by jury in a personal injuries action when the injuries were severe. In granting leave to appeal out of time Sellers LJ said that he recognised that a mere alteration in the law might not be sufficient ground for extending time (see [1965] All ER 563 at 567, [1966] 1 QB 273 at 278). However, the authorities cited to the court were all cases of appeals against a final judgment, and they were not therefore applicable to an interlocutory appeal of the present character, particularly where the form of the trial was an issue and the action was still some way from reaching trial. In the event a five-judge court, while giving general guidance on the way the discretion to order jury trials

should be exercised, affirmed the judge's order because of the defendants' acquiescence in it for many months and the lateness of their appeal.

7.12 Lord Greene MR's approach in *Re Berkeley* was followed in *Property and Reversionary Investment Corp Ltd v Templar* [1978] 2 All ER 433, [1977] 1 WLR 1223. In that case Judge Fay QC held in November 1974 that since landlords had failed to comply with the strict letter of a rent review clause, their tenant was entitled to go on paying the original rent until at least the time of the next rent review, which was due to take place in 1979. In March 1977 the House of Lords cast doubt on the necessity for strict compliance with the wording of a rent review clause in a similar context (see *United Scientific Holdings Ltd v Burnley BC* [1977] 2 All ER 62, [1978] AC 904). After citing Lord Greene MR's judgment in *Re Berkeley* Roskill LJ said ([1978] 2 All ER 433 at 435, [1977] 1 WLR 1223 at 1225):

> 'It is therefore plain that it is not enough for counsel for the landlords to say that the recent decision of the House of Lords clearly shows that Judge Fay's decision was wrong. He must show there are special reasons why he should be allowed to argue that the judgment should not stand.'

7.13 The landlords were willing to undertake not to claim back rent for the two and a half years which had elapsed since Judge Fay's decision, and the issue in dispute was therefore limited to the question whether the landlords should be entitled to argue in this court that they should be entitled to recover the higher rent for the 18 months until the next rent review, or whether they should have to wait until that review before being entitled to increase the rent. Roskill and Cumming-Bruce LJJ concluded that the continuing contractual relationship provided the necessary special circumstances for allowing the landlords leave to appeal out of time. As Cumming-Bruce LJ said ([1978] 2 All ER 433 at 436, [1977] 1 WLR 1223 at 1225–1226): '... it does not seem just that future obligations between the parties to the lease should depend on the construction now shown to be wrong.'

7.14 In *C M Van Stillevoldt BV v El Carriers Inc* [1983] 1 All ER 699, [1983] 1 WLR 207 Griffiths LJ was concerned with an application for leave to appeal out of time from a decision of Staughton J that he had no jurisdiction to extend the time of appointment of an arbitrator. The registrar of this court had refused an extension of time, relying, inter alia, on the fact that this was the second time that the would-be appellants were craving indulgence, the whole case being concerned with the late appointment of the arbitrator. Griffiths LJ held that the registrar was entitled to take that fact into account (see [1983] 1 All ER 699 at 704, [1983] 1 WLR 207 at 213), but in the exercise of his own discretion he extended time, holding that the delay was short (days not weeks); there were personal reasons of the solicitor (the burden of work and his wife's illness, plus, for some short part of the delay, being lulled into a false sense of security by the opposing solicitors); there was certainly an arguable case on appeal; and, finally, there was no question of the opposing side being prejudiced 'save for this fact of course, that they will now have to face the appeal rather than the [would-be appellants] having the door slammed in their faces at this stage'.

7.15 In *The Supreme Court Practice 1997* vol 1, para 59/4/4 this dictum is taken as authority for the proposition that:

> 'The fact that a judgment or order which is otherwise final will be re-opened if the application is granted does not count as prejudice for these

purposes, because that is inherent in every application for an extension of time for appealing ...' a

What Griffiths LJ said does not seem to us to be correctly reflected in this note, which should be approached with some caution. It may well be that where the delay in appealing is as short as it was in that case, the fact that the case will be reopened will carry little weight, but the longer time goes by, particularly if the defendant has been told, or reasonably assumes, that no appeal will be pursued, the greater the weight that will be attached to this factor. b

7.16 In *Norwich and Peterborough Building Society v Steed* [1991] 2 All ER 880, [1991] 1 WLR 449 this court was concerned with an applicant who was seeking leave to appeal six and half months out of time. The whole of that period had been taken up with his efforts to obtain legal aid. It was a case in which, as c McCowan LJ pointed out, he always intended to appeal. At the outset of his judgment McCowan LJ said that the things which a court takes into account in deciding whether to grant an extension are 'first, the length of delay; secondly, the reasons for the delay; thirdly, the chances of the appeal succeeding; and, fourthly, the degree of prejudice to the respondent if the application is granted' (see [1991] 2 All ER 880 at 881–882, [1991] 1 WLR 449 at 450). After weighing up d the different factors in that case, the court granted leave to appeal out of time.

7.17 In *Re Dennis (a bankrupt)* [1994] CA Transcript 158 judgment at first instance was given in May 1992, and the unsuccessful party decided not to appeal. In February 1993 counsel by chance came across an 1801 decision which was highly relevant to the issues in the case. He drew this decision to the attention of e his instructing solicitors and suggested that different counsel should now be instructed. The solicitors applied for legal aid the next day, and emergency legal aid was eventually granted on 22 March 1993. On 14 April 1993 new counsel was instructed, and the application for leave was made on 23 April 1993. The court considered the four factors identified by McCowan LJ in the *Norwich and Peterborough* case. After showing that the court had been referred to *Craig v* f *Phillips* and *Property and Reversionary Investment Corp Ltd v Templar*, Bingham MR said that he thought it was important that the case was not one—

'in which a party seeks to appeal because a later decision throws doubt on the decision in question, but is an application made for the reasons I have g indicated, that through a failure to discover an old authority the case was put to the judge on a basis that may have led to a wrong decision.'

He finished his judgment by putting the matter in this way:

'One starts from the position that it is the duty of the parties to appeal h within the time limit and therefore the court does not by any means as a matter of course, and indeed at all readily, grant leave to appeal out of time. It particularly does not do so if the party has taken a decision not to appeal and has then changed its mind. But ultimately, and overriding or embracing all the factors which go into the exercise of discretion on a matter of this kind, is the question as to what the interests of justice require on the facts of a j particular case.'

7.18 Although certain properties had been sold since the judgment at first instance, the proceeds of sale remained undistributed and there was thus 'no relevant prejudice'. The court therefore upheld the registrar's decision to grant leave to appeal out of time.

7.19 The only other rulings we need to mention are three which have been very recently given in the context of Ord 17, r 11. In *Seagaram v Grant* [1996] CA Transcript 1878 this court was concerned with a boundary dispute between neighbours in which substantial costs had already been incurred. On 14 June 1995 the judge held that the action had been automatically struck out, and the plaintiffs decided not to appeal. Instead an unsuccessful application was made to reinstate the action. New solicitors were instructed on 23 October 1995, and they sent instructions to counsel in early December to consider the claim against the first solicitors. Through quite exceptional personal circumstances counsel did not deal with the papers until May 1996. At this stage she appreciated that on the authority of *Downer & Downer Ltd v Brough, Protim Services Ltd v Newcomb* [1996] 1 WLR 575, which was reported in The Times on 19 January 1996, the judge's original decision that the case had been struck out was wrong. An application for leave to appeal was then lodged ten months out of time. (It is right to add that a second action could have been started, but a question would have arisen as to whether the costs of the first action would have to be paid if this second action was not to be stayed.)

7.20 This court granted leave to appeal out of time. Lord Woolf MR said:

> 'It is of course always difficult in a situation of this sort to find the proper balance. However, on the facts that are before this court, I am satisfied that the balance comes down in the plaintiffs' favour. The period of delay is undoubtedly substantial. It is a period where the court would normally today want very clear reasons for giving that length of extension, and, speaking for myself on this matter, it does seem to me that one would normally expect this to be the maximum amount of delay which one could ordinarily regard as being acceptable to this court if the answer to the other issues to be considered point to an extension of time.'

7.21 *Sadiq v London Buses Ltd* [1997] CA Transcript 264 was a case in which negligence had been admitted: it was therefore a meritorious claim. On 17 May 1995 the judge held that it had been automatically struck out. This court's decision in *Ferreira v American Embassy Employees Association* [1996] 1 WLR 536 was published in The Times on 30 June 1995 and it showed that the judge's decision was wrong. The plaintiff's solicitors took immediate steps to try to protect their client, but they adopted the wrong route by asking the judge in the county court to rectify matters. That application failed on 20 September, and leave to appeal was sought from this court within a fortnight of that date. Leave to appeal out of time was granted. Brooke LJ said:

> 'In my judgment the circumstances in which Roskill LJ spoke as he did in *Property and Reversionary Investment Corp Ltd v Templar* [1978] 2 All ER 433, [1977] 1 WLR 1223 are quite different from the present, where the delay is comparatively short, the reason for the delay has been explored, which, although it shows a lack of understanding by the plaintiff's solicitor of the nature of the court's inherent jurisdiction, nevertheless shows a commendable desire to save time and costs involved in bringing an appeal to this court, and we are concerned with comparatively new provisions of the County Court Rules which this court is working out on a case-by-case basis, and, in the context of this case, by chance the relevant decision was taken shortly after the judge made his ruling in this case.'

7.22 In *Noviello v Ele International Ltd* [1997] CA Transcript 265 the plaintiffs had applied for an extension of time for requesting a hearing date on 28 July 1994. The guillotine date was 14 August 1994, and in November 1994 the district judge extended time. The plaintiffs out of caution issued a second set of proceedings on 22 December 1994. On 30 March 1995 the judge reversed the district judge. He held that the action was struck out, and he refused to reinstate it. On 30 June 1995 the decision in *Ferreira's* case was published in The Times which showed that the first of these rulings was wrong. The application for leave to appeal was not made until 5 September 1995. (The second action was struck out under Ord 9, r 10 on 22 December 1995, no steps having been taken to pursue it.)

7.23 The plaintiffs' advisers put forward no explanation for the two months' delay between the decision in *Ferreira's* case and the lodging of the application for leave, and in his judgment Brooke LJ stressed that such delays ought to be explained. However, given that the process of straightening out whether it was right to appeal to this court following the decision in *Ferreira's* case was a complex one and the long vacation had intervened, he considered that the overall interests of justice required that the application should not fail simply because no reasons were given. In the result the court granted leave to appeal out of time, and the subsequent appeal was immediately conceded.

7.24 Counsel for the defendants have submitted to us that in the last three cases, where an extension of time for appealing has been granted following authoritative rulings by this court in relation to Ord 17, r 11, the court has been failing to have proper regard to the principle that a change in the law does not in itself provide a ground for extending time for appealing. They have also pointed out that now that *Bannister* has been decided, there may be a flood of applications for leave to appeal out of time, and a firm stand should be taken by this court if it is not to be once again swamped with satellite litigation of a type of which it disapproves so much.

7.25 In our judgment, it would be quite wrong to contemplate taking an approach which was dictated simply by the fear that there might be too many cases arriving at this court which would otherwise justify the granting of leave to appeal if the proper principles were applied to them. The right course is to attempt to identify whether there are indeed any circumstances in which an extension of time for leave to appeal should in justice be given in such cases. If there are, then it ought to be possible to give guidance to parties contemplating the possibility of applying for leave to appeal out of time which will lead in some cases to the application for leave not being resisted and in others to there being no attempt to obtain it. In that way it is to be hoped that satellite litigation will be discouraged, but in a way that does not add to the possible feeling of injustice that might otherwise exist.

7.26 It is important to recognise two matters in relation to Ord 17, r 11 cases. The first is that the rule has led to actions being struck out where there has been no trial on the merits. In other words, this is a quite different context in which to apply the general principle that there must be finality in litigation. Second, it is difficult to imagine circumstances more special than those which have flowed from the introduction of r 11(9). The difficulties that the rule has created are manifest from the many decisions of this court on the meaning and effect of the rule, and there have certainly been significant areas of dispute where there was room for more than one legitimate view as to the appropriate construction of the rule, or as to the approach the court should take in relation to different factual situations. For example, in the months that followed the decision in *Rastin v*

British Steel plc [1994] 2 All ER 641, [1994] 1 WLR 732 it was not readily foreseeable that *Williams v Globe Coaches (a firm)* [1996] 1 WLR 553 would provide an exception to *Rastin*'s case. It was not easy to foresee the decision in *Ferreira*'s case. And there will be aspects of *Bannister* where it may be possible to show that advice not to appeal against a judge's ruling was completely reasonable advice at the time it was given. Accordingly, if a party can show that he acted on reasonable advice in the context of Ord 17, r 11, and that he did not appeal immediately in reliance on that advice, and if he can also show that if an extension of time for appealing were granted he has a very strong argument that his appeal will succeed, then there will be the beginnings, in our view, of a successful application for an extension of time on the basis of special circumstances.

7.27 However, an extension of time for appealing will not on any view be given automatically in Ord 17, r 11 cases following a change in the law. Among the factors which will strongly militate against the grant of such an extension are the following.

(a) If there is any inexcusable delay in applying for an extension of time. The period for serving a notice of appeal in the ordinary way is 28 days. Order 17, r 11 cases are concerned with situations in which substantial delays have already occurred. There is no reason why every effort should not be made to lodge an application within that timescale once a relevant change in the law has been reported, and to notify the potential respondent as soon as it has been lodged. For example, an applicant will have to explain why he could not lodge the application without legal aid, and/or why, if it can be shown that it was necessary to have legal aid before lodging the application, he could not obtain it for that purpose (even if the pursuit of the appeal was ultimately dependent on advice for which further legal aid was necessary), and why he did not tell the respondent what he had in mind at the earliest practicable moment. The plaintiffs in *Seagaram v Grant* and *Sadiq v London Buses Ltd* were exceptionally fortunate. In *Seagaram*'s case, however, there was the added feature that in any event the boundary dispute was continuing and another action could still be launched at any time, and in *Sadiq*'s case the plaintiff had started a second action, so that the finality of the litigation on the strike-out was not absolute.

(b) If the respondent can demonstrate that any third party might be affected by the reopening of the litigation.

(c) If the respondent can demonstrate that he or his insurers have reasonably acted on the basis that the claim is at an end and their affairs have been conducted on this basis or if prejudice has been suffered in any other way. The respondent should normally adduce the evidence of the conduct or prejudice on which he relies. The longer the time since the decision which is now sought to be challenged, the easier it will be for him to discharge this burden. There will be a strong presumption, which would not require any evidence unless the contrary is asserted, that the respondent or his insurers have conducted themselves on the basis that the litigation is over if they have received no notice of any intention to continue to pursue it for many months after the decision was made. In this context, again, if it can be seen that the dispute between the parties is a continuing one and can still be the subject of a further action, this will be a material factor to counter any claim the respondent might make that he had assumed the claim had been finally disposed of and conducted his affairs on that basis.

(d) If the plaintiff has actually pursued a second action, causing the respondent to incur costs in defending it. In such cases, however, if there has been no application to stay the second action until after the costs of the first have been

paid, it would be legitimate in any application made in the second action not to insist on the costs of the first action being paid as a basis for allowing the second action to continue if it could at the time of that application be seen that the first action should in fact never have been held to have been struck out.

(e) As we have already indicated but it is important to emphasise again, unless the would-be appellant has a very good prospect of succeeding on the appeal, if an extension of time for appealing is granted.

8 *Olaleye-Oruene v London Guildhall University*

8.1 In this action, commenced on 27 April 1992, the plaintiff, who acted in person, claimed that the defendants had discriminated against her by reason of her race in various matters between October 1990 and June 1991. A defence was delivered to the court office on 28 August 1992. The trigger date was therefore 11 September 1992, and the guillotine date 11 December 1993. On 24 September 1992 the district judge gave directions, which included a direction that the trial be set down on a joint certificate of readiness signed by both parties. On the authority of *Downer & Downer Ltd v Brough* [1996] 1 WLR 575 it is highly arguable that that order would have taken the action outside the automatic directions. In May 1993 the plaintiff served a Race Relations Act questionnaire. There was then a dispute as to whether proper leave had been obtained, but in any event the defendants did not answer the questionnaire, and the plaintiff took no steps to ensure that they did. She then tried to set the action down for trial on 2 August 1994. This was resisted by the defendants on the ground that the action had been automatically struck out.

8.2 The plaintiff tried to get legal aid at this stage, but those efforts failed. On 17 March 1995 she appeared herself before the district judge who held that the action had been automatically struck out. His decision was upheld on appeal by Judge Quentin Edwards QC on 16 May 1995.

8.3 On 22 May 1995 the plaintiff instructed her present solicitors. They advised her to apply to the judge ex parte for leave to appeal, but he refused leave three days later. On 29 May an application for emergency legal aid was submitted for the purposes of pursuing an appeal. This was refused and an appeal against the refusal failed two weeks later. On 11 August 1995 the appeal against the refusal of legal aid in relation to the plaintiff's previous solicitors was also refused.

8.4 Between August 1995 and November 1995 the plaintiff's new solicitors conducted research under the green form scheme which led them to believe that it might be arguable that the order of 24 September 1992 had taken the action outside the automatic directions. In the result a further application for legal aid was made on 29 November 1995. This was refused in mid-December. An appeal against this refusal was lodged on 3 January 1996. It is alleged that the papers were then mislaid by the Legal Aid Board. However that may be, on 15 March 1996 legal aid was granted limited to taking counsel's opinion. In the meantime *Downer*'s case had been decided: the report of this decision appeared in The Times on 19 January 1996.

8.5 For reasons which are nowhere explained in any affidavit, it then took until 22 August 1996 to issue an application for leave to appeal to the Court of Appeal. Counsel tried to explain to us how this further period of delay came about, but nothing he said could begin to excuse such a delay.

8.6 It would seem that in this particular case it was not the publication of *Downer*'s case which alerted the plaintiff's solicitors to a point which they had not thought previously available. It appears to have been the intention of the plaintiff

to appeal from the very moment the judge made his decision on 16 May 1995, and on any view by November 1995 her solicitors thought that there was a point worth arguing. It is puzzling why, if the plaintiff, having regard to her difficulties in obtaining legal aid, was able to go back before the judge to apply for leave, she could not personally lodge an application with this court within 28 days after the judge's decision, or at the very least fairly soon after her solicitors had researched the point in November 1995. In that context the failure, following the granting of legal aid for the obtaining of advice in March 1996, to issue any application for leave until 22 August 1996, by then some 15 months after the decision in an action which was already very stale, was the final straw. This application must be dismissed.

9 *Summary of judgments of two-judge courts (Brooke and Waller LJJ) since Bannister v SGB plc*

Bannister, para 3.12: automatic directions not excluded

9.1 In *Edmondson v Scottish and Newcastle Breweries plc* [1997] CA Transcript 952 the court held that a notice in Form N233, issued on the direction of a district judge following the delivery of a brief defence in Form N9, was not necessarily an order for pre-trial directions such as to take the action outside the scope of automatic directions pursuant to Ord 17, r 11(2)(a). The mere fact that the district judge evinced a wish to consider with the parties whether he should give directions pursuant to Ord 17, r 10, and directed Form N233 to issue for that purpose, did not ipso facto constitute an order for pre-trial directions within the meaning of the rule. In that case, the district judge first postponed, and then abandoned the idea of giving any such directions, and the court held that automatic directions applied throughout.

Bannister, para 4.2: defence sent to the wrong county court

9.2 In *Brett v Northern Foods Ltd* [1997] CA Transcript 948 the defendants' solicitors posted the defence to the wrong county court. That court forwarded it to another county court, where it arrived three weeks later, and that court forwarded it to the county court in which the action was proceeding, where it arrived nearly two weeks after that.

9.3 The court held that the trigger date occurred 14 days after the defence arrived at the court office of the correct county court. On the proper construction of Ord 9, r 2(6) the defence had to be delivered to the court office for the county court in which the action was proceeding. This was a rule relating to procedure, as opposed to the statutory provision which was considered in *Sharma v Knight* [1986] 1 WLR 757, which went to jurisdiction.

Bannister, para 7.11: effect of High Court order preceding transfer

9.4 In *Rajah v Garner* [1997] CA Transcript 811 the court had to consider an order of a High Court master transferring the action to the county court which contained the following directions:

> '(4) Automatic directions under County Court Rule Order 17, r 11(3) varied to limit expert witnesses to one, reports to be exchanged within 28 days after the Plaintiffs' answers to Defendant's Official Referees' Schedule. (5) The Plaintiffs to apply for date for trial within three months of today.'

9.5 The court held that this order was a manual order which displaced automatic directions in their entirety and replaced them with directions for the

timetable to like effect, where relevant, to the automatic directions in r 11(3). It did not, however, introduce a strike out sanction (for which clear words would be needed) (see *Bannister* [1997] 4 All ER 129 (para 11.8)) and the proper sanction for failure to apply for a hearing date in those circumstances was therefore an 'unless' order and not an automatic strike out.

Bannister, para 12.8: various examples of the *Ferreira* principles in action

9.6 In *Bourne v British Telecommunications plc* (7 May 1997, unreported) the plaintiff had applied for an extension of time prior to the guillotine date. This application was due to be heard after the guillotine date, but before it was heard the plaintiff's solicitor actually applied for the hearing date to be fixed. He then consented to the dismissal of the application for an extension of time before it was heard. The court rejected the argument that by withdrawing the application for an extension, the plaintiff had 'nullified' the implied request (see *Bannister* [1997] 4 All ER 129 (para 12.8)), in the sense that it turned it into something that had never existed, so that by the time the plaintiff made an actual request the action had already been automatically struck out. The court held that the implied request was alive at the guillotine date and was then continued and subsumed in the express request, and that it would be quite unreal to contemplate that in such circumstances an abandonment of the application for an extension of time carried with it the abandonment of a request to fix a hearing date.

9.7 In *Pearson v Export Packaging Services* (14 May 1997, unreported) on a first application to extend time for the fixing of a hearing date, the district judge granted an extension to a certain date and ordered that the Ord 17 timetable for setting down be extended to (a new guillotine date) 'and in default thereof the action be deemed struck out'. The plaintiff made an application for a further extension of time which was heard and refused two weeks before the new guillotine date, and thereafter made no express application to fix a hearing date before that new date. The court rejected the argument that this was not a circumstance in which the implied request as described in *Ferreira*'s case or *Bannister* was intended to apply so as to prevent automatic strike out, either because the implied request did not exist at all where the hearing of the application for an extension of time predated the guillotine date, or because the failure to request a hearing date expressly showed that the implied request had been abandoned. It ruled that the principles identified in *Ferreira*'s case, as restated in *Bannister*, recognised that an application for an extension of time for requesting a hearing date contained the implied request, and that there had to be clear evidence of abandonment for that request to be withdrawn. The court held that all requests for an extension of time for the fixing of a hearing date contained the implied request, and that there was no evidence of abandonment on the facts of the present case.

9.8 In *Smithson v Palmer & Harvey Ltd* (15 May 1997, unreported) the guillotine date was in February. The previous year the plaintiff had issued an application in the early autumn to extend the time for fixing a hearing date until 31 December. Neither party attended the hearing of this application in October, and the district judge adjourned it with liberty to restore. The plaintiff's solicitor never explained why he did not attend: the defendant's solicitors said they had never received notice of the application. The plaintiff's solicitor took no steps to restore the application for hearing, either before 31 December or before the guillotine date. It was eventually restored in March, and because nobody appreciated that the guillotine date had passed, an extension of time to some

future date was granted. The district judge and, on appeal, the circuit judge both held, in essence, that the application to extend time was not in these circumstances 'alive' at the guillotine date. This court considered that it was not possible to hold that they were clearly wrong, and that after nobody had attended in October, and no application was made to restore the hearing before 31 December, it was reasonable to hold that the application had been abandoned.

Bannister, between paras 20.2 and 21.1: Guillotine date (new sub-heading)

9.9 In *Khela v Pone* [1997] CA Transcript 1253 an issue arose in relation to the date on which an action was automatically struck out. In response to a query, an executive officer of the county court replied, incorrectly, that the action had been automatically struck out on 29 June, whereas the correct guillotine date was 23 August. This court held that nothing that might be said by an executive officer of the court could alter the way the rules were to be applied, and it was wrong to say that the 'court automatically struck the action out on 29 June'. It distinguished this situation from a case in which a member of the judiciary made a judicial declaration identifying the guillotine date.

Appeal in Greig Middleton & Co Ltd v Denderowicz allowed. Application in Olaleye-Oruene v London Guildhall University dismissed.

Mary Rose Plummer Barrister.

P v T Ltd

CHANCERY DIVISION
SIR RICHARD SCOTT V-C
30 APRIL 1997

Discovery – Discovery against persons against whom no cause of action – Jurisdiction – Plaintiff seeking discovery of information or documents for purpose of determining whether cause of action lying against unidentified third party – Third party suspected of libel or malicious falsehood – Whether order to be made where plaintiff uncertain whether tort committed – Whether order confined to cases in which torts having criminal aspect are alleged.

The managing director of T Ltd informed the plaintiff, a senior employee who was responsible for putting out to tender major contracts, that serious allegations had been made against him by a third party. He refused however to provide further details as to their nature or the identity of the informant. Thereafter, the plaintiff attended a disciplinary hearing convened by the managing director and two members of the personnel department to answer allegations of gross misconduct. His request for further information was again refused and, since he was unable to respond adequately to the allegations without further information, he was summarily dismissed without notice or pay in lieu on the ground of gross misconduct. Following an unsuccessful appeal, the plaintiff complained to an industrial tribunal claiming unfair dismissal. That complaint led to an admission by T Ltd that the plaintiff had been unfairly dismissed; the tribunal ordered T Ltd to re-engage him, but the company refused to do so. The plaintiff's employment prospects were now severely adversely affected by the knowledge within the industry that he had been dismissed for impropriety, for which he was unable to give any explanation. He therefore commenced proceedings against T Ltd and applied to the court for an order that T Ltd disclose the precise details of the allegations made against him and the identity of the person who had supplied the information and that he be at liberty to use that information in proceedings against the informant for libel or malicious falsehood. T Ltd contended that such an order was to be confined to cases involving torts which had some criminal aspect to them.

Held – Where justice required the granting of relief, the court would make an order for discovery to assist a prospective plaintiff to obtain the information and documents necessary to bring an action in tort against a third party, notwithstanding that, without such information, the plaintiff could not ascertain whether the unidentified third party had in fact committed a tort against him. Moreover, it was not necessary that the tort of which the plaintiff complained be criminal in nature. In the instant case, it was not possible for the plaintiff to know for certain whether he had a viable cause of action in libel or malicious falsehood against the informant without discovery; justice therefore demanded that he should be placed in a position to clear his name if the allegations made against him were without foundation . An order for discovery to enable the plaintiff to determine whether any action lay against the informant would, accordingly, be made (see p 208 *h* to p 209 *g*, post).

Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943 applied.

Notes

For action against defendant for purpose of discovery only, see 13 *Halsbury's Laws* (4th edn) para 18, and for a case on the subject, see 18 *Digest* (2nd reissue) 10, 47.

Cases referred to in judgment

Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.

Upmann v Elkan (1871) LR 12 Eq 140; *affd* (1871) LR 7 Ch App 130.

Motion

By notice of motion dated 3 March 1997 the plaintiff applied to the court for an order that the defendant, his former employer, disclose to him, and state on affidavit whether it had in its possession any documents containing or evidencing, the precise details of the allegations made against him which formed the basis for his dismissal or purported dismissal on 8 August 1996 and the identity of the complainant who made those allegations and that he be at liberty to use such information in an action against the unidentified complainant. The facts are set out in the judgment.

Patrick Elias QC (instructed by *Merriman White*) for the plaintiff.

Witold Pawlak (instructed by *Hart Brown*, Guildford) for the defendant.

SIR RICHARD SCOTT V-C. The application made before me this morning is a rather unusual one. I can best describe it by starting with the circumstances in which the litigation has been commenced. The plaintiff is a Mr P. The defendant is a company, T Ltd (T). The plaintiff was employed by T. His employment commenced on 1 October 1982. Immediately before the events which have given rise to this litigation his responsibility in his employment with T was to put out to tender major contracts. In his affidavit, sworn on a date which the document in front of me does not indicate, he commented that the contracts for which he was responsible might be extremely valuable to the contractors concerned, ranging in value from a few thousand pounds up to several million pounds. It seems reasonably clear therefore that his employment involved some considerable responsibility and that his status within the company was, relatively at least, a senior one.

At the end of May 1996 the plaintiff was asked to go to the office of the managing director of T, a Mr C. He attended and was told by Mr C that T had received what were described as third party allegations against him, which T regarded as very serious. In his affidavit Mr P says that he asked for details of the allegations that had been made, but, he said, Mr C refused to provide any details either as to the nature of the allegations or as to their source. He then had a meeting with Mr C on 11 June 1996. Present also was a Mr R, the personnel manager of T. The purpose of the meeting was to discuss the allegations that had been made against Mr P, but again he was not given any details of those allegations. In his affidavit he says that he was told on this occasion that the third party who had made the allegations had made them to Mr R, the personnel manager, who was present at that meeting. He was told that the individual who had spoken to Mr R would be prepared to stand up in court and repeat the allegations. But, as I have said, Mr P was not given any details of the allegations that had been made.

His contract with T contains provision for disciplinary hearings and for appeals from the findings made at those disciplinary hearings. By a letter of 29 July 1996 Mr P was required to attend a disciplinary hearing in connection with the allegations that had been made against him. The hearing was to take place on 8 August. Mr P's solicitor was not permitted to be present. The letter stated that the hearing would consider 'allegations of gross misconduct which have been made by an external party with respect to your conduct'. I draw attention to the description of the allegations as allegations of gross misconduct. The disciplinary hearing took place on 8 August. I have before me a transcript of the hearing. It was attended by Mr C and of course Mr P and also by a lady, C W, described as personnel director of T. The important opening remarks were made by Mr C. His remarks included this passage:

> 'The management has carried out an investigation following receipt of allegations from an external party. After much discussion the external party has requested that they are not identified at this stage. We have considered their reasons for not wanting to be named and concluded that it is a reasonable request. As a result of this we are not willing to disclose the exact nature of the allegation as this would immediately identify the external party involved. We are however satisfied that the allegations are genuine and that they have been made in good faith. Our conclusion [I think there is a verb 'is' which is omitted] that the allegations are evidence of gross misconduct in the way in which you have conducted yourself with external contractors.'

Mr C went on: 'In the case of yourself you have a chance to answer this point, but we recognise that we are not disclosing the exact nature of the allegations and you are unable to state your case in detail.'

I would make the comment that it seems to me a little inaccurate to say that the management were not disclosing the exact nature of the allegations. There had been no detail whatever given of the allegations, save for the conclusionary comments that they constituted gross misconduct. That being the case, it is not surprising that Mr P was unable to say anything useful. He did not know what was the case that he had to meet. It appears to me that the normal purpose of having a disciplinary hearing could not have been achieved in the light of the refusal of the management to disclose any details of the allegations that had been made against Mr P. Indeed I would describe the disciplinary hearing as no more than a farce. The farcical elements may not have appeared to Mr P of course. He denied any gross misconduct on his part but did not really know what it was that he was supposed to be denying.

The conclusion at the end of the hearing was expressed by Mr C, who said:

> 'The allegations we have received are evidence of gross misconduct in the way you have conducted yourself with external contractors. Therefore my decision is that you be summarily dismissed without notice or pay in lieu of notice on the grounds of gross misconduct. In accordance with the company's disciplinary rules your last day of service is today, 8th August 1996. This decision will be confirmed in writing to you.'

I have to say that it seems to me grossly unfair that an employee should be dismissed for gross misconduct without being given any opportunity, any chance at all, of meeting the evidently serious allegations that had been made against him. Indeed, as an example of employment practice it seems to me outrageous.

The dismissal was confirmed by letter of the same date and it is not surprising that Mr P appealed. The appeal, pursuant to the disciplinary rules and procedures incorporated into Mr P's contract, was heard on 10 September 1996. The same three individuals who had been present at the disciplinary hearing were present. In addition a Mr J H, who I take to be a senior executive of T, was in attendance. The appeal was as farcical as the disciplinary hearing. The management remained obdurate in their refusal to reveal any details at all of the allegations that had been made against Mr P. Mr C said, by way of rehearsal of the decision reached at the disciplinary hearing:

> 'I concluded that the allegations we had received were evidence of gross misconduct in the way in which Mr P conducted himself with external contractors. Therefore my decision was that he should be summarily dismissed without notice or pay in lieu of notice on the grounds of gross misconduct in accordance with the company's disciplinary rules and that is the case.'

Mr H responded by saying to Mr P:

> 'I will ask you to present your case. However, I do recognise that by not disclosing the exact nature of the allegations the management side make it difficult for you to state your case in detail. I think I say for the record I have had a report from management and I am aware of the details of the allegations. However, if you would like to, make your appeal statement now please.'

But of course Mr P was no more able to deal with the allegations against him on this appeal occasion than he had been able to deal with them at the disciplinary hearing itself. It will be noted there was a repeat of the statement that the 'exact nature' of the allegations had not been disclosed. But save for saying that the allegations related to Mr P's dealing with external contractors, which could hardly be described as a matter of detail, no details at all were given; it was not simply the 'exact nature' that was withheld. In the circumstances it will not be a matter of surprise that the appeal failed.

Mr H gave the decision. He said:

> 'I have heard the management case and I have considered the points raised in your letter of 15th August and I have come to the following conclusions. Firstly, I recognise the inability of management to present you with details of the allegation makes it difficult to state your case. However, in the circumstances I regard the management's position as reasonable and I am prepared to accept their position that the disclosure of the details would identify the source who wishes to remain anonymous. Secondly, I received the report from management about the allegations made against you. I understand that the management believes the allegations are genuine and are made in good faith and as such constitute gross misconduct.'

He went on: 'I can find no evidence of any conspiracy against you. I am prepared to accept the management view that you should be dismissed and therefore reject your appeal.' That was an end of the proceedings held within the company regarding the dismissal.

Not surprisingly, Mr P brought a case before the industrial tribunal complaining of unfair dismissal. His complaint of unfair dismissal led to an admission by the defendants that he had indeed been unfairly dismissed. At a

hearing on 5 March 1997 the industrial tribunal ordered that Mr P be re-engaged by T, but T has refused to re-engage him. As I understand it, although I do not know that there is any evidence of this before me, T has continued in the meantime to pay Mr P his salary and it is intended that the payment of his salary will continue until August. I understood from Mr Pawlak, who has appeared before me for T, that that was the position. But as from August, again as I understand it, the position will be that the payment of his salary will cease and, as I have said, T will not re-engage him. He was, of course, awarded monetary compensation by the industrial tribunal for his unfair dismissal.

Mr P is in a difficult position in attempting to obtain another job. In his affidavit before me he has said:

> 'My career has been wrecked by the actions of T. I have tried to obtain employment but within the industry I believe that it is well known that I have been dismissed for alleged impropriety with contractors. I am completely incapable of clearing my name without knowing who has made allegations against me, what those allegations are or anything about what I am supposed to have done wrong. The losses I have suffered far exceed the loss of salary and benefits during my notice period because the circumstances in which my employment came to an end have severely adversely affected my chances of finding employment. If the allegations had never been made against me and I had simply resigned and given three months' notice I think I would have been able to find suitable employment within that three-month period or shortly thereafter.'

I should perhaps, in my résumé of the background circumstances, have added that under the contract of employment that Mr P had with T three months' notice applied. It was therefore open to T to give him three months' notice. That three months has already expired.

The fear expressed by Mr P in his affidavit that I have just read has a strong ring of likelihood. If he seeks employment elsewhere he is bound to be asked by whom he was previously employed. His answer will be T. He is likely to be asked something about the circumstances in which his employment came to an end. He is at the moment unable to say anything other than that he was dismissed. If asked why he was dismissed he will be unable to give any truthful answer other than to say that he was dismissed for gross misconduct connected with his dealings with external contractors. At that point his prospects of employment with his interviewer will probably be at an end. If the interviewer asks anything further, such as the nature of the gross misconduct, and is told by Mr P that he has no idea because T refused to give him any details, the suspicion in the mind of the interviewer that there may have been gross misconduct will certainly not have been dispelled. It is easy to accept that the circumstances in which Mr P's employment with T came to an end will seriously prejudice his future efforts to obtain employment. The fear he has expressed that his employment prospects had been very severely adversely affected seems to me to be well justified.

It is in an endeavour to protect and improve the unfortunate position in which he finds himself that Mr P has commenced the action in which the application before me has been made. The action was commenced by writ issued on 7 November 1996. The writ was accompanied by a statement of claim which has since been the subject of an amendment. There are two causes of action sued on in the statement of claim. The first is contractual. It is alleged that there were

various implied terms of Mr P's contract of employment which were broken by the circumstances in which he was dismissed. It is alleged in the statement of claim that his dismissal was void and of no effect. But since T was contractually entitled to give three months' notice terminating his employment, the prospects of his satisfying the court that he remains employed seem to me to be slim. As to damages for breach of contract, T has continued to pay his salary during and beyond the termination of the three-month notice period and it is difficult to see under ordinary rules relating to quantification of damages how he could receive anything substantial by way of damages for breach of contract. He hopes that he may be able to persuade the court to award him damages for the stigma he has suffered in being wrongfully, as he contends, characterised as guilty of gross misconduct. But the present state of authority is against contractual damages for stigma being available. Mr Patrick Elias QC, who has appeared for Mr P before me, tells me that the House of Lords is at present reserved on a case in which that issue will be reconsidered. What may be the result of that reconsideration, of course, I know not. It may be that Mr P will in due course be in a position to ask a judge for contractual damages for stigma. At the moment, and in the present state of the law pending any revision by the House of Lords, he cannot, in my view, expect to be awarded stigma damages. In any event, an award of stigma damages, the stigma being the stain of being accused of and dismissed for gross misconduct, may not succeed in curing the blight on his employment prospects or fully compensate him for the damage caused to him by that blight.

I now come, therefore, to the second cause of action on which he is suing in this present action. The cause of action is conspiracy. It is pleaded that T—

> 'conspired and combined with a person whom the plaintiff cannot identify, save to say that it is the person who made the allegations upon which the defendant purported to rely in dismissing the plaintiff (a) to injure the plaintiff in the course of his employment and (b) to commit an unlawful act, namely to dismiss or to purport to dismiss the plaintiff without notice on 8th August 1996.'

In the part of the pleading that deals with the breach of contract claim particulars are given of the matters, to which I have already referred in my rehearsal of the history, relating to the meetings between Mr P and Mr C, the disciplinary hearing and the appeal. Those particulars are repeated in the statement of claim as particulars of the unlawful act and of the injury to Mr P which were the object of the alleged conspiracy. The pleading goes on to provide particulars of the loss and damage suffered by Mr P by reason of the conspiracy. Under these particulars it is expressly alleged that: 'The plaintiff's earning capacity is presently very low. He has little prospect of finding employment since he cannot clear his name of the false accusations made against him by the defendant.' There is, it seems to me, somewhat of an inaccuracy in that pleading. The false allegations, if that is what they are, have not been made against him by T. They have been made against him by the person or persons not yet identified. What T has done is not to make accusations against Mr P but to act on accusations made against him by others.

In the relief that is sought in the action there is, apart from certain declarations that are sought and damages that are claimed, an application for 'an order by way of specific performance that the defendant do forthwith disclose to the plaintiff: (a) the precise nature of the allegations made against him which formed the basis for his dismissal or purported dismissal on 8th August 1996; (b) the identity of the

complainant who made those allegations.' It is probably the case that if Mr P discovers the precise nature of the allegations he will discover at the same time the identity of the complainant who made the allegations.

Those are the relevant contents of the statement of claim in the new action Mr P has started. By the notice of motion now before me, dated 3 March 1997, Mr P seeks at this interlocutory stage that 'T do forthwith disclose to him: (1) precise details of the allegations made against him; and (2) the identity of the complainant who made those allegations'. He asks that either Mr C or Mr H give those details on affidavit and he asks also for various items of discovery relating to the allegations.

In para 4 of the notice of motion the plaintiff asks that he be at liberty to use, in an action against the unidentified person who made the allegations against him, the documents and information provided by T pursuant to any order that I may make. Paragraph 4 makes it clear that Mr P is seeking the documents and information by way of discovery in the new action which he has started. But Mr Elias has, in his submissions to me, sought the information on an alternative basis. The alternative basis is the well known principle established by *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133. Let me, however, first deal with the claim in so far as it is made pursuant to the two causes of action pleaded in the statement of claim.

First, as to the contractual cause of action. In my opinion, the discovery is not necessary for the purpose of the contractual cause of action set out in the statement of claim. In the statement of claim it is pleaded that the allegations against Mr P, whatever they are, are untrue in that he has been guilty of no gross misconduct. But the breaches of contract and wrongful dismissal allegations are all admitted by T in its defence. In these circumstances, the only issue between the parties on the breach of contract cause of action is quantum of damages. Since T does not in its defence contend that it had just cause to dismiss Mr P and does not propose to contend in the action that he had committed gross misconduct, there is no issue in the action that justifies the discovery that Mr P now seeks.

As to the conspiracy action, I have great doubts whether the pleaded cause of action of conspiracy against T is viable. T, as I understand the case, has not been a party to a conspiracy but is simply an employer which has acted on information brought to its attention by others. That state of affairs does not to my mind constitute a basis upon which a case for actionable conspiracy can be brought against T. I would not grant an order for discovery under either of the causes of action, whether breach of contract or conspiracy, that are pleaded in the statement of claim. The statement of claim does not in terms place reliance on a *Norwich Pharmacal* cause of action but, as Mr Elias points out, all the facts necessary for a *Norwich Pharmacal* claim are pleaded in the statement of claim, either in connection with the breach of contract cause of action or in connection with the cause of action in conspiracy. Mr Elias points out that the relief sought by the statement of claim contains in para 3 an express claim for relief which falls within the type of relief that would be sought in a *Norwich Pharmacal* action. Accordingly, he submits, it is open to him on this motion to seek discovery on a *Norwich Pharmacal* footing if I am not persuaded that the discovery should be ordered for the purposes of either of the specifically pleaded causes of action.

I agree with Mr Elias that the contents of the statement of claim do permit him to pursue a *Norwich Pharmacal* claim and I do not think there is any technical obstacle to his inviting me at this interlocutory stage to make such an order. As

to whether such an order should be made at this interlocutory stage, the facts on which Mr P relies for the discovery he seeks are not in issue. They are all admitted; they are common ground between the parties. If Mr P is entitled to discovery on *Norwich Pharmacal* grounds he ought, in my judgment, to have it now on the facts that are common ground rather than be required to wait.

So I turn to the question whether he ought to have that discovery. *Norwich Pharmacal* established the proposition, which had previously been in doubt, that an action in which no more was sought than some particular discovery, necessary to enable the plaintiff to bring an action against some third party might be permissible. The House of Lords held, on the facts of that case, that it was. Lord Reid, in commenting on the ambit of the principle to which he was lending his authority, distinguished the rule that prevents discovery from a person who will be a witness in an action being obtained by a separate action. He said ([1973] 2 All ER 943 at 947–948, [1974] AC 133 at 174):

> 'To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery of the information sought. It may sometimes have been misapplied in the past but I see no reason why we should continue to do so. But that does not mean, as the appellants contend, that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order discovery in order that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that. So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference?'

Then Lord Reid considered the particular position of Customs and Excise in the case in question. He referred to views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140 at 145; (1871) LR 7 Ch App 130 at 133 and said ([1973] 2 All ER 943 at 948, [1974] AC 133 at 175):

> 'They [referring to the views expressed by Lord Romilly MR and Lord Hatherley LC] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that

if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.'

In the present case the first issue, I suppose, is whether the circumstances ought to incline the court to exercise what is a discretionary power to order discovery so that Mr P may be enabled to bring proceedings to clear his name against the person or persons who supplied the information, which he contends to be false, to T. There are a number of matters to be taken into consideration in this connection. First, there is the nature of the action which Mr P might, if he has the information he seeks, bring against the third person or third persons. Two alternative actions have been suggested. One is an action in defamation. It is not known of course whether the communication was oral or written. The second is an action for malicious falsehood. An action for malicious falsehood would require not only that the information given by the third person to T was false but also that the information was given with the intention of doing injury to Mr P. In effect it would be necessary I think for him to show that the individual giving the information knew it to be false or had no real belief in its truth. Malice is an essential ingredient in the cause of action, but malice has its own particular meaning in this and most other torts where it is a requisite. So far as defamation is concerned it would be necessary for Mr P to show that the information was false. It would be necessary for him to show that the information disparaged him in the eyes of the recipient of it. It appears clear that he would succeed in establishing that last requirement, for it was on the basis of this information that he was charged and convicted by his employers of gross misconduct. I find it very difficult to conceive of a case in which an action for malicious falsehood could succeed in which there would not also be a good action for defamation. An action for defamation might be available even if an action for malicious falsehood were not. So far as defamation is concerned the need to show malice would arise only if the communication were covered by qualified privilege. The present position is that it is not possible for Mr P to know for certain whether he does or does not have a viable cause of action against the informant. He does not know what was the information that was supplied. As I read his affidavit, he is confident that he had committed no act justifying the description of gross misconduct, but until he knows what it is that he is said to have done his position in that regard will remain inchoate.

In that respect his position is not the same as that of the plaintiff in the *Norwich Pharmacal* case. In the *Norwich Pharmacal* case the plaintiff was able to demonstrate that tortious infringements of patent rights were being committed. It did not know by whom. It did not know who to sue. But that there was tortious conduct against it was not in question. In the present case, it is in question whether a tort has been committed against Mr P. He believes that it has. The purpose of any order I make, as I suppose of any order that a judge ever

makes, is to try to enable justice to be done. It seems to me that in the circumstances of the present case justice demands that Mr P should be placed in a position to clear his name if the allegations made against him are without foundation. It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me. It seems to me that the principles expressed in the *Norwich Pharmacal* case, although they have not previously been applied so far as I know to a case in which the question whether there has been a tort has not clearly been answered, ought to be applicable in a case such as the present.

Mr Pawlak for T has submitted that the application of the *Norwich Pharmacal* principles should be confined to cases involving torts which have, as he put it, some criminal aspect to them. The torts of which the plaintiff complained in *Norwich Pharmacal* did indeed have that aspect to them. Many torts have such an aspect to them. It is a matter of legitimate comment that libel and malicious falsehood do not. On the other hand malicious falsehood and libel are torts which procedurally are often dealt with differently from ordinary torts. They are cases upon which juries can be obtained. The recognition by the civil justice system that torts of that character still justify the use of juries sets them somewhat apart from other torts and somewhat nearer perhaps the torts with a criminal aspect to which Mr Pawlak has referred. I do not wish to say that I accept the limitation that Mr Pawlak has suggested, namely that the *Norwich Pharmacal* principle should not be applied to discovery of details regarding what one might call ordinary torts. It is true that there is no such case where *Norwich Pharmacal* has been so applied; but there is no such case where *Norwich Pharmacal* relief has been refused. For my part, I see no reason whatever why the *Norwich Pharmacal* principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of libel or malicious falsehood in circumstances such as exist in the present case. I am of opinion that this is a case in which justice does require the granting of the relief sought by the notice of motion. The relief is, in my opinion, granted by the principle in the *Norwich Pharmacal* case. I have not been taken by counsel in any detail through the notice of motion. I have expressed in the remarks I have already made my acceptance of the need to make a *Norwich Pharmacal* order.

Order accordingly. Leave to appeal refused.

Celia Fox Barrister.

R v Secretary of State for the Home Department and another, ex parte Robinson

COURT OF APPEAL, CIVIL DIVISION
LORD WOOLF MR, POTTER AND BROOKE LJJ
10, 11 JUNE, 11 JULY 1997

Immigration – Leave to enter – Refugee – Asylum – Fear of persecution held by applicant for refugee status – Persecution of Tamils in Sri Lanka following assassination of president of country by Tamil militants – Special adjudicator refusing to grant refugee status as safe haven in country and so applicant not having well-founded fear of persecution – Applicant applying to Immigration Appeal Tribunal for leave to appeal – Whether tribunal having jurisdiction to consider questions relating to safe havens – Whether tribunal in deciding whether to grant leave limited to considering issues raised by applicant – Convention and Protocol relating to the Status of Refugees, art 1A(2).

The applicant, a Tamil from northern Sri Lanka, applied for asylum in the United Kingdom. Under art 1A(2) of the Convention relating to the Status of Refugees the term 'refugee' applied to any person who 'owing to a well-founded fear' of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, was outside the country of his nationality and was unable to or, owing to such fear of persecution, was unwilling to avail himself of the protection of that country. The applicant had come to the United Kingdom from Colombo to escape persecution as a result of his connections with the LTTE (the Tamil Tigers) following the assassination of the President of Sri Lanka by Tamil militants in May 1993. However, his asylum application was refused and he was refused leave to enter the United Kingdom. The special adjudicator dismissed the applicant's appeal, holding that while the applicant could not reasonably be expected to return to an area controlled by the Tamil Tigers as there was a risk that he would be recruited by them against his will to support them, he could safely return to Colombo which was controlled by the Sri Lankan authorities, and therefore did not have a well-founded fear of persecution. The special adjudicator did not expressly consider whether it was reasonable to expect the applicant to settle in Colombo. The Immigration Appeal Tribunal subsequently refused the applicant's application for leave to appeal against the special adjudicator's decision, without referring to that question either. Thereafter, the applicant applied with leave of the Court of Appeal for judicial review of the tribunal's decision.

Held – (1) Where an applicant for asylum had a well-founded fear of persecution in his country of nationality but there was in that country a safe haven where he would not have that fear, he could not claim the status of 'refugee' pursuant to art 1A(2) of the convention, if it was reasonable for him to live there. In determining whether it was reasonable, the test to be applied was whether it was unduly harsh to expect the applicant who was being persecuted in one part of his country to move to another less hostile part of the country before seeking refugee status abroad. Other appropriate factors included whether as a practical matter (ie financial, logistical or other good reason) the 'safe' area was reasonably accessible and whether the applicant would encounter great physical danger, or

undue hardship, in travelling or staying there. It followed that the special adjudicator ought to have considered whether it was reasonable for the applicant to return to Colombo (see p 217 *b* to *g* and p 220 *d* to *f*, post).

(2) Although the applicant's grounds of appeal to the tribunal had not referred to the question of whether it was reasonable for him to return to Colombo, the tribunal in hearing an appeal had jurisdiction to consider issues relating to safe havens and was not limited in its consideration of the facts by the arguments actually advanced by the asylum seeker. In the instant case, whilst it was clear that living in Colombo still created problems for Tamils in the north, it was far from being an obvious case of Colombo not being a safe haven and it followed that the tribunal had not erred in law in failing to recognise that the special adjudicator had not expressly dealt with that question. Accordingly, the application for judicial review of the tribunal's refusal to grant leave to appeal from the special adjudicator's decision would be dismissed (see p 218 *g* to *j*, p 219 *j* to p 220 *a*, p 222 *a* to *e* and p 224 *c d*, post).

Notes

For control of immigration with respect to political asylum and refugees, see 4(2) *Halsbury's Laws* (4th edn reissue) para 82, and for cases on the subject, see 7(2) *Digest* (2nd reissue) 93–96, *518–530*.

Cases referred to in judgment

A-G of Canada v Ward (UN High Comr for Refugees et al intervening) (1993) 103 DLR (4th) 1, Can SC.

Adan v Secretary of State for the Home Dept [1997] 2 All ER 723, [1997] 1 WLR 1107, CA.

Anandanadarajah v Immigration Appeal Tribunal [1996] Imm AR 514, CA.

El-Tanoukhi v Secretary of State for the Home Dept [1993] Imm AR 71, CA.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

Ikhlaq v Secretary of State for the Home Dept [1997] CA Transcript 529; *affg* (15 July 1996, unreported), IAT.

R v Immigration Appeal Tribunal, ex p Jonah [1985] Imm AR 7.

R v Immigration Appeal Tribunal, ex p Probakaran [1996] Imm AR 603.

R v Immigration Appeal Tribunal, ex p Sivanentheran (21 May 1997, unreported), CA.

R v Immigration Appeal Tribunal, ex p Sureshkumar (1997) Times, 25 January, [1996] CA Transcript 1811.

R v Kensington and Chelsea London BC, ex p Kihara (1996) 29 HLR 147, CA.

R v Secretary of State for the Home Dept, ex p Ahmed (15 May 1996, unreported), IAT.

R v Secretary of State for the Home Dept, ex p Dupovac (8 February 1995, unreported), IAT.

R v Secretary of State for the Home Dept, ex p Gunes [1991] Imm AR 278.

R v Secretary of State for the Home Dept, ex p Nirmalan (30 December 1996, unreported), IAT.

R v Secretary of State for the Home Dept, ex p Sivakumaran (UN High Comr for Refugees intervening) [1988] 1 All ER 193, [1988] AC 958, [1988] 2 WLR 92, HL.

R v Secretary of State for the Home Dept, ex p Vigna [1993] Imm AR 93.

R v Secretary of State for the Home Dept, ex p Vijendran (15 January 1997, unreported), IAT.

R v Secretary of State for the Home Dept, ex p Yurekli [1991] Imm AR 153, CA; *affg* [1990] Imm AR 334.

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 124 ALR 265 Aust Fed Ct.

Thirunavukkarasu v Minister of Employment and Immigration (1993) 109 DLR (4th) 682, Can Fed CA.

Cases also cited or referred to in skeleton arguments

Akkulak v Immigration Appeal Tribunal [1995] Imm AR 114, CA.

Al-Medawi v Secretary of State for the Home Dept [1989] 3 All ER 843, [1990] 1 AC 876, HL.

Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, HL.

Immigration Appeal Tribunal v Ali [1988] Imm AR 237, CA.

Khaboka v Secretary of State for the Home Dept [1993] Imm AR 484, CA.

Mendis v Immigration Appeal Tribunal [1989] Imm AR 6, CA.

R v Immigration Appeal Tribunal, ex p Arslan [1997] Imm AR 63.

R v Immigration Appeal Tribunal, ex p Mehta [1976] Imm AR 38, CA.

R v Immigration Appeal Tribunal, ex p Suen (17 March 1997, unreported), QBD.

R v Secretary of State for the Home Dept, ex p Begum [1989] Imm AR 547; *affd* [1990] Imm AR 1, CA.

R v Secretary of State for the Home Dept, ex p Chugtai [1995] Imm AR 559.

R v Secretary of State for the Home Dept, ex p Ikhlaq [1997] CA Transcript 529.

R v Secretary of State for the Home Dept, ex p Kazmi [1995] Imm AR 73.

R v Secretary of State for the Home Dept, ex p Miranda (31 March 1995, unreported), IAT.

R v Secretary of State for the Home Dept, ex p Mehari [1994] 2 All ER 494, [1994] QB 474.

R v Secretary of State for the Home Dept, ex p Singh [1996] Imm AR 41.

Sandralingham v Secretary of State for the Home Dept, Rajendrakumar v Immigration Appeal Tribunal [1996] Imm AR 97, CA.

Application for judicial review

Anthonypillai Francis Robinson applied with leave granted by the Court of Appeal (Waite, Saville and Otton LJJ) on 11 October 1996 for judicial review of the decision of the Immigration Appeal Tribunal on 11 April 1996 refusing him leave to appeal from the decision of the special adjudicator, Mr H J E Latter, on 13 March 1996 whereby he dismissed the applicant's appeal under s 8 of the Asylum and Immigration Appeals Act 1993 against the refusal of his application for asylum on 11 April 1995. The Court of Appeal directed that the application was to be heard by that court. The facts are set out in the judgment of the court.

Nicholas Blake QC and *Raza Husain* (instructed by *Nathan & Co*) for the applicant.

David Pannick QC and *Alison Foster* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Mark Shaw (instructed by the *Treasury Solicitor*) for the Immigration Appeal Tribunal.

Cur adv vult

11 July 1997. The following judgment of the court was delivered.

LORD WOOLF MR.

1. This appeal raises three points of general importance. The first is the scope of what is now often called 'the internal flight alternative'. This is linked with the definition of 'refugee' in the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)). The second is whether the appellate authorities handling appeals under the Asylum and Immigration Appeals Act 1993 have jurisdiction to consider issues relating to the internal flight alternative. The third relates to the scope of the duty, if any, on the Immigration Appeal Tribunal to consider issues which are not apparent on the face of a notice of appeal when it decides whether to grant leave to appeal from a decision of a special adjudicator.

2. The facts of the case are very similar to those which have frequently had to be considered by the appellate authorities in recent years in cases concerned with Tamils from Northern Sri Lanka who seek asylum in this country. The present applicant, Anthonypillai Francis Robinson, was born in Sri Lanka, of Tamil ethnic origin, in September 1967. He grew up in the Jaffna area, and he was detained by Sri Lankan security forces and the Indian peace-keeping force on three occasions between 1984 and May 1988. One of his uncles, who was then a Roman Catholic priest, was at one time wanted by Sri Lankan authorities on suspicion of supporting the Tamil separatist movement: this uncle left Sri Lanka following his detention in 1983 and was subsequently recognised as a refugee in the United Kingdom. By 1988 the LTTE (the Tamil Tigers) were the de facto authority in Jaffna, and they required the applicant to help them in their campaign against the Sri Lankan government. In May 1991 his family home was destroyed by Sri Lankan forces and he had to go and live with his parents in a refugee camp run by priests. For the next two years the LTTE required him to undergo military training and to join their forces, although he was reluctant to do so.

3. In April 1993 he left Jaffna and travelled to Colombo. He stayed with a friend for about a fortnight until the incident in which the President of Sri Lanka was assassinated by Tamil militants on 1 May 1993. He had given his mother's jewellery to his friend to pay for his support, and he paid the balance left over from the sale of this jewellery to an agent who helped him to leave the country. After the President's death the security measures against young Tamils were stepped up and on 4 May 1993 he was detained by the security forces for five days on suspicion of being a member of the LTTE. He was beaten, but later released without charge. He then went into hiding, and stayed at a number of short-term addresses until his departure from Sri Lanka could be arranged the following month, when he travelled to this country by air via Abu Dhabi and claimed asylum on arrival.

4. His asylum application was refused on 11 April 1995 and he was refused leave to enter on 22 April 1995. He appealed to a special adjudicator, but on 13 March 1996 a special adjudicator, Mr Latter, dismissed his appeal. On 11 April 1996 the tribunal refused leave to appeal. He then applied for leave to apply for judicial review of the tribunal's decision to refuse leave to appeal, but on 10 May 1996 Popplewell J dismissed this application after an oral hearing. On 11 October 1996 this court granted him leave to renew his application for judicial review and

directed that the substantive hearing should take place before this court since it raised procedural issues of general contemporary importance.

5. The special adjudicator had found the applicant and his supporting witness, the uncle to whom we have referred, to be credible witnesses. He held that the mere fact of the applicant's past connection with the Tamil Tigers would not, ipso facto, lead to a risk of persecution, and that he therefore had to consider whether there was a particular or special factor in the applicant's background which could put him at unusual risk. He did not consider that the risk of repeated detention by the security forces in Colombo, when searching for suspected terrorists, constituted persecution within the meaning of the convention. He went on:

> 'I do not think there is any serious possibility that the appellant can be regarded as having a special characteristic by reason of the fact that he is his uncle's nephew which means that he is likely to be treated differently from other Tamils of his age and background living in Colombo or other areas controlled by the Sri Lankan government. I accept the appellant could not reasonably be expected to return to an area controlled by the LTTE. There is a risk that he would be recruited by them against his will to support them. The issue is whether the appellant can safely return to an area controlled by the Sri Lankan authorities. In my view the appellant is not at particular or unusual risk compared with other Tamils in Colombo. He does not satisfy me that he has a well-founded fear of persecution.'

6. The special adjudicator ended by saying that he was sure that in the light of the current situation in Sri Lanka the Secretary of State for the Home Department would give careful consideration as to whether or not the applicant should be granted a period of exceptional leave to remain. In this context he mentioned the fact that the applicant had only been in Colombo for a few days before he was arrested and that he then moved from place to place before leaving Sri Lanka; that he has no relatives in Colombo and does not know where his parents are; and that his uncle lives in this country, where he has been granted asylum, and that he also has a grandmother, two uncles and two aunts living here. It is a central feature of Mr Blake QC's submissions that the special adjudicator should have taken considerations of this kind into account when deciding whether the applicant was a refugee as defined by the convention (see para 334(ii) of the Statement of Changes in Immigration Rules (HC Paper (1994) No 395)) and that he should not merely have left them as matters for the Secretary of State to consider when determining whether to grant the applicant exceptional leave to remain outside the rules.

7. Arguments of this kind were not, however, included in the grounds of appeal to the tribunal, which were settled by his solicitors. These were limited to issues relating to the applicant's safety if he was returned to Colombo, and arguments concerned with deficiencies in the reasoning of the special adjudicator. The tribunal's chairman did not therefore allude to them in the short reasons he gave for refusing leave to appeal. Mr Blake, however, contends that the tribunal was wrong when it said that the special adjudicator 'concluded that the applicant could safely return [to Colombo] and it would be reasonable for him to do so'. He said that the special adjudicator did not express himself in these terms, so far as questions of reasonableness were concerned, and that if he had considered questions of reasonableness as a free-standing issue, there were more

matters that he should have taken into account, and this raised questions fit for argument at a substantive hearing before the tribunal.

The definition of refugee and the 'internal flight alternative'

8. The convention conferred special status on a person recognised as a refugee within the meaning of the convention. Chapter II of the convention sets out the juridical status of a refugee. Chapter III prescribes the conditions on which refugees are entitled to enjoy gainful employment, Ch IV their welfare entitlements, and so on. In particular, so long as they are recognised as refugees, they may not be expelled from the territory in which they are lawfully present save on grounds of national security or public order, and even then only after due process of law (see art 32), and in any event a refugee may not be expelled or returned 'in any manner whatsoever' to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (see art 33). In *R v Secretary of State for the Home Dept, ex p Sivakumaran (UN High Comr for Refugees intervening)* [1988] 1 All ER 193 at 203, [1988] AC 958 at 1001 Lord Goff of Chieveley said that it was plain that the non-refoulement provision in art 33 was intended to apply to all persons determined to be refugees under art 1 of the convention.

9. It is therefore to art 1 that we must turn to see who is entitled to the benefits conferred by the convention. Article 1A(2) provides, so far as is material, that for the purposes of the convention, the term 'refugee' is to apply to any person who—

> 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...'

10. The convention does not deal in express terms with a situation in which a person may technically be able to live in part of a country free of fear but for one reason or other it is not reasonable to expect him to do so. Obvious examples are parts of countries which are uninhabitable—desert areas or mountainous terrain are very straightforward illustrations—and other examples have cropped up over the years in which the terms of the convention have been worked out in practice.

11. There is no international court charged with the interpretation and implementation of the convention, and for this reason the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, published in 1979 by the Office of the United Nations High Commissioner for Refugees, is particularly helpful as a guide to what is the international understanding of the convention obligations, as worked out in practice. As its preface makes clear the explanations of the definition of the term 'refugee' which it contains were based on the knowledge accumulated by the High Commissioner's Office since the convention came into force in 1954. This knowledge was derived, inter alia, from the practice of states in regard to the determination of refugee status, exchanges of views between the office and the competent authorities of contracting states, and the literature devoted to the subject over the previous quarter of a century.

12. When the authors of this *UNHCR Handbook* came to explain the phrase 'is outside the country of his nationality' in art 1A(2) of the convention, they said (para 91):

'The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.' (Authors' emphasis.)

13. A similar concept is to be found in s 8 of the joint position of 4 March 1996 (OJ 1996 L63, p 2) defined by the Council of the European Union on the basis of art K.3 of the Treaty on European Union (the TEU) (OJ 1992 C191) on the harmonised application of the definition of the term 'refugee' in art 1 of the convention (p 6):

'*Relocation within the country of origin*

Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned "is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country", to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move.'

14. It is a long-established principle of international law that it is legitimate, when interpreting a treaty, to take into account not only the context in which it was made but also any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation. This principle has been formalised in art 31(3)(b) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964). In *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 706–707, [1981] AC 251 at 282 Lord Diplock said that this article in his view did no more than codify already existing public international law.

15. It appears to us that the 1996 joint position reflects a contemporary understanding of the obligations created by the convention which is not confined to the member states of the European Community. (See eg Professor James C Hathaway *The Law of Refugee Status* (1991) pp 133–134, Guy Goodwin-Gill *The Refugee in International Law* (2nd edn, 1996) pp 74–75, *Thirunavukkarasu v Minister of Employment and Immigration* (1993) 109 DLR (4th) 682 and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265.)

16. The 1996 joint position is based on the principle that the international protection afforded by the convention will only come into play when a country cannot afford the claimant protection within its own frontiers. The idea was clearly stated by La Forest J in *A-G of Canada v Ward (UN High Comr for Refugees et al intervening)* (1993) 103 DLR (4th) 1 at 12:

'The rationale underlying international protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option. International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international

community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other States becomes engaged.'

17. It follows that if the home state can afford what has variously been described as 'a safe haven', 'relocation', 'internal protection', or 'an internal flight alternative' where the claimant would not have a well-founded fear of persecution for a convention reason, then international protection is not necessary. But it must be reasonable for him to go to and stay in that safe haven. As the majority of the Federal Court of Australia observed in *Randhawa*'s case:

'If it is not reasonable to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to the country as a whole is well-founded.' (See (1994) 124 ALR 265 at 270, 280 per Black and Whitlam CJJ.)

18. In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination. In *Thirunavukkarasu*'s case (1993) 109 DLR (4th) 682 at 687 Linden JA, giving the judgment of the Federal Court of Canada, said:

'Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?'

19. He went on to observe that while claimants should not be compelled to cross battle lines or hide out in an isolated region of their country, like a cave in the mountains, a desert or jungle, it will not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there.

20. In the English cases which touch on this topic, while not identifying the governing considerations so clearly, Nolan J in *R v Immigration Appeal Tribunal, ex p Jonah* [1985] Imm AR 7 considered that it was unreasonable to expect a senior Ghanaian trade union official to go back to a very remote village accessible only by a 15-mile walk through the jungle; on the other hand, in both *R v Secretary of State for the Home Dept, ex p Yurekli* [1990] Imm AR 334 (Otton J), [1991] Imm AR 153 (CA) and *R v Secretary of State for the Home Dept, ex p Gunes* [1991] Imm AR 278 (Simon Brown J) the courts held that it was not unreasonable to expect Kurdish Turks to relocate in a part of Turkey away from the villages in which they faced

persecution. A similar view was expressed by this court in *El-Tanoukhi v Secretary of State for the Home Dept* [1993] Imm AR 71 which related to a decision that it was not unreasonable to expect a claimant who lived in a part of Lebanon under Israeli control to relocate in a different part of Lebanon.

21. Mr Pannick, who appeared for the Secretary of State for the Home Department, accepted that it was appropriate to interpret this country's obligations under the convention by reference to what is set out in para 91 of the *UNHCR Handbook*. This is scarcely surprising in the light of this country's recent adherence to the 1996 joint position of the Council of the European Union. In those circumstances, if a question arises whether an applicant for asylum might reasonably live in another part of his home country where he has no present fear of persecution, the answer to this question goes directly to the issue whether he should properly be treated as a 'refugee' within the meaning of the convention, or whether he may legitimately be returned to that part of his home country consistently with this country's obligations under the convention.

The jurisdiction of the appellate authorities

22. The reason why this is important in the present context is that the jurisdiction of the appellate authorities in asylum cases is derived exclusively from s 8(1) of the 1993 Act, which provides:

> 'A person who is refused leave to enter the United Kingdom under the [Immigration Act 1971] may appeal against the refusal to a special adjudicator on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the [1951 Geneva Convention and its Protocol]'.

23. Although s 19(1) of the Immigration Act 1971 has effect as if s 8 of the 1993 Act were contained in Pt II of the 1971 Act, the restriction on the grounds of appeal in asylum cases which is contained in s 8 of the 1993 Act serves to limit the jurisdiction of a [special] adjudicator under s 19(1) of the earlier Act in such cases to the single issue set out in s 8.

24. It was because of the language of s 8 that different divisions of the Immigration Appeal Tribunal, each chaired by its Vice-President, Professor D C Jackson, in three cases decided between February 1995 and December 1996 (*R v Secretary of State for the Home Dept, ex p Dupovac* (8 February 1995, unreported), *R v Secretary of State for the Home Dept, ex p Ahmed* (15 May 1996, unreported) and *R v Secretary of State for the Home Dept, ex p Nirmalan* (30 December 1996, unreported), concluded that they had no jurisdiction to consider a question arising under the internal flight alternative because they did not believe that it impinged on this country's obligations under the convention. The reason why they formed this view was that they considered that para 91 of the *UNHCR Handbook* could not import an extra provision into the convention and that the only provision of the rules which bore on issues relating to the internal flight alternative (see para 343 of the 1994 Statement of Changes) was a national rule which conferred a discretion on the Secretary of State to refuse an application in circumstances unconnected with this country's convention obligations.

25. It appears to us that the tribunal fell into error in these cases because of the way the relevant rules were drafted before the true nature of the 'internal flight alternative' was fully considered by the courts or by academic writers, at all events in this country. The relevant rules, which are contained in paras 334, 336 and 343 of the 1994 Statement of Changes are in these terms:

'*Grant of asylum*

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and (ii) he is a refugee, as defined by the Convention and Protocol; and (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

Refusal of asylum

336. An application which does not meet the criteria set out in paragraph 334 will be refused.

Consideration of cases

343. If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go, the application may be refused.'

26. That Parliament in 1993 intended the appellate authorities to ensure that this country's obligations under the convention are enforced is evident from s 2 of the 1993 Act, which reads: 'Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.'

27. Before July 1993, the relevant Statement of Changes in Immigration Rule (HC Paper (1990) No 251) simply prescribed that cases involving asylum seekers should be referred by immigration officers to the Home Office who were to consider the case in accordance with the provisions of the convention and protocol (see para 75). An effort was then made, with effect from 7 July 1993, to spell out the effect of the convention in the rules themselves (see the new paras 180A to 180Q introduced into the 1990 Statement of Changes by the Statement of Changes in Immigration Rules (HC Paper (1993) No 725) and later, for the new consolidated rules, see paras 327–352 of 1994 Statement of Changes). However, no effort was made, no doubt for very prudent reasons, to codify the meaning of the word 'refugee' in what is now para 334(ii) in the 1994 Statement of Changes, and the only reference to the concept of the safe haven or the internal flight alternative is contained in para 343, under the heading 'Consideration of cases', which says in effect that if there is a safe haven or internal flight alternative an application for asylum may be refused. This is no more than the obverse side of the proposition that if there is no such safe haven then the claimant will be a refugee within the meaning of the convention and this country will be bound to grant him asylum, as is made clear in para 334. Simon Brown LJ reached much the same conclusion in his bracketed observations in *Adan v Secretary of State for the Home Dept* [1997] 2 All ER 723 at 733, [1977] 1 WLR 1107 at 1118.

28. It follows that the tribunal was wrong to hold in *Ex p Dupovac, Ex p Ahmed* and *Ex p Nirmalan* that it had no jurisdiction to consider such issues on an appeal founded on s 8 of the 1993 Act and that another division of the tribunal, chaired by the chief immigration adjudicator (Judge Pearl) was correct in *Ikhlaq v Secretary of State for the Home Dept* (15 July 1996, unreported) to hold that it had. In two recent cases this court has assumed, without hearing argument, that these issues could be considered on a s 8 appeal (see *R v Secretary of State for the Home Dept, ex*

p Ikhlaq [1997] CA Transcript 529 per Staughton LJ and *R v Immigration Appeal Tribunal, ex p Sivanentheran* (21 May 1997, unreported) per Lord Bingham of Cornhill CJ). We have now heard full argument on this issue and we are satisfied that the assumption on which the court acted in those two cases was correct in law. What almost certainly led to the division of opinion within the tribunal which we have now resolved is the language of para 343. The paragraph ends with the words 'the application *may* be refused' (our emphasis). The discretion to refuse the application which the use of the word 'may' connotes is only appropriate because—

> 'If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go'

he would not be *entitled* to have his claim to be a refugee accepted. In the obverse situation he would be so entitled, and no question of discretion would therefore arise.

29. In our judgment, the Secretary of State and the appellate authorities would do well in future to adopt the approach which is so conveniently set out in s 8 of the European Union's 1996 joint position. Where it appears that persecution is confined to a specific part of a country's territory the decision maker should ask: can the claimant find effective protection in another part of his own territory to which he or she may reasonably be expected to move? We have set out in paras 18 and 19 of this judgment appropriate factors to be taken into account in deciding what is reasonable in this context. We consider the test suggested by Linden JA—'would it be unduly harsh to expect this person to move to another less hostile part of the country?'—to be a particularly helpful one (see *Thirunavukkarasu's* case (at 687)). The use of the words 'unduly harsh' fairly reflects that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country.

Grounds not referred to in the notice of appeal

30. We turn now to consider the third point which arises on this appeal. We have observed that the special adjudicator did not expressly consider whether it was reasonable to expect the claimant to settle in Colombo. He merely asked himself whether the claimant would have a well-founded fear of persecution if he was returned there. However, he did consider the question whether the claimant had 'special characteristics', so that he may have been assuming that Colombo was a safe haven in accordance with previous decisions. No question relating to reasonableness, as opposed to safety, was raised in the grounds of appeal to the tribunal. Under these circumstances was the tribunal itself obliged to consider whether the special adjudicator had dealt correctly with questions relating to reasonableness when it considered whether to grant leave to appeal?

31. Mr Blake concedes that the relevant rules of procedure obliged the applicant to say why he thought the special adjudicator's decision was wrong (see the Asylum Appeals (Procedure) Rules 1993, SI 1993/1661, r 13(3) and Pt 3 of the Form A2 prescribed in the schedule to those rules). He says, however, that this is not the end of the matter, because the tribunal is part of the decision-making process on the question whether a person is a refugee, and the answer to that question depends, so far as the claimant's part in the process is concerned, on the evidence he presents to the decision makers and not on the legal arguments he submits, if any. Mr Blake supported this submission by reference to para 205 and

paras 28–29 of the *UNHCR Handbook*. His argument ran like this. A person is a refugee within the meaning of the convention as soon as he fulfils the criteria contained in the convention definition. At the first stage of the process of determining his refugee status he has to present the relevant facts to the examiner truthfully and honestly. At the second stage it is the duty of the examiner, once he has established the facts, to relate the objective and the subjective elements in the case to the relevant convention criteria in order to arrive at the correct conclusion as to the claimant's status. Thus if the facts show that he has a well-founded fear of persecution for a convention reason in one part of a country and he cannot reasonably avail himself of a safe haven or internal flight alternative in any other part of that country then he is unable to avail himself of the protection of that country within the meaning of art 1A(2) of the convention, and it is the duty of the decision maker to see that this is the case when he applies the convention criteria to the facts he has found.

32. Mr Blake went on to submit that the functions that the appellate authorities perform under the 1993 Act necessarily preclude the argument that they are limited, when applying the convention criteria to the facts they find, to considering the points, if any, raised by the applicant or his advisers. In the context of Tamil asylum seekers, he has shown us that issues relating to the reasonableness of Colombo as a safe haven have cropped up repeatedly in recent years (see, for example, *R v Secretary of State for the Home Dept, ex p Vigna* [1993] Imm AR 93 at 94 per Roch J, *R v Immigration Appeal Tribunal, ex p Probakaran* [1996] Imm AR 603 at 605 per Jowitt J and *R v Secretary of State for the Home Dept, ex p Vijendran* (15 January 1997, unreported) per Latham J (note that Latham J's test of 'satisfactory quality of life' was expressly disapproved by this court in *Ex p Sivanentheran*)).

33. We were referred during argument to a passage in the judgment of Hobhouse LJ, with which the two other members of this court agreed, when the court refused a renewed application for leave to apply for judicial review of the tribunal's decision in *Anandanadarajah v Immigration Appeal Tribunal* [1996] Imm AR 514 at 519. In that passage Hobhouse LJ said, agreeing with the judge:

> 'In an application for asylum the applicant has to discharge a burden of proof, place before the adjudicator the material upon which he seeks to rely and to advance the arguments which he considers assist his case. In the present matter the only submission of substance which was made to the special adjudicator was that Colombo was an unsafe place for the applicant and that it gave rise to a fear on his part that if he stayed there he would be subjected to persecution of a relevant kind. The adjudicator did not accept the applicant's evidence on that point and did not accept the only submission that was made to him. Under those circumstances, other categories of reasonableness not having been raised before him, it is not surprising that the adjudicator did not specifically refer to them.'

34. In that case the special adjudicator's decision had been challenged on the basis that he had failed to assess the requirement of 'reasonableness' as laid down in para 343 of the 1994 Statement of Changes in respect of Colombo, although this was brought to his attention. In fact, as Hobhouse LJ observed, the only arguments raised before the special adjudicator had related to questions of safety, and the tribunal had refused leave to appeal on the basis that there was no error of law and that the adjudicator had considered all the points raised before him.

35. Neither leading counsel who appeared before us was concerned to support this dictum of Hobhouse LJ if it was intended to suggest that, even if an appellant does not present a particular argument, a special adjudicator is not obliged to apply his own understanding of the convention and its jurisprudence to his findings on the facts presented to him. The central issue in these appeals is whether this country would be in breach of its obligations under the convention if it did not recognise the appellant as a refugee and were to subject him to refoulement contrary to art 33 of the convention, and we have shown in this judgment that a question whether a particular part of the appellant's home country affords a safe haven or an internal flight alternative is one which may well have to be considered by a special adjudicator, whether the appellant raises it or not, when deciding pursuant to r 334(ii) whether the appellant is a refugee.

36. Of course, it may well be the case that once the special adjudicator has rejected the appellant's case that he has a well-founded fear of persecution for a convention reason if returned to the part of his country to which he is to be sent back, there is nothing else in his evidence which could reasonably support an argument that it would not be reasonable to return him there. This was the reason why this court refused a renewed application recently in *R v Immigration Appeal Tribunal, ex p Sureshkumar* (1997) Times, 25 January even though it knew that leave to appeal had been granted in the present case and that the appeal had not yet been heard.

37. It follows from what we have said that it is the duty of the appellate authorities to apply their knowledge of convention jurisprudence to the facts as established by them when they determine whether it would be a breach of the convention to refuse an asylum seeker leave to enter as a refugee, and that they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representative. If Hobhouse LJ's dictum is interpreted as adopting a more restrictive approach to the duty of a special adjudicator, then it should not be followed. It has no greater authority than any other observation made in this court when it refuses a renewed application for leave (see *R v Kensington and Chelsea London BC, ex p Kihara* (1996) 29 HLR 147 at 162 per Simon Brown LJ) and this court, which has heard full argument on the present appeal, is not bound by it.

38. It is now, however, necessary for us to identify the circumstances in which it might be appropriate for the tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the tribunal in relation to a point not taken in the notice of appeal to the tribunal.

39. Because the rules place an onus on the asylum seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should, of course, focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'. Similarly,

if when the tribunal reads the special adjudicator's decision there is an obvious point of convention law favourable to the asylum seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the grounds of appeal to the tribunal had a strong prospect of success if leave to appeal were to be granted.

40. We were invited during the hearing to give more general guidance to the tribunal about the criteria it should apply when deciding whether to grant leave to appeal. The tribunal has told us, however, that it is its experience that the circumstances in which it is proper to grant leave to appeal vary greatly and depend on the facts of individual cases. Its discretion to grant or refuse leave is at large under the 1993 rules, and counsel for the tribunal tells us that this position, approved by Parliament, is workable and works satisfactorily. In non-asylum cases, in contrast, the circumstances in which the tribunal must and may grant leave to appeal are set out (see s 22(5) of the 1971 Act and r 14 of the Immigration Appeals (Procedure) Rules 1984, SI 1984/2041).

41. In these circumstances we consider it inappropriate, particularly in the absence of much more information than is at present available to us, to give the tribunal the more general guidance suggested by counsel. But if this court is not to take this course, it behoves the tribunal itself to make clear to would-be appellants the general criteria it is accustomed to apply (while leaving room for exceptional cases to be accommodated outside any general statement of criteria) so that its decision-making process in a very important area of its jurisdiction may be both transparent and consistent. There are few things that upset would-be litigants more than a court or tribunal acting in a way which does not appear to be fair and consistent as between different applicants when it is exercising its gate-keeping function of deciding whether to grant leave to access it (see, for comparable complaints about inconsistencies in the way the judges of the Crown Office List were performing a similar function a few years ago, the Law Commission report, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226) (1994) (see 27 *Law Commission Reports* p 419) para 5.13 (p 464)). Provided that the tribunal exercises its jurisdiction in a consistent and transparent way, giving clear reasons, which should include the reason why it is refusing to grant leave when unusual points have been put to it, we see no reason why we should give guidance in relation to matters with which it is inevitably much more familiar than this court would ever be.

42. Our final task on this appeal is to apply the principles we have set out in this judgment to the facts of the present case. It appears to us that the applicant's advisers were hard-pressed to conjure up out of those facts an 'internal flight alternative' case that was even arguable once the special adjudicator had rejected the argument that the applicant had a well-founded fear of persecution for a convention reason in Colombo. They based their arguments on the history of the very short time the applicant spent in Colombo in May to June 1993 when it was in its most disrupted state, following the assassination of the President and the Leader of the Opposition. These arguments ran along these lines: (1) the applicant had no relatives to accommodate, support and protect him in Colombo; (2) he had no employment prospects or capacity for independent

support in Colombo, and had lived off the proceeds of his mother's jewellery until he left there; (3) he had no secure accommodation in Colombo and had spent the best part of six weeks moving from address to address to avoid the attention of the authorities; he had arrived in Colombo dressed as a Sinhalese to avoid suspicion but he did not read Sinhalese and had language difficulties; (4) there was a risk of repetition of his detention in May 1993 in Colombo at the hands of the authorities having regard to his family background, previous history and the understandable interest of the authorities in Colombo in suspect Tamils.

43. The appellate authorities had to consider the position in Colombo very much later than May to June 1993 when they exercised their jurisdiction in this case. The relevant time at which to consider the position was when they each came to make their decisions. We accept Mr Pannick's submission that the fourth argument was not open to the applicant in the light of the special adjudicator's findings of fact, unless what is meant is a risk of an occasional detention for questioning following a terrorist incident in Colombo. In our judgment, although it is clear that living in Colombo still creates its problems for Tamils from the north, this is far from being an obvious case of Colombo not being a safe haven or internal flight alternative, and the tribunal did not err in law in failing to recognise that the special adjudicator had not expressly dealt with it as such. This application is therefore dismissed.

Application dismissed.

Kate O'Hanlon Barrister.

R v Ireland
R v Burstow

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD STEYN, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

19, 20, 21 MAY, 24 JULY 1997

Criminal law – Assault – Assault occasioning actual bodily harm – Psychiatric injury – Defendant making repeated silent telephone calls to victims – Victims suffering psychological damage as a result of calls – Whether psychiatric illness amounting to bodily harm – Whether silent telephone calls capable of constituting assault – Offences against the Person Act 1861, s 47.

Criminal law – Grievous bodily harm – Causing and inflicting – Defendant making repeated silent and abusive telephone calls to victim and harassing her – Whether offence of inflicting grievous bodily harm could be committed where no physical violence was applied directly or indirectly to victim – Offences against the Person Act 1861, s 20.

In two separate appeals the question arose as to the ambit of 20[a] and 47[b] of the Offences against the Person Act 1861.

In the first appeal, the defendant made repeated silent telephone calls, mostly at night, to three women, as a result of which they suffered psychiatric illness. He was charged with three counts of assault occasioning actual bodily harm under s 47 of the 1861 Act, to which he pleaded guilty. The defendant was sentenced to three years' imprisonment. The Court of Appeal dismissed his subsequent appeal against conviction on the grounds that psychiatric injury could amount to bodily harm under s 47 and that since repeated telephone calls of a menacing nature could cause victims to apprehend an immediate and unlawful violence, the defendant's conduct was capable of amounting to assault. The defendant appealed.

In the second appeal, the defendant had conducted an eight-month campaign of harassment against a woman which included making both silent and abusive telephone calls to her, distributing offensive cards in the street where she lived, visiting her place of work and her home, taking photographs of her and her family, and sending her a note which was intended, and was understood to be, menacing. The victim was badly affected by that campaign of harassment; it preyed on her mind, she was fearful of personal violence and a consultant psychiatrist stated that she was suffering from a severe depressive illness. The defendant was charged with one count of unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 of the 1861 Act. At the trial, following the judge's ruling that a s 20 offence could be committed where no physical violence had been applied directly or indirectly to the body of the victim, the defendant changed his plea to guilty and was sentenced to three years' imprisonment. The Court of Appeal dismissed his appeal against conviction on the grounds that

a Section 20, so far as material, is set out at p 228 *j* to p 229 *a*, post

b Section 47, so far as material, is set out at p 229 *a*, post

psychiatric injury could amount to bodily harm under s 20. The defendant appealed.

Held – (1) In the light of the best current scientific appreciation of the link between the body and psychiatric injury, the words 'bodily harm' in ss 20 and 47 of the 1861 Act were capable of covering recognised psychiatric illnesses, such as an anxiety disorder or a depressive disorder, which affected the central nervous system of the body. However, those neuroses had to be distinguished from simple states of fear, or problems in coping with everyday life, which did not amount to psychiatric illnesses. Since, in the instant appeals, both of the victims had developed anxiety and depressive disorders, it followed that they had suffered 'bodily harm' (see p 227 *g h*, p 231 *d* to *j*, p 233 *j*, p 237 *h* and p 241 *c*, post); *R v Chan-Fook* [1994] 2 All ER 552 approved.

(2) The making of silent telephone calls which caused psychiatric injury to the victim was capable of amounting to an assault in law under s 47 of the 1861 Act where the calls caused the victim to apprehend an immediate application of force. Furthermore, an offence of inflicting grievous bodily harm under s 20 of the 1861 Act could be committed even though no physical violence was applied directly or indirectly to the body of the victim. Accordingly, both appeals would be dismissed (see p 227 *g h*, p 235 *c* to *j*, p 236 *g* to p 237 *b e* to *h*, p 238 *f j*, p 239 *c d* and p 240 *j* to p 241 *c*, post); *R v Clarence* [1886–90] All ER Rep 133 distinguished.

Decision of the Court of Appeal in *R v Ireland* [1997] 1 All ER 112 affirmed.

Notes

For assault occasioning actual bodily harm and the offence of inflicting grievous bodily harm, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 490, 491.

For the Offences against the Person Act 1861, ss 20, 47, see 12 *Halsbury's Statutes* (4th edn) (1994 reissue) 99, 105.

Cases referred to in opinions

Bourhill v Young [1942] 2 All ER 396, [1943] AC 92, HL.

Fagan v Metropolitan Police Comr [1968] 3 All ER 442, [1969] 1 QB 439, [1968] 3 All ER 1120, DC.

Longford, The (1889) 14 PD 34, CA.

McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

Meade's and Belt's Case (1823) 1 Lew CC 184, 168 ER 1006, Assizes.

Page v Smith [1995] 2 All ER 736, [1996] AC 155, [1995] 2 WLR 644, HL.

R v Chan-Fook [1994] 2 All ER 552, [1994] 1 WLR 689, CA.

R v Clarence (1888) 22 QBD 23, [1886–90] All ER Rep 133, CCR.

R v Mandair [1994] 2 All ER 715, [1995] 1 AC 208, [1994] 2 WLR 700, CA.

R v Salisbury [1976] VR 452, Vic Full Ct.

R v Savage, R v Parmenter [1991] 4 All ER 698, [1992] 1 AC 699, [1991] 3 WLR 914, HL.

R v Venna [1975] 3 All ER 788, [1976] QB 421, [1975] 3 WLR 737, CA.

R v Wilson [1955] 1 All ER 744, [1955] 1 WLR 493, CCA.

R v Wilson (Clarence), R v Jenkins (Edward John) [1983] 3 All ER 448, [1984] AC 242, [1983] 3 WLR 686, HL.

Royal College of Nursing of the UK v Dept of Health and Social Security [1981] 1 All ER 545, [1981] AC 800, [1981] 2 WLR 279, HL.

Appeals

R v Ireland

Robert Matthew Ireland appealed with leave of the Appeal Committee granted on 15 January 1997 against the decision of the Court of Appeal (Swinton Thomas LJ, Tucker and Douglas Brown JJ) ([1997] 1 All ER 112, [1997] QB 114) delivered on 14 May 1997 dismissing his appeal against his conviction on a plea of guilty in the Crown Court at Newport on three counts of assault occasioning actual bodily harm contrary to s 47 of the Offences against the Person Act 1861 before Judge Prosser QC on 10 March 1995. The facts are set out in the judgment of Lord Steyn.

R v Burstow

Anthony Christopher Burstow appealed with leave of the Appeal Committee granted on 15 January 19976 against the decision of the Court of Appeal (Lord Bingham CJ, Owen and Connell JJ) ([1997] 1 Cr App R 144) delivered on 29 July 1996 dismissing his appeal against conviction on a plea of guilty in the Crown Court at Reading on one charge of unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 of the Offences against the Person Act 1861 before Judge Lait on 4 March 1996. The facts are set out in the judgment of Lord Steyn.

Malcolm Bishop QC and *Philip Richards* (instructed by *Evans & Ellis*, Chepstow) for Ireland.

Christopher Llewellyn-Jones QC and *Roger Griffiths* (instructed by the *Crown Prosecution Service*) for the Crown.

Peter Feinberg QC and *Andrew Turton* (instructed by *Hart Brown*, Woking) for Burstow.

Bruce Houlder QC and *Paul Reid* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

24 July 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had an opportunity of reading in draft the speeches prepared by my noble and learned friends Lord Steyn and Lord Hope of Craighead. I agree with them, and for the reasons they give I would dismiss both appeals.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading the draft of the speech prepared by my noble and learned friend Lord Steyn. For the reasons he gives I too would dismiss both appeals. I would, however, reiterate that in *Ireland* the question as to whether there was a fear of immediate violence for the purposes of s 47 of the Offences against the Person Act 1861 and the question as to how the concept of immediacy is to be applied, in a case where words or silence by someone using the telephone are relied on as constituting the assault, did not arise for decision.

LORD STEYN. My Lords, it is easy to understand the terrifying effect of a campaign of telephone calls at night by a silent caller to a woman living on her own. It would be natural for the victim to regard the calls as menacing. What

may heighten her fear is that she will not know what the caller may do next. The spectre of the caller arriving at her doorstep bent on inflicting personal violence on her may come to dominate her thinking. After all, as a matter of common sense, what else would she be terrified about? The victim may suffer psychiatric illness such as anxiety neurosis or acute depression. Harassment of women by repeated silent telephone calls, accompanied on occasions by heavy breathing, is apparently a significant social problem. That the criminal law should be able to deal with this problem, and so far as is practicable, afford effective protection to victims is self-evident.

From the point of view, however, of the general policy of our law towards the imposition of criminal responsibility, three specific features of the problem must be faced squarely. First, the medium used by the caller is the telephone: arguably it differs qualitatively from a face-to-face offer of violence to a sufficient extent to make a difference. Secondly, ex hypothesi the caller remains silent: arguably a caller may avoid the reach of the criminal law by remaining silent however menacing the context may be. Thirdly, it is arguable that the criminal law does not take into account 'mere' psychiatric illnesses.

At first glance it may seem that the legislature has satisfactorily dealt with such objections by s 43(1) of the Telecommunications Act 1984, which makes it an offence persistently to make use of a public telecommunications system for the purpose of causing annoyance, inconvenience or needless anxiety to another. The maximum custodial penalty is six months' imprisonment. This penalty may be inadequate to reflect a culpability of a persistent offender who causes serious psychiatric illness to another. For the future there will be for consideration the provisions of ss 1 and 2 of the Protection from Harassment Act 1997, not yet in force, which creates the offence of pursuing a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. The maximum custodial penalty is six months' imprisonment. This penalty may also be inadequate to deal with persistent offenders who cause serious psychiatric injury to victims. Section 4(1) of the 1997 Act, which creates the offence of putting people in fear of violence, seems more appropriate. It provides for maximum custodial penalty upon conviction on indictment of five years' imprisonment. On the other hand, s 4 only applies when as a result of a course of conduct the victim has cause to fear, on at least two occasions, that violence *will* be used against her. It may be difficult to secure a conviction in respect of a silent caller: the victim in such cases may have cause to fear that violence *may* be used against her but no more. In my view, therefore, the provisions of these two statutes are not ideally suited to deal with the significant problem which I have described. One must therefore look elsewhere.

It is to the provisions of the Offences against the Person Act 1861 that one must turn to examine whether our law provides effective criminal sanctions for this type of case. In descending order of seriousness the familiar trilogy of sections (as amended) provide as follows:

> '**18.** Whosoever shall unlawfully and maliciously by any means whatsoever ... cause any grievous bodily harm to any person ... with intent ... to do some ... grievous bodily harm to any person ... shall be guilty of felony, and being convicted thereof shall be liable ... to [imprisonment] for life.
>
> **20.** Whosoever shall unlawfully and maliciously ... inflict any grievous bodily harm upon any other person, either with or without any weapon or

instrument, shall be guilt of a misdemeanor, and being convicted thereof shall be liable [to imprisonment for not more than five years].

47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable [to imprisonment for not more than five years].'

Making due allowance for the incongruities in these provisions, the sections can be described as 'a "ladder" of offences graded in terms of relative seriousness' (see Ashworth *Principles of Criminal Law* (2nd edn, 1995) p 313). An ingredient of each of the offences is 'bodily harm' to a person. In respect of each section the threshold question is therefore whether a psychiatric illness, as testified to by a psychiatrist, can amount to 'bodily harm'. If the answer to this question is No, it will follow that the 1861 Act cannot be used to prosecute in the class of cases which I have described. On the other hand, if the answer to the question is Yes, it will be necessary to consider whether the persistent silent caller, who terrifies his victim and causes her to suffer a psychiatric illness, can be criminally liable under any of these sections. Given that the caller uses the medium of the telephone and silence to terrify his victim, is he beyond the reach of these sections?

Similar problems arise in the case of the so-called stalker, who pursues a campaign of harassment by more diffuse means. He may intend to terrify the woman and succeed in doing so, by relentlessly following her, by unnecessarily appearing at her home and place of work, photographing her, and so forth. Is he beyond the reach of the trilogy of sections in the 1861 Act?

The two appeals before the House

There are two appeals before the House. In *R v Ireland* the appellant was convicted on his plea of guilty of three offences of assault occasioning actual bodily harm, contrary to s 47 of the 1861 Act. The judgment of the Court of Appeal dismissing his appeal is reported ([1997] 1 All ER 112, [1997] QB 114). The case against Ireland was that during a period of three months in 1994 covered by the indictment he harassed three women by making repeated telephone calls to them during which he remained silent. Sometimes, he resorted to heavy breathing. The calls were mostly made at night. The case against him, which was accepted by the judge and the Court of Appeal, was that he caused his victim to suffer psychiatric illness. Ireland had a substantial record of making offensive telephone calls to women. The judge sentenced him to a total of three years' imprisonment.

Before the Court of Appeal there were two principal issues. The first was whether psychiatric illness may amount to bodily harm within the meaning of s 47 of the 1861 Act. Relying on a decision of the Court of Appeal in *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689, the Court of Appeal in Ireland's case concluded that psychiatric injury may amount to bodily harm under s 47 of the 1861 Act. The second issue was whether Ireland's conduct was capable of amounting to an assault. In giving the judgment of the court in Ireland's case Swinton Thomas LJ said ([1997] 1 All ER 112 at 115, [1997] QB 114 at 119):

> 'It has been recognised for many centuries that putting a person in fear may amount to an assault. The early cases pre-date the invention of the telephone. We must apply the law to conditions as they are in the twentieth century.'

The court concluded that repeated telephone calls of a menacing nature may cause victims to apprehend immediate and unlawful violence. Given these conclusions of law, and Ireland's guilty plea, the Court of Appeal dismissed the appeal. The Court of Appeal certified the following question as being of general public importance, namely: 'As to whether the making of a series of silent telephone calls can amount in law to an assault.' But it will also be necessary to consider the question whether psychiatric illness may in law amount to bodily harm under s 47 of the 1861 Act. Those are the issues of law before the House in the appeal of *R v Ireland*.

In *R v Burstow* the appellant was indicted on one count of unlawfully and maliciously inflicting grievous bodily harm, contrary to s 20 of the 1861 Act. The facts are fully set out in the reported judgment of the Court of Appeal ([1997] 1 Cr App R 144). I can therefore describe the facts shortly. Burstow had a social relationship with a woman. She broke it off. He could not accept her decision. He proceeded to harass her in various ways over a lengthy period. His conduct led to several convictions and periods of imprisonment. During an eight-month period in 1995 covered by the indictment he continued his campaign of harassment. He made some silent telephone calls to her. He also made abusive calls to her. He distributed offensive cards in the street where she lived. He was frequently, and unnecessarily, at her home and place of work. He surreptitiously took photographs of the victim and her family. He sent her a note which was intended to be menacing, and was so understood. The victim was badly affected by this campaign of harassment. It preyed on her mind. She was fearful of personal violence. A consultant psychiatrist stated that she was suffering from a severe depressive illness. In the Crown Court counsel asked for a ruling whether an offence of unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 may be committed where no physical violence has been applied directly or indirectly to the body of the victim. The judge answered this question in the affirmative. Burstow thereupon changed his plea to guilty. The judge sentenced him to three years' imprisonment. Burstow applied for leave to appeal against conviction. The Court of Appeal heard full oral argument on the application, and granted the application for leave to appeal but dismissed the appeal. Two questions of law were canvassed before the Court of Appeal. First, there was the question whether psychiatric injury may amount to bodily harm under s 20. The Court of Appeal regarded itself as bound by the affirmative decision in *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689. The second issue was whether in the absence of physical violence applied directly or indirectly to the body of the victim an offence under s 20 may be committed. The Court of Appeal concluded that this question must be answered in the affirmative. The concluding observations of Lord Bingham of Cornhill CJ (at 149) were as follows:

> 'It is not straining language to speak of one person inflicting psychiatric injury on another. It would in our judgment be an affront to common sense to distinguish between section 18 and section 20 in the way contended for by the applicant. It would also, we think, introduce extreme and undesirable artificiality into what should be a very practical area of the law if we were to hold that, although grievous bodily harm includes psychiatric injury, no offence against section 20 is committed unless such psychiatric injury is the result of physical violence applied directly or indirectly to the body of the victim. The decision in *Chan-Fook* is in our view fatal to the applicant's submission.'

In the result the Court of Appeal dismissed the appeal against conviction. The court certified the following point as of general importance, namely:

> 'Whether an offence of inflicting grievous bodily harm under s 20 of the Offences against the Person Act 1861 can be committed where no physical violence is applied directly or indirectly to the body of the victim.'

It will be noted that in neither appeal is there an issue on mens rea: the appeals focus on questions of law regarding the actus reus.

The common question: can psychiatric illness amount to bodily harm?

It will now be convenient to consider the question which is common to the two appeals, namely whether psychiatric illness is capable of amounting to bodily harm in terms of ss 18, 20 and 47 of the 1861 Act. The answer must be the same for the three sections.

The only abiding thing about the processes of the human mind, and the causes of its disorders and disturbances, is that there will never be a complete explanation. Psychiatry is and will always remain an imperfectly understood branch of medical science. This idea is explained by Vallar's psychiatrist in Iris Murdoch's *The Message to the Planet*:

> 'Our knowledge of the soul, if I may use that unclinical but essential word, encounters certain seemingly impassable limits, set there perhaps by the gods, if I may refer to them, in order to preserve their privacy, and beyond which it may be not only futile but lethal to attempt to pass and though it is our duty to seek for knowledge, it is also incumbent on us to realise when it is denied us, and not to prefer a fake solution to no solution at all.'

But there has been progress since 1861. And courts of law can only act on the best scientific understanding of the day. Some elementary distinctions can be made. The appeals under consideration do not involve structural injuries to the brain such as might require the intervention of a neurologist. One is also not considering either psychotic illness or personality disorders. The victims in the two appeals suffered from no such conditions. As a result of the behaviour of the appellants they did not develop psychotic or psychoneurotic conditions. The case was that they developed mental disturbances of a lesser order, namely neurotic disorders. For present purposes the relevant forms of neurosis are anxiety disorders and depressive disorders. Neuroses must be distinguished from simple states of fear, or problems in coping with everyday life. Where the line is to be drawn must be a matter of psychiatric judgment. But for present purposes it is important to note that modern psychiatry treats neuroses as recognisable psychiatric illnesses (see *Liability for Psychiatric Illness* (Law Com Consultation Paper No 137) (1995) Pt III (The Medical Background) and Mullany and Handford *Tort Liability for Psychiatric Damage* (1993), discussion on 'A medical perspective' pp 24–42, esp p 30, footnote 88). Moreover, it is essential to bear in mind that neurotic illnesses affect the central nervous system of the body, because emotions such as fear and anxiety are brain functions.

The civil law has for a long time taken account of the fact that there is no rigid distinction between body and mind. In *Bourhill v Young* [1942] 2 All ER 396 at 402 [1943] AC 92 at 103 Lord Macmillan said:

> 'The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well

> recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one.'

This idea underlies the subsequent decisions of the House of Lords regarding post-traumatic stress disorder in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 301–302, [1983] 1 AC 410 at 418 per Lord Wilberforce and *Page v Smith* [1995] 2 All ER 736 at 752, [1996] AC 155 at 181 per Lord Browne-Wilkinson. So far as such cases are concerned with the precise boundaries of tort liability they are not relevant. But so far as those decisions are based on the principle that the claimant must be able to prove that he suffered a recognisable psychiatric illness or condition they are by analogy relevant. The decisions of the House of Lords on post-traumatic stress disorder hold that where the line is to be drawn is a matter for expert psychiatric evidence. By analogy, those decisions suggest a possible principled approach to the question whether psychiatric injury may amount to bodily harm in terms of the 1861 Act.

The criminal law has been slow to follow this path. But in *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689 the Court of Appeal squarely addressed the question whether psychiatric injury may amount to bodily harm under s 47 of the 1861 Act. The issue arose in a case where the defendant had aggressively questioned and locked in a suspected thief. There was a dispute as to whether the defendant had physically assaulted the victim. But the prosecution also alleged that even if the victim had suffered no physical injury, he had been reduced to a mental state which amounted to actual bodily harm under s 47. No psychiatric evidence was given. The judge directed the jury that an assault which caused a hysterical and nervous condition was an assault occasioning actual bodily harm. The defendant was convicted. Upon appeal the conviction was quashed on the ground of misdirections in the summing up and the absence of psychiatric evidence to support the prosecution's alternative case. The interest of the decision lies in the reasoning on psychiatric injury in the context of s 47. In a detailed and careful judgment given on behalf of the court Hobhouse LJ said ([1994] 2 All ER 552 at 558–559, [1994] 1 WLR 689 at 695, 696):

> 'The first question on the present appeal is whether the inclusion of the word "bodily" in the phrase "actual bodily harm" limits harm to harm to the skin, flesh and bones of the victim ... The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties.'

In concluding that 'actual bodily harm' is capable of including psychiatric injury Hobhouse LJ emphasised that—

> 'it does not include mere emotions such as fear or distress or panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.'

He observed that in the absence of psychiatric evidence a question whether or not an assault occasioned psychiatric injury should not be left to the jury.

The Court of Appeal, as differently constituted in *R v Ireland* and *R v Burstow*, was bound by the decision in *R v Chan-Fook*. The House is not so bound. Counsel for the appellants in both appeals submitted that bodily harm in Victorian legislation cannot include psychiatric injury. For this reason they argued that *R v*

Chan-Fook was wrongly decided. They relied on the following observation of Lord Bingham of Cornhill CJ in *R v Burstow* [1997] 1 Cr App R 144 at 148–149:

> 'Were the question free from authority, we should entertain some doubt whether the Victorian draftsman of the 1861 Act intended to embrace psychiatric injury within the expressions "grievous bodily harm" and "actual bodily harm".'

Nevertheless, Lord Bingham of Cornhill CJ observed that it is now accepted that in the relevant context the distinction between physical and mental injury is by no means clear cut. He welcomed (at 149) the ruling in *R v Chan-Fook*. I respectfully agree. But I would go further and point out that, although out of considerations of piety we frequently refer to the actual intention of the draftsman, the correct approach is simply to consider whether the words of the 1861 Act considered in the light of contemporary knowledge cover a recognisable psychiatric injury. It is undoubtedly true that there are statutes where the correct approach is to construe the legislation 'as if one were interpreting it the day after it was passed' (see *The Longford* (1889) 14 PD 34 at 36). Thus in *The Longford* 14 PD 34 at 37, 38 the word 'action' in a statute was held not to be apt to cover an Admiralty action in rem since when it was passed the Admiralty Court 'was not one of His Majesty's Courts of Law'. Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking' (see *Practical Legislation* (1902) p 83; see also Cross *Statutory Interpretation* (3rd edn, 1995) p 51 and Pearce and Geddes *Statutory Interpretation in Australia* (4th edn, 1996) pp 90–93). In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety (see *Royal College of Nursing of the UK v Dept of Health and Social Security* [1981] 1 All ER 545, [1981] AC 800 for an example of an 'always speaking' construction in the House of Lords).

The proposition that the Victorian legislator when enacting ss 18, 20 and 47 of the 1861 Act, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used. Moreover the 1861 Act is a statute of the 'always speaking' type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.

For these reasons I would, therefore, reject the challenge to the correctness of *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689. In my view the ruling in that case was based on principled and cogent reasoning and it marked a sound and essential clarification of the law. I would hold that 'bodily harm' in ss 18, 20 and 47 must be interpreted so as to include recognisable psychiatric illness.

R v Burstow: the meaning of 'inflict' in s 20

The decision in *R v Chan-Fook* opened up the possibility of applying ss 18, 20 and 47 in new circumstances. The appeal of Burstow lies in respect of his conviction under s 20. It was conceded that in principle the wording of s 18, and in particular the words 'cause any grievous bodily harm to any person', do not preclude a prosecution in cases where the actus reus is the causing of psychiatric injury. But counsel laid stress on the difference between 'causing' grievous bodily harm in s 18 and 'inflicting' grievous bodily harm in s 20. Counsel argued that the difference in wording reveals a difference in legislative intent: inflict is a narrower concept than cause. This argument loses sight of the genesis of ss 18 and 20. In his commentary on the 1861 Act Greaves, the draftsman, explained the position in *The Criminal Law Consolidation and Amendment Acts* (2nd edn, 1862) pp 3–4:

> 'If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was re-written; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and frequently varying from each other in phraseology, and ... these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature, which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout.'

The difference in language is therefore not a significant factor.

Counsel for Burstow then advanced a sustained argument that an assault is an ingredient of an offence under s 20. He referred your Lordships to cases which in my judgment simply do not yield what he sought to extract from them. In any event, the tour of the cases revealed conflicting dicta, no authority binding on the House of Lords, and no settled practice holding expressly that assault was an ingredient of s 20. And, needless to say, none of the cases focused on the infliction of psychiatric injury. In these circumstances I do not propose to embark on a general review of the cases cited: compare the review in Smith and Hogan *Criminal Law* (8th edn, 1996) pp 440–441. Instead I turn to the words of the section. Counsel's argument can only prevail if one may supplement the section by reading it as providing 'inflict *by assault* any grievous bodily harm'. Such an implication is, however, not necessary. On the contrary, s 20, like s 18, works perfectly satisfactorily without such an implication. I would reject this part of counsel's argument.

But counsel had a stronger argument when he submitted that it is inherent in the word 'inflict' that there must be a direct or indirect application of force to the body. Counsel cited the speech of Lord Roskill in *R v Wilson (Clarence), R v Jenkins (Edward John)* [1983] 3 All ER 448 at 454–455, [1984] AC 242 at 259–260, in which Lord Roskill quoted with approval from the judgment of the full court of the Supreme Court of Victoria in *R v Salisbury* [1976] VR 452. There are passages that give assistance to counsel's argument. But Lord Roskill expressly stated that he

was 'content to accept, as did the [court in *Salisbury*], that there can be an infliction of grievous bodily harm contrary to s 20 without an assault being committed' (see [1983] 3 All ER 448 at 455, [1984] AC 242 at 260). In the result the effect of the decisions in *R v Wilson* and *R v Salisbury* is neutral in respect of the issue as to the meaning of 'inflict'. Moreover, in *R v Burstow* [1997] 1 Cr App R 144 at 149 Lord Bingham of Cornhill CJ pointed out that in *R v Mandair* [1994] 2 All ER 715 at 719, [1995] 1 AC 208 at 215 Lord Mackay of Clashfern LC observed with the agreement of the majority of the House of Lords: 'In my opinion ... the word "cause" is wider or at least not narrower than the word "inflict".' Like Lord Bingham of Cornhill CJ I regard this observation as making clear that in the context of the 1861 Act there is no radical divergence between the meaning of the two words.

That leaves the troublesome authority of the decision of the Court for Crown Cases Reserved in *R v Clarence* (1888) 22 QBD 23, [1886–90] All ER Rep 133. At a time when the defendant knew that he was suffering from a venereal disease, and his wife was ignorant of his condition, he had sexual intercourse with her. He communicated the disease to her. The defendant was charged and convicted of inflicting grievous bodily harm under s 20. There was an appeal. By a majority of nine to four the court quashed the conviction. The case was complicated by an issue of consent. But it must be accepted that in a case where there was direct physical contact the majority ruled that the requirement of infliction was not satisfied. This decision has never been overruled. It assists counsel's argument. But it seems to me that what detracts from the weight to be given to the dicta in *R v Clarence* is that none of the judges in that case had before them the possibility of the inflicting, or causing, of psychiatric injury. The criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury. In my judgment *R v Clarence* no longer assists.

The problem is one of construction. The question is whether as a matter of current usage the contextual interpretation of 'inflict' can embrace the idea of one person inflicting psychiatric injury on another. One can without straining the language in any way answer that question in the affirmative. I am not saying that the words cause and inflict are exactly synonymous. They are not. What I am saying is that in the context of the 1861 Act one can nowadays quite naturally speak of inflicting psychiatric injury. Moreover, there is internal contextual support in the statute for this view. It would be absurd to differentiate between ss 18 and 20 in the way argued on behalf of Burstow. As Lord Bingham of Cornhill CJ observed in *R v Burstow* [1997] 1 Cr App R 144 at 149, this should be a very practical area of the law. The interpretation and approach should so far as possible be adopted which treats the ladder of offences as a coherent body of law. Once the decision in *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689 is accepted the realistic possibility is opened up of prosecuting under s 20 in cases of the type which I described in the introduction to this judgment.

For the reasons I have given I would answer the certified question in *R v Burstow* in the affirmative.

R v Ireland: was there an assault?

It is now necessary to consider whether the making of silent telephone calls causing psychiatric injury is capable of constituting an assault under s 47. The Court of Appeal, as constituted in *R v Ireland*, answered that question in the affirmative. There has been substantial academic criticism of the conclusion and

reasoning in *R v Ireland* (see *Archbold News*, Issue 6, 12 July 1996, *Archbold's Criminal Pleading, Evidence and Practice* (1995), Supplement No 4 (1996) pp 345–347, Smith and Hogan *Criminal Law* p 413, Jonathan Herring 'Assault by Telephone' [1997] CLJ 11 and 'Assault' [1997] Crim LR 434 at 435–436). Counsel's arguments, broadly speaking, challenged the decision in *R v Ireland* on very similar lines. Having carefully considered the literature and counsel's arguments, I have come to the conclusion that the appeal ought to be dismissed.

The starting point must be that an assault is an ingredient of the offence under s 47. It is necessary to consider the two forms which an assault may take. The first is battery, which involves the unlawful application of force by the defendant upon the victim. Usually, s 47 is used to prosecute in cases of this kind. The second form of assault is an act causing the victim to apprehend an imminent application of force upon her (see *Fagan v Metropolitan Police Comr* [1968] 3 All ER 442 at 445, [1969] 1 QB 439 at 444).

One point can be disposed of, quite briefly. The Court of Appeal was not asked to consider whether silent telephone calls resulting in psychiatric injury is capable of constituting a battery. But encouraged by some academic comment it was raised before your Lordships' House. Counsel for Ireland was most economical in his argument on the point. I will try to match his economy of words. In my view it is not feasible to enlarge the generally accepted legal meaning of what is a battery to include the circumstances of a silent caller who causes psychiatric injury.

It is to assault in the form of an act causing the victim to fear an immediate application of force to her that I must turn. Counsel argued that as a matter of law an assault can never be committed by words alone and therefore it cannot be committed by silence. The premise depends on the slenderest authority, namely an observation by Holroyd J to a jury that 'no words or singing are equivalent to an assault' (see *Meade's and Belt's Case* (1823) 1 Lew CC 184 at 185, 168 ER 1006). The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, eg a man accosting a woman in a dark alley saying 'come with me or I will stab you'. I would, therefore, reject the proposition that an assault can never be committed by words.

That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me to be 'Yes, depending on the facts'. It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way 'I will be at your door in a minute or two' may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the *possibility* of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under s 47 may be fit to leave to the jury. And a trial judge may, depending on the circumstances, put a commonsense consideration before jury, namely what, if not the possibility of imminent personal violence, was the victim terrified about?

I conclude that an assault may be committed in the particular factual circumstances which I have envisaged. For this reason I reject the submission that as a matter of law a silent telephone caller cannot ever be guilty of an offence under s 47. In these circumstances no useful purpose would be served by answering the vague certified question in *R v Ireland*.

Having concluded that the legal arguments advanced on behalf of Ireland on s 47 must fail, I nevertheless accept that the concept of an assault involving immediate personal violence as an ingredient of the s 47 offence is a considerable complicating factor in bringing prosecutions under it in respect of silent telephone callers and stalkers. That the least serious of the ladder of offences is difficult to apply in such cases is unfortunate. At the hearing of the appeal of *R v Ireland* attention was drawn to the Bill which is annexed to Law Commission report, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com Consultation Paper No 218) (1993). Clause 4 of that Bill is intended to replace s 47. Clause 4 provides: 'A person is guilty of an offence if he intentionally or recklessly causes injury to another.' This simple and readily comprehensible provision would eliminate the problems inherent in s 47. In expressing this view I do not, however, wish to comment on the appropriateness of the definition of 'injury' in cl 18 of the Bill, and in particular the provision that 'injury' means 'impairment of a person's mental health'.

The disposal of the appeals

The legal arguments advanced on behalf of Burstow have failed. The appeal must be dismissed.

The legal arguments advanced on behalf of Ireland have also failed. But counsel for the appellant submitted that the appeal should be allowed because on an examination of the statements there was no prima facie case against him. I reject this submission. The prosecution case was never fully deployed because Ireland pleaded guilty. The fact of his plea demonstrated his mens rea. It was said, however, that the ingredient of psychiatric injury was not established on the statements. It is true that the statement from the psychiatrist is vague. But I would not accept that read in context it was insufficient to allow the case to go before a jury. It would be an exceptional course, in the face of an unequivocal and deliberate plea of guilty, to entertain an appeal directed exclusively to the sufficiency of evidence. Such a course is not warranted in the present case. I would therefore dismiss the appeal of Ireland.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Steyn. I agree with it, and for the reasons which he gives I also would dismiss both appeals. I should like however to add a few words on the point which arises in *R v Burstow* as to the meaning of the word 'inflict' in s 20 of the Offences against the Person Act 1861, and on the point which arises in *R v Ireland* as to whether the making of a series of silent telephone calls can amount in law to an assault within the meaning of s 47 of that Act.

R v Burstow: 'inflict'

In this case the appellant changed his plea to guilty after a ruling by the trial judge that the offence of unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 of the 1861 Act may be committed where no physical

violence has been applied directly or indirectly to the body of the victim. Counsel for the appellant accepted that if *R v Chan-Fook* [1994] 2 All ER 552, [1994] 1 WLR 689 was correctly decided, with the result that 'actual bodily harm' in s 47 is capable of including psychiatric injury, the victim in this case had suffered grievous bodily harm within the meaning of s 20. But he submitted that no offence against s 20 had been committed in this case because, although the appellant might be said to have 'caused' the victim to sustain grievous bodily harm, he had not 'inflicted' that harm on her because he had not used any personal violence against her.

Counsel based his submission on the decision in *R v Clarence* (1888) 22 QBD 23, [1886–90] All ER Rep 133. In that case it was held that some form of direct personal violence was required for a conviction under s 20. The use of the word 'inflict' in the section was said to imply that some form of battery was involved in the assault. The conviction was quashed because, although the venereal infection from which the victim was suffering was the result of direct physical contact, there had been no violence used and thus there was no element of battery. It seems to me however that there are three reasons for regarding that case as an uncertain guide to the question which arises where the bodily harm which has resulted from the defendant's conduct consists of psychiatric injury.

The first is that the judges in *R v Clarence* were concerned with a case of physical, not psychiatric, injury. They did not have to consider the problem which arises where the grievous bodily harm is of a kind which may result without any form of physical contact. The second is that the intercourse had taken place with consent, as the defendant's wife was ignorant of his venereal disease. So there was no question in that case of an assault having been committed, if there was no element of violence or battery. Also, as Lord Roskill pointed out in *R v Wilson (Clarence), R v Jenkins (Edward John)* [1983] 3 All ER 448 at 455, [1984] AC 242 at 260 the judgments of the judges who formed the majority are not wholly consistent with each other. This casts some doubt on the weight which should be attached to the judgment when the facts are entirely different, as they are in the present case.

In *R v Wilson* [1983] 3 All ER 448 at 454, [1984] AC 242 at 259–260 Lord Roskill referred with approval to the judgment of the Supreme Court of Victoria in *R v Salisbury* [1976] VR 452 at 461, in which the following passage appears:

> '... although the word "inflicts" ... does not have as wide a meaning as the word "causes" ... the word "inflicts" does have a wider meaning than it would have if it were construed so that inflicting grievous bodily harm always involved assaulting the victim.'

Lord Roskill said that he was content to accept, as was the full court in *R v Salisbury*, that there can be an infliction of grievous bodily harm contrary to s 20 without an assault being committed (see [1983] 3 All ER 448 at 455, [1984] AC 242 at 260). But these observations do not wholly resolve the issue which arises in this case, in the context of grievous bodily harm which consists only of psychiatric injury.

The question is whether there is any difference in meaning, in this context, between the word 'cause' and the word 'inflict'. The fact that the word 'cause' is used in s 18, whereas the word used in s 20 is 'inflict,' might be taken at first sight to indicate that there is a difference. But for all practical purposes there is, in my opinion, no difference between these two words. In *R v Mandair* [1994] 2 All ER

715 at 719, [1995] 1 AC 208 at 215 Lord Mackay of Clashfern LC said that the word 'cause' is wider or at least not narrower than the word 'inflict'. I respectfully agree with that observation. But I would add that there is this difference, that the word 'inflict' implies that the consequence of the act is something which the victim is likely to find unpleasant or harmful. The relationship between cause and effect, when the word 'cause' is used, is neutral. It may embrace pleasure as well as pain. The relationship when the word 'inflict' is used is more precise, because it invariably implies detriment to the victim of some kind.

In the context of a criminal act therefore the words 'cause' and 'inflict' may be taken to be interchangeable. As the Supreme Court of Victoria held in *R v Salisbury* [1976] VR 452, it is not a necessary ingredient of the word 'inflict' that whatever causes the harm must be applied directly to the victim. It may be applied indirectly, so long as the result is that the harm is caused by what has been done. In my opinion it is entirely consistent with the ordinary use of the word 'inflict' in the English language to say that the appellant's actions 'inflicted' the psychiatric harm from which the victim has admittedly suffered in this case. The issues which remain are issues of fact and, as the appellant pled guilty to the offence, I would dismiss his appeal.

R v Ireland: 'assault'

In this case the appellant pled guilty to three contraventions of s 47 of the 1861 Act. He admitted to having made numerous telephone calls to three women, during which he remained silent when the women answered the telephone. These calls lasted sometimes for a minute or so, and sometimes for several minutes. On some occasions they were repeated over a relatively short period. There is no doubt that this conduct was intended to distress the victims, each of whom suffered as a result from symptoms of such a kind as to amount to psychiatric injury. But, for the appellant to be guilty of an offence contrary to s 47 of the 1861 Act, he must be held to have committed an act which amounts to an assault.

Plainly there was no element of battery—although counsel for the Crown made brief submissions to the contrary—as at no time was there any kind of physical contact between the appellant and his victims. As Swinton Thomas LJ observed in the Court of Appeal, that is a fact of importance in this case (see [1997] 1 All ER 112 at 115, [1997] QB 114 at 119). But it is not an end of the matter, because as he went on to say it has been recognised for many centuries that putting a person in fear may amount to what in law is an assault. This is reflected in the meaning which is given to the word 'assault' in *Archbold's Criminal Pleading, Evidence and Practice* (1997) p 1594 para 19-66, namely that an assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence. This meaning is well vouched by authority (see *R v Venna* [1975] 3 All ER 788, [1976] QB 421 and *R v Savage, R v Parmenter* [1991] 4 All ER 698 at 711, [1992] 1 AC 699 at 740 per Lord Ackner).

The question is whether such an act can include the making of a series of silent telephone calls. Counsel for the appellant said that such an act could not amount to an assault under any circumstances, just as words alone could not amount to an assault. He also submitted that, in order for there to be an assault, it had to be proved that what the victim apprehended was immediate and unlawful violence, not just a repetition of the telephone calls. It was not enough to show that merely that the victim was inconvenienced or afraid. He said that the Court of Appeal

had fallen into error on this point, because they had proceeded on the basis that it was sufficient that when the victims lifted the telephone they were placed in immediate fear and suffered the consequences which resulted in psychiatric injury. The court had not sufficiently addressed the question whether the victims were apprehensive of immediate and unlawful violence and, if so, whether it was that apprehension which had caused them to sustain the bodily injury.

I agree that a passage in the judgment of the Court of Appeal ([1997] 1 All ER 112 at 118, [1997] QB 114 at 122) suggests that they had equated the apprehension of immediate and unlawful violence with the actual psychiatric injury which was suffered by the victims. I also agree that, if this was so, it was an incorrect basis from which to proceed. But in the penultimate sentence in this passage Swinton Thomas LJ said that in the court's judgment repetitive telephone calls of this nature were likely to cause the victim to apprehend immediate and unlawful violence. Furthermore, as the appellant pled guilty to these offences, the question whether that apprehension caused the psychiatric injury did not need to be explored in evidence. The important question therefore is whether the making of a series of silent telephone calls can amount in law to an assault.

There is no clear guidance on this point either in the statute or in the authorities. On the one hand in *Meade's and Belt's Case* (1823) 1 Lew CC 184, 168 ER 1006 Holroyd J said that no words or singing can amount to an assault. On the other hand in *R v Wilson* [1955] 1 All ER 744 at 745, [1955] 1 WLR 493 at 494 Lord Goddard CJ said that the appellant's words, 'Get out knives' would itself be an assault. The word 'assault' as used in s 47 of the 1861 Act is not defined anywhere in that Act. The legislation appears to have been framed on the basis that the words which it used were words which everyone would understand without further explanation. In this regard the fact that the statute was enacted in the middle of the last century is of no significance. The public interest, for whose benefit it was enacted, would not be served by construing the words in a narrow or technical way. The words used are ordinary English words, which can be given their ordinary meaning in the usage of the present day. They can take account of changing circumstances both as regards medical knowledge and the means by which one person can cause bodily harm to another.

The fact is that the means by which a person of evil disposition may intentionally or recklessly cause another to apprehend immediate and unlawful violence will vary according to the circumstances. Just as it is not true to say that every blow which is struck is an assault—some blows, which would otherwise amount to battery, may be struck by accident or in jest or may otherwise be entirely justified—so also it is not true to say that mere words or gestures can never constitute an assault. It all depends on the circumstances. If the words or gestures are accompanied in their turn by gestures or by words which threaten immediate and unlawful violence, that will be sufficient for an assault. The words or gestures must be seen in their whole context.

In this case the means which the appellant used to communicate with his victims was the telephone. While he remained silent, there can be no doubt that he was intentionally communicating with them as directly as if he was present with them in the same room. But whereas for him merely to remain silent with them in the same room, where they could see him and assess his demeanour, would have been unlikely to give rise to any feelings of apprehension on their part, his silence when using the telephone in calls made to them repeatedly was an act of an entirely different character. He was using his silence as a means of

conveying a message to his victims. This was that he knew who and where they were, and that his purpose in making contact with them was as malicious as it was deliberate. In my opinion silent telephone calls of this nature are just as capable as words or gestures, said or made in the presence of the victim, of causing an apprehension of immediate and unlawful violence.

Whether this requirement, and in particular that of immediacy, is in fact satisfied will depend on the circumstances. This will need in each case, if it is disputed, to be explored in evidence. But that step was not necessary in this case as the appellant was prepared to plead guilty to having committed the offence. I would therefore answer the certified question in the affirmative and dismiss this appeal also.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons which he gives I would dismiss the appeals.

Appeals dismissed.

Celia Fox Barrister.

Okolo v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
BELDAM, SWINTON THOMAS AND SCHIEMANN LJJ
23 MAY 1997

Compulsory purchase – Compulsory purchase order – Application to quash order – Time limit – Application to be made within six-week period – Period commencing on Tuesday and application made on Tuesday six weeks later – Whether application made within limit – Whether six-week period including same day of week within period as day on which period commencing – Acquisition of Land Act 1981, s 23(4).

On Monday, 17 June 1996 confirmation by the Secretary of State of a compulsory purchase order made in respect of property owned by the applicant was published in a local newspaper. Thereafter, the applicant applied to the court challenging the validity of the order. By s 23(4)[a] of the Acquisition of Land Act 1981, applications to the High Court concerning compulsory purchase orders had to be made 'within six weeks' from the date on which the notice of completion or making of the order was first published, excluding the date of publication. On 24 June 1996 the applicant applied to the court for leave to move for judicial review of the Secretary of State's decision, although he failed to set out any proper grounds for the application. On being informed that that was not the correct procedure, he issued a notice of motion on Tuesday, 30 July 1996 asking for the compulsory purchase order to be quashed. The Secretary of State applied to the court to strike out that application since it was one day out of time and the six-week time period could not be extended under the 1981 Act. The judge dismissed the Secretary of State's application, on the ground that, applying the corresponding date rule, the final day of the six-week period was Tuesday, 30 July and therefore the application had been made within time. The Secretary of State appealed. On the appeal, the applicant contended that even if the application of 30 July had been made out of time, the application of 24 June had not, and so there had been an application to the High Court within the meaning of s 23(4) of the 1981 Act within the requisite period, which survived.

Held – For the purposes of s 23(4) of the 1981 Act, 'six weeks' meant 42 days, and the corresponding date rule did not apply. It followed, in the instant case, that the six-week period expired at midnight on Monday, 29 July and so the application had been made out of time. Moreover, having regard to the absence of any proper grounds, the application of 24 June was not a proper application and had no prospect of success. Accordingly, the appeal would be allowed and the application of 30 July struck out (see p 247 *a* to *d* and p 249 *e* to p 250 *c*, post).

Decision of Sedley J [1997] 2 All ER 911 reversed.

Notes

For challenging the validity of compulsory purchase orders, see 8(1) *Halsbury's Laws* (4th edn reissue) para 85.

For the meaning of 'week', see 45 *Halsbury's Laws* (4th edn) para 1112.

a Section 23(4), so far as material, is set out at p 246 *b*, post

For the Acquisition of Land Act 1981, s 23, see 9 *Halsbury's Statutes* (4th edn) (1994 reissue) 388.

Cases referred to in judgments

Burton v Secretary of State for Transport [1988] 2 EGLR 35, CA.

Dodds v Walker [1981] 2 All ER 609, [1981] 1 WLR 1027, HL.

Dunlop Pedriau Rubber Co Ltd v Federated Rubber Workers' Union of Australia (1931) 46 CLR 329, Aust HC.

Griffiths v Secretary of State for the Environment [1983] 1 All ER 439, [1983] 2 AC 51, HL.

Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd [1986] 1 All ER 573, CA.

R v Sweeny (1840) 2 ILR 278, Ir HC.

Cases also cited or referred to in skeleton arguments

Bazalgette v Lowe (1855) 3 Eq Rep 491.

Cartwright v MacCormack (Trafalgar Insurance Co Ltd, third parties) [1963] 1 All ER 11, [1963] 1 WLR 18, CA.

Goldsmiths' Co v West Metropolitan Rly Co [1904] 1 KB 1, [1900–3] All ER Rep 667, CA.

Hanily v Minister of Local Government and Planning [1951] 2 All ER 749, [1951] 2 KB 917, CA.

Riley (E J) Investments Ltd v Eurostile Holdings Ltd [1985] 3 All ER 181, [1985] 1 WLR 1139, CA.

Stewart v Chapman [1951] 2 All ER 613, [1951] 2 KB 792, DC.

Appeal

The Secretary of State for the Environment applied with leave from the judgment of Sedley J ([1997] 2 All ER 911) given on 30 January 1997 giving reasons for his decision made on 22 January 1997, whereby he dismissed the Secretary of State's application for an order to strike out the application of Solomon Obiajulo Okolo made under s 23 of the Acquisition of Land Act 1981 against the Secretary of State and Kingston upon Hull City Council challenging the validity of a compulsory purchase order, on the grounds that it had been made outside the period of six weeks stipulated in s 23(4) of the Act. The council took no part in the proceedings. The facts are set out in the judgment of Schiemann LJ.

John Litton (instructed by the *Treasury Solicitor*) for the Secretary of State.

Prashant Popat (instructed by *Leigh Williams*, Bromley) for Mr Okolo.

SCHIEMANN LJ (giving the first judgment at the invitation of Beldam LJ). This is an appeal from an order of Sedley J made on 22 January 1997, for which reasons were given to the parties on 30 January this year, whereby the judge dismissed the Secretary of State for the Environment's application to strike out two applicants' originating applications which sought to challenge the confirmation on 14 May 1996 of a compulsory purchase order (see [1997] 2 All ER 911).

Sedley J's delay in giving judgment was because he was dealing with two notices of motion by litigants in person. One of them, Mr Okolo, did not appear in front of him either in person or by being represented. The other, Mrs Omoregei, appeared in person but the judge did not call upon her to argue because, as he put it, 'her unsolicited interventions have not suggested to me that she is capable of doing herself justice'. With the care and attention so typical of

that judge, he took time off to see whether an argument could be constructed to support his conclusion that the Secretary of State's application to strike out these notices of motion should not succeed.

This appeal arises out of a confirmation by the appellant, the Secretary of State, of a compulsory purchase order. This was confirmed on 14 May 1996. The confirmation of the order was first published in the Hull Daily Mail on 17 June 1996 and that day notification was sent to the respondent, Mr Okolo. Mr Okolo appealed against the confirmation of the order with two documents. The first one in time, which was not before the judge, is on the standard Form 86A, or at least it is copied in part from it. It says:

> 'IN THE HIGH COURT OF JUSTICE
> QUEENS BENCH DIVISION ...
> In the matter of an application for Judicial Review
> THE QUEEN -v- THE SECRETARY OF STATE FOR THE ENVIRONMENT EX PARTE SOLOMON OBIAJULU OKOLO
> Notice of application for leave to apply for Judicial Review Rules of Supreme Court Order 53 rule 3(2) ...'

Then against the side heading *'Judgment, order, decision ... in respect of which relief is sought ...'* it states:

> 'The decision of the respondent ("the Secretary of State for the Environment") to confirm the Compulsory Purchase Orders [which he then identifies] and confirmed in a letter to the applicant from the Housing Team Government Office for Yorkshire and Humberside, dated 14th May 1996, but not received by the applicant until 16th May 1996.'

Against 'Relief sought':

> '(1) An order of certiorari to quash the decision aforesaid. (2) A declaration that the decision aforesaid is nullity in law and of no effect. (3) Further or in the alternative to (2) above, a declaration that the Secretary of State is obliged under the Department of the Environment Guide to Procedure for Compulsory Purchase Order to entertain the applicant's objections to the Compulsory Purchase Order dated 27th September 1994 and 25th September 1995 under the stated procedure. (4) An order of prohibition preventing the Hull City Council or its Chief Executive from initiating or finalising the "Vesting Declaration Procedure" to acquire the property situated at 49 Cranbrook Avenue Hull and 45 Auckland Avenue Hull respectively. (5) Interim Relief; Further or in the alternative to (4) above. An order that the grant of leave to apply for judicial review operates as a stay of the proceedings to which this application relates—namely the Compulsory Purchase Order.'

I then turn to the heading 'Grounds on which relief is sought'. They read as follows:

> '1.1 In this case the applicant will contend that he has legal grounds for judicial review in that the Secretary of State's decision to confirm the Compulsory Purchase Order made by Hull City on 27th September 1994 and 25th September 1995 vitiated by: 2.1 COLLUDING WITH PROCEDURAL ILLEGALITY ("Substantive and Procedural Ultra Vires") 2.2 ILLEGALITY 2.3 IRRATIONALITY 2.4 IMPROPRIETY ...'

It then says:

> '3. The applicant seeks 3.1 Leave to move this Honourable Court for judicial review 3.2 An order for expedition ... 3.3 Affidavit of applicant to be sent under separate cover before 25th July 1996. 3.4 Skeleton Arguments to be forwarded under separate cover before 25th July 1996. 3.5 If leave is granted the relief sought herein. 4. *FACTS AND SUBMISSIONS.* 5. *AFFIDAVIT OF THE APPLICANT.*'

So far as I can see, no affidavit was ever sworn.

That Form 86A was the first document which Mr Okolo launched on an unsuspecting world. He must have had drawn to his attention, perhaps by the Crown Office, that, if one wished to challenge a compulsory purchase order, the normal procedure, foreseen by statute, is the making of an application to the High Court. The rules then apply the notice of motion procedure and leave is not necessary. The applicant then set about drafting a new document. It is that document which was under challenge before the judge.

The new document once more asks for the compulsory purchase order to be quashed and then goes on:

> 'AND FURTHER TAKE NOTICE that the grounds of this application are that the said Compulsory Purchase Order is not within the powers of the Housing Act 1985 in that: (1) the Hull City Council intend to deal with the lands the subject of the said Compulsory Purchase Order in a manner contrary to the provisions of Section 291 of the said Housing Act 1985 ...'

That is an allegation of some present intention of the Kingston upon Hull City Council to do something other than what is permitted under the 1985 Act and:

> (2) the above-named Secretary of State acted Ultra Vires in confirming the said Compulsory Purchase Order being an Order or intended to be exercised with a view to dealing with the land acquired in a manner contrary to the said Section 291 of the Housing Act 1985.'

It was that document, dated 30 July 1996, with which the judge was concerned.

The relevant statutory provision is s 17 of the 1985 Act, which gives the housing authority power to acquire land for various purposes compulsorily. Section 578 of that Act provides:

> 'The Acquisition of Land Act 1981, the Compulsory Purchase Act 1965 and the Land Compensation Act 1961 apply to the compulsory purchase of land under this Act subject to the following provision of this Part.'

Sections 10 to 12 of the 1981 Act provide for the publication of the compulsory purchase order. Section 13 says that the Secretary of State may confirm the order but, if any objection which is made is not withdrawn, he must hold a public inquiry and consider the objection before determining whether or not to confirm the order. Section 15 of the 1981 Act says:

> 'As soon as maybe after the order has been confirmed the acquiring authority shall publish in one or more local newspapers circulating, the locality in which the land comprised in the order is situated a notice in the prescribed form ...'

which is then set out.

Section 23 of the same Act is crucial to this case. It provides that any person aggrieved by the confirmation of a compulsory purchase order may make an application to the High Court. Section 23(4) states:

> 'An application to the High Court under this section shall be made within six weeks ... (b) in the case of a compulsory purchase order to which the said Act of 1945 does not apply, from the date on which notice of the confirmation or making of the order is first published in accordance with this Act ...'

The 1981 Act provides that the court may quash the compulsory purchase order but it can only be challenged by the method set out in s 23. The crucial question before Sedley J was essentially when those six weeks ran out. The date of the publication of the order was Monday, 17 June. If one starts counting at the beginning of Tuesday, 18 June, one view is that six weeks had expired at the end of Monday, 29 July. If one simply counts a week as seven days from the time of the actual publication of the order, manifestly six times seven days have expired by that time plus a few hours on top. That argument did not appeal to Sedley J for reasons which will shortly appear.

Before I turn to it further, I can say that the Secretary of State applied to strike out the two notices of motion, which had been launched on 30 July, as being a day late, it being common ground that the period prescribed by statute cannot be extended. On that application Sedley J refused to strike out. Mr Okolo did not appear. Sedley J's reason for refusing to strike out was essentially that the six-week period was a short period and, therefore, matters should be construed strictly; one should start counting not on the day of publication of the order but rather on the following day, which was common ground in front of him and has been common ground before us.

Sedley J then cited a whole series of cases. In particular, he cited *Griffiths v Secretary of State for the Environment* [1983] 1 All ER 439, [1983] 2 AC 51, a decision of the House of Lords. That case however, as he himself noted, was not directly concerned with the mode of computing time, but it seems to have been assumed that one did it in the way that Sedley J employed in the present case. As he accepted, it certainly was not decided in that case. The judge referred to a judgment in *Dunlop Pedriau Rubber Co Ltd v Federated Rubber Workers' Union of Australia* (1931) 46 CLR 329. He then referred to *Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd* [1986] 1 All ER 573 and another House of Lords case, *Dodds v Walker* [1981] 2 All ER 609, [1981] 1 WLR 1027. He also discovered an Irish case, *R v Sweeny* (1840) 2 ILR 278, where the court evidently, although we have not seen the case, gave what Sedley J described as a particularly expansive meaning of 'week' requiring a clear seven days and enlarging the overall period to nine days. The judge finally mentioned the French expression 'quinzaine' or 'quinze jours' as he puts it, for a fortnight.

When we opened the case today, counsel had, pursuant to a suggestion of Sedley J, been allotted to Mrs Omoregei in the sense that she had been given legal aid. Counsel, Mr Bedeau, who appeared for her, informed us that he had been expressly instructed by this lady that she had no interest in the property at the relevant times at all and, therefore, was instructed not to resist the appeal. He accepted that she was not a person aggrieved, entitled within the statute to challenge the order, so she disappeared from the case. We were then left with Mr Okolo's case. Mr Okolo, who had not appeared before Sedley J, but appeared

before us represented by Mr Popat of counsel, who has argued the case both in writing and on paper very well.

The point in relation to the six weeks is very simple and, to my mind, one of first impression. In my judgment, if the notice is published on a Monday and you are given six weeks to challenge it, six weeks will have ended by midnight of the Monday in six weeks' time. I equiparate six weeks with six times seven days. There are various cases to which reference has been made where, in the landlord and tenant field, one is construing periods of a month. There the courts have used what has been described as the corresponding date rule. 'Month' is of course a rather more difficult word than 'week' because 'month' can be anything from 28 to 31 days and, therefore, it has no precise meaning. Parliament in the Interpretation Act 1978 has given it a definition in relation to statutes passed after 1850.

The need for such a rule as to the corresponding date is one which has arisen because of this uncertainty. I see no need for such a rule in relation to a 'week' where none of these problems arise. One notes that even in cases where the rule would normally apply there are modifications of it, for instance where a notice is given on the 31st day of a month containing 31 days, such as August, that would expire in a month with only 30 days in September, and one could not continue into the next month.

It is really a very short point as counsel on both sides recognise. It is common ground that there is no decision to the effect that the corresponding date rule has an equivalent where statute has prescribed a given number of weeks as the relevant period.

Mr Popat then raised for the first time a point that had not been before Sedley J. He relied on the application for leave to move for judicial review which had been made two or three days within the six weeks, however you calculate them. He put forward a careful argument in relation to that. He said that the statute merely provides that application shall be made to the High Court. It does not indicate what form that application is to be made. He said that application was made by way of the Form 86A, which I have read. He accepts that the Form 86A has not set out any proper grounds, but the need for that arises not from statute but from the Rules of the Supreme Court. When one turns either to RSC Ord 53 or Ord 8, which deals with notices of motion, there is a requirement that the grounds be stated. That is common between the two procedures.

Mr Popat then reminded the court of Ord 2, r 1(1), which says:

> 'Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings ...'

He might have drawn our attention to Ord 2, r 1(3):

> 'The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.'

He says effectively there was an application to the High Court; true it was in the wrong form, but that does not result in it being a nullity and, therefore, an application was made which took the form of an application for leave to move for judicial review which should survive.

The difficulty is that this was not argued before Sedley J. The Secretary of State had no reason to suppose that that original document would ever be relied on. It was not until the ingenuity of Mr Popat hit on it that the point was taken and brought to the attention of the Secretary of State. What we are formally dealing with is an appeal in relation to an application to strike out a notice of motion dated 30 July. It is implicit in Mr Popat's argument that we should be dealing with an application to strike out the earlier document. That would be, not so much on the basis that it was out of time, but rather on the basis that it really was an abuse of process of the court to launch proceedings in that way.

Mr Popat says that it would be very unfair for this court to approach the matter in that way because he says, first of all, we have no application by the Secretary of State to strike out that earlier document and, secondly, he did not really have any warning as to any possible attack in relation to that earlier document and that it should survive.

We indicated to him that we were concerned to see what in substance was the point that was sought to be made by Mr Okolo. Unfortunately he has been unable to put it in front of us with any greater degree of crispness than Mr Okolo himself produced in the two documents which emanated from him.

By way of background as to the court's approach in these matters, we were usefully referred to *Burton v Secretary of State for Transport* [1988] 2 EGLR 35. That was an appeal in relation to orders made by the Secretary of State for Transport with regard to road improvements. There again there was an application to quash three orders made by the Secretary of State under ss 10 and 14 of the Highways Act 1980. Mr Graham Eyre QC, sitting as a deputy judge of the High Court, refused to quash them, as did the Court of Appeal in due course. What is of interest in the present context are some remarks made by Woolf LJ, which, while obiter, give the court an approach which should be taken in cases of this kind where statute has prescribed a limited period within which a challenge can be made.

Woolf LJ drew attention to the need to state grounds crisply and clearly which the rules of court provide. He pointed out that in that particular case the notice of motion provided no grounds for it whatever. He said (at 36):

> 'Grounds of this sort do not comply with Ord 94. Grounds should identify the actual point relied on in terms which enable the department to ascertain the case it has to meet and whether or not it has any merit. If this is not done, then the department should consider making an application to strike out the notice of motion. In considering any such application the court will, I hope, bear in mind that Parliament has laid down a six-week time-limit for making the application to the High Court which the courts have no power to extend ... Parliament has also indicated that such an application is the only means by which an order made by the Secretary of State can be challenged. The time-limit and the limited scope of appeal provided by the Schedule indicate that Parliament intended applications to the High Court to be dealt with expeditiously and therefore the court should deal firmly with applications which are designed to frustrate that intention.'

Mann LJ, agreeing with him, said that the originating motion contained no grounds at all, and that the absence of grounds was not improved on in July 1987 when, during the hearing, an amendment to the motion was presented. He said (at 37):

> 'I have little doubt that if this application had been subjected to a filter such as is necessary to secure leave to move for judicial review ... it would not have passed through the filter ...'

He suggested that filter procedure would be appropriate to introduce in this type of case. Purchas LJ, another judge familiar which this branch of the law, as indeed are Mann and Woolf LJJ, said (at 38):

> 'There must be an onus upon those responsible for presenting the originating motion under Ord 94 to ensure that the requirements of Ord 8 r 3(2) are met.'

Those remarks indicate the policy behind the cases cited in *Burton's* case. In so far as the application was one which was to strike out the notice of motion on 30 July, in my judgment, it should have been struck out as being outside the time limits. In so far as we have looked at the substance of the matter and looked at the notice of motion and the application for leave together, it seems to me that they do not improve the situation nor should they lead us to refrain from striking out the notice of motion which was before us.

Mr Popat has constructed an interesting argument. I see no prospect of the original application for leave to move for judicial review getting leave in its present form. I can see every policy argument against granting any extension of time after this passage of time. It is accepted by Mr Litton that the mere failure to get a particular form right will not always lead to something being out of time just because one needs to alter the heading on the form. That is a concession rightly made but the present case does not come anywhere near providing a form which can sensibly be described as a proper application. I would, therefore, allow this appeal and strike out the notice of motion.

SWINTON THOMAS LJ. I agree. Mr Popat in his able submissions submits that the document of 24 June 1996 satisfies the provisions of s 23 of the Acquisition of Land Act 1981. In my judgment, whether or not a document amounts to a valid application is one of fact and degree to be resolved if in dispute by the court. The mere fact that something describes itself as an application does not automatically turn it into a valid application for the purposes of a particular legislation.

RSC Ord 94 is headed 'Application and Appeals to High Court under various Acts: Queen's Bench Division *Jurisdiction of High Court to quash certain orders, schemes, etc.*' Rule 1(2) provides:

> 'The application must be made by originating motion and, without prejudice to Order 8, rule 3(2) the notice of such motion must state the grounds of the application.'

That rule and what was said by this court in *Burton v Secretary of State for Transport* [1988] 2 EGLR 35, the relevant parts of which have already been read by Schiemann LJ, are particularly relevant to this issue. In truth the document of 24 June gives no grounds entitling Mr Okolo to relief under s 23 of the 1981 Act. Apart from calling itself an application it bears none of the indicia of a valid application. In my judgment, it is not a valid application for the purposes of s 23.

If I should be wrong in coming to that conclusion, I agree that the application would fall to be struck out for the reasons given by Schiemann LJ as an abuse of process. *a*

As so the calculation of the six weeks' period for the purposes of s 23 of the Act, I agree that that period is one of 42 days from the day following the date of the publication. The corresponding date rule so-called, has no application to this period. Accordingly, for those reasons, and the reasons given by Schiemann LJ, I would also allow this appeal. *b*

BELDAM LJ. I also agree that the appeal of the Secretary of State for the Environment should be allowed and the applications should be struck out.

Appeal allowed. Leave to appeal to House of Lords refused. *c*

L I Zysman Esq Barrister.

Re S (a minor) (custody: habitual residence)

HOUSE OF LORDS
LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD NOLAN, LORD NICHOLLS OF BIRKENHEAD AND LORD HUTTON
16, 17 JUNE, 24 JULY 1997

Minor – Custody – Jurisdiction – Habitual residence – Illegitimate child habitually resident in England removed to Ireland by relatives on mother's death without father's knowledge or consent – Two days later father granted interim care and control of child by English court and child made ward of court – Whether court having jurisdiction to make order – Whether child habitually resident in England at date of order – Whether relatives changing child's habitual residence by taking him out of jurisdiction – Family Law Act 1986, ss 2(3), 3(1)(a) – Children Act 1989, s 3(5).

Minor – Custody – Rights of custody – Wrongful removal or retention – Illegitimate child removed from England to Ireland by relatives on mother's death without father's knowledge or consent – Father having no rights of custody at date of removal – Two days later father granted interim care and control of child by English court and return of child ordered – Whether retention of child in Ireland thereafter wrongful – Child Abduction and Custody Act 1985, Sch 1, art 3.

Minor – Custody – Enforcement of custody order – Unlawful removal – Illegitimate child removed from England to Ireland by relatives on mother's death without father's knowledge or consent – Father not having right to determine child's place of residence at date of removal – Two days later father granted interim care and control of child by English court and return of child ordered – Whether removal of child thereafter unlawful – Child Abduction and Custody Act 1985, s 23(2), Sch 2, art 12.

The mother, who was Irish, and the father, who was Moroccan, began to live together in 1990 but never married. They had one child, S, a boy, who was born in January 1995. The parties later separated and the mother obtained an ex parte interim residence order and an interim prohibited steps order in respect of S. On 4 March 1996 the mother was admitted to hospital in London, where she died from a brain haemorrhage. On 11 March the appellants, S's maternal grandmother and aunt, who had come to London from Ireland on 5 March to help look after S, took him back there without the father's knowledge or consent. On 13 March the Dublin Circuit Court granted guardianship and care and control of S to the aunt. Later that day the High Court in England made an order granting interim care and control of S to the father and ordering the grandmother to return S to the jurisdiction. The following day the father issued an originating summons to make S a ward of court, and he also applied for (a) a declaration that S's retention in Ireland was wrongful within the meaning of art 3[a] of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (which had the force of law in the United Kingdom by virtue of s 1(2) of the Child Abduction and Custody Act 1985 and was set out in Sch 1 thereto) and (b) a declaration pursuant to s 23(2)[b] of the 1985 Act that S's removal to Ireland was unlawful within the meaning of that section and art 12[c] of the European

a Article 3, so far as material, is set out at p 259 *f g*, post
b Section 23(2) is set out at p 264 *j* to p 265 *b*, post

Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 (which had the force of law in the United Kingdom by virtue of s 12(2) of the 1985 Act and was set out in Sch 2 thereto). The appellants applied to dismiss the father's originating summons and the order of 13 March for want of jurisdiction, on the ground that S was not habitually resident in England on that date, as required by ss 2(3)[d] and 3(1)(a)[e] of the Family Law Act 1986. The deputy judge dismissed the application, and also that of the father, but the Court of Appeal allowed the father's appeal and made the declarations sought, holding that S was habitually resident in England at the relevant time. The appellants appealed to the House of Lords.

Held – The appeal would be dismissed for the following reasons—

(1) The powers conferred by s 3(5) of the Children Act 1989 on a person, who had the care of a child but without parental responsibility, to do what was reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare did not include the power to change his habitual residence merely by taking him out of the jurisdiction. By merely taking S out of the jurisdiction the appellants had not brought about a change in his habitual residence, since neither had parental rights over S, who was too young to form any intention as to his own future residence, and two days with them was not sufficient of itself to result in his existing habitual residence being lost and a new one gained. Nor had the habitual residence been changed by the Irish court's order. Moreover, the wardship jurisdiction of the English court was exercisable in respect of any child who could be said to be habitually resident within the jurisdiction. It followed that S was habitually resident in England on 13 March and that the court had had jurisdiction to make the order it made on that date (see p 254 *b*, p 257 *d f g j*, p 258 *a b*, p 259 *c* to *e*, p 266 *j* and p 267 *a b*, post); *Re P (G E) (an infant)* [1964] 3 All ER 977 and *Re B-M (wardship: jurisdiction)* [1993] 1 FLR 979 approved.

(2) For the purposes of the Hague Convention, 'removal' and 'retention' could both occur on the facts in relation to the same child at different times; moreover, the nature of retention could change and an initial lawful retention could become a wrongful retention where, for example, a parent who had no parental rights when a child was removed and initially retained subsequently acquired such rights and demanded his return. Accordingly, although S's initial removal and retention were not wrongful within the meaning of art 3 of the convention because at that time the father had no rights of custody over S, once he had acquired such rights, as a result of the English court's order on 13 March, the retention of S thereafter contrary to that order and to his father's wishes became wrongful and was not prevented from being so by the Irish court's order earlier that day (see p 254 *b*, p 261 *j* to p 262 *c g* to *j*, p 263 *h j*, p 266 *j* and p 267 *a b*, post); *Re H and anor (minors) (abduction: custody rights), Re S and anor (minors) (abduction: custody rights)* [1991] 3 All ER 230 applied; *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961 distinguished.

(3) Although the father did not have the right to determine S's place of residence under English law on 11 March, he did have that right after the English court's order on 13 March. Since S was kept out of the United Kingdom without the father's consent from that date, it followed that s 23(2) of the 1985 Act was

c Article 12 is set out at p 264 *h j*, post
d Section 2(3) is set out at p 255 *d*, post
e Section 3(1)(a) is set out at p 255 *e f*, post

satisfied and that the court was empowered to declare for the purposes of art 12 of the European Convention that S's removal had been unlawful (see p 254 *b*, p 266 *b* to *j* and p 267 *a b*, post).

Notes

For exercise of the High Court's inherent jurisdiction with respect to children, see 5(2) *Halsbury's Laws* (4th edn reissue) para 1012.

For the return of children wrongfully removed or retained, see ibid paras 981–994.

For the recognition or enforcement of decisions relating to the custody of a child under the European Convention, see ibid paras 996–1004.

For the Child Abduction and Custody Act 1985, s 23, Sch 1, art 3, Sch 2, art 12, see 6 *Halsbury's Statutes* (4th edn) (1992 reissue) 306, 310, 320.

For the Family Law Act 1986, ss 2, 3, see ibid 328, 330.

For the Children Act 1989, s 3, see ibid 395.

Cases referred to in opinions

B-M (wardship: jurisdiction), Re [1993] 1 FLR 979.

C v S (minor: abduction: illegitimate child) [1990] 2 All ER 961, sub nom *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, [1990] 3 WLR 492, HL.

F v S (wardship: jurisdiction) [1991] 2 FLR 349.

H and anor (minors) (abduction: custody rights), Re, Re S and anor (minors) (abduction: custody rights) [1991] 3 All ER 230, [1991] 2 AC 476, [1991] 3 WLR 68, HL.

P (G E) (an infant), Re [1964] 3 All ER 977, [1965] Ch 568, [1965] 2 WLR 1, CA.

Appeal

The maternal grandmother and aunt of a child, S, appealed with leave of the Appeal Committee of the House of Lords given on 5 June 1997 from the decision of the Court of Appeal (Butler-Sloss, Evans LJJ and Sir Iain Glidewell) ((1997) Times, 8 January) made on 18 December 1996 (1) allowing an appeal by the father from the decision of Lionel Swift QC sitting as a deputy judge of the High Court on 4 October 1996 dismissing the father's application for (a) a declaration pursuant to s 23(2) of the Child Abduction and Custody Act 1985 that the appellants' removal of S from England to Ireland on 11 March 1996 was unlawful within the meaning of that section and art 12 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 as set out in Sch 2 to the 1985 Act, and (b) a declaration that his retention there was wrongful within the meaning of art 3 of the Convention on the Civil Aspects of International Child Abduction 1980 as set out in Sch 1 to the 1985 Act; and (2) dismissing the appellants' cross-appeal from the deputy judge's decision of the same date dismissing their application to dismiss the originating summons dated 12 March 1996 issued by the father to make S a ward of court and the order of Wall J on 13 March 1996 granting interim care and control of S to the father and ordering his return to England, for want of jurisdiction, on the ground that S was not habitually resident in England on that date, as required by ss 2(2) and 3(1)(a) of the Family Law Act 1986. The facts are set out in the opinion of Lord Slynn of Hadley.

Patricia Scotland QC and *Lord Phillimore* (instructed by *Reynolds Porter Chamberlain*) for the appellants.

Judith Parker QC and *Maureen Mullally* (instructed by *Fletcher Dervish & Co*) for the father.

Their Lordships took time for consideration. *a*

24 July 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given, I would dismiss this appeal. *b*

LORD SLYNN OF HADLEY. My Lords, this appeal raises three principal questions: first, whether the English High Court had jurisdiction on 13 March 1996 to make an order giving interim care and control to the father of an infant, S, and subsequently to order that S remain a ward of court; second, whether *c* taking S on 11 March 1996 from England to Ireland and subsequently keeping him there constituted the wrongful removal or retention of a child within the meaning of art 3 of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention) as given the force of law in the United Kingdom by s 1(2) of and Sch 1 to the Child Abduction and Custody Act 1985; third, whether such taking and *d* keeping of S constituted an unlawful removal of S within the meaning of art 12 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg, 20 May 1980) (the European Convention) (as given the force of law in the United Kingdom by s 12(2) of and Sch 2 to the 1985 Act) and of s 23 of that Act. *e*

The first question

S was born on 21 January 1995. His mother was an Irish national, his father Moroccan. They were not then, or subsequently, married and it is common ground that as an unmarried father, under English law prior to orders of the *f* English court in his favour, the father had no parental rights in respect of S. It is also common ground that prior to her death S's habitual residence was that of his mother so that the question is what was the mother's habitual residence at the relevant times.

She had lived in England with the father from 1990 to July 1995 when she *g* obtained from the Willesden County Court an ex parte interim order for the residence of S and an interim prohibited steps order. From 3 to 16 August 1995, when she returned to England, S and his mother stayed with her mother (the first appellant in this case) on holiday in Ireland. Thereafter she stayed in England until 4 September when she returned to Ireland intending to come back to *h* England in January 1996. In fact she went to England alone from 2 to 7 November 1995 when she returned to Ireland; she went to England again with S on 16 January 1996 and remained there until she was admitted to hospital in London on 4 March and died there from a brain haemorrhage on 10 March 1996.

S's father had looked after him for part of the time whilst the mother was in hospital but on 5 March and 6 March the grandmother and another daughter (the *j* second appellant) respectively came to London and helped to look after S.

On 11 March the two appellants took S to Ireland where he has lived since. It is at this stage that the maternal family and the father resorted to the courts, they in Ireland, he in England. On the same day, 13 March 1996, the Dublin Circuit Court made an order granting guardianship and care and control of S to the

second appellant, his aunt, and an hour or so later the English High Court made an order granting interim care and control of S to the father, ordering that the grandmother return S to the jurisdiction of the English court. To this end an originating summons to make S a ward of court, dated 12 March 1996, was issued on 14 March 1996. On 17 April the aunt was joined as a second defendant to the proceedings brought by the father and the wardship was continued.

The High Court's jurisdiction in respect of children, so far as relevant, is to be found in the Family Law Act 1986. Section 1 of that Act specifies the orders to which Pt I applies and includes:

> '... (d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children—(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child ...'

By s 2(3):

> 'A court in England and Wales shall not have jurisdiction to make a section 1(1)(d) order unless—(a) the condition in section 3 of this Act is satisfied, or (b) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.'

The condition in s 3(1) of the Act is that on the relevant date the child concerned—

> '(a) is habitually resident in England and Wales or, (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom ...'

Since S was not present in England and Wales at the time that the order was made by the English High Court, the question is whether S was habitually resident in England and Wales on the relevant date, which, by virtue of s 7 of the Act, is the date when an application is made for an order.

The trial judge, Mr Lionel Swift QC, after a hearing lasting eight days and a careful consideration of the authorities as to what constituted 'habitual residence' recorded that there was no dispute that the mother was habitually resident in England until 3 September 1995. He then examined extensive evidence as to the movements of, and the relationship between, the parents in the subsequent period and said:

> 'I am prepared to accept that during the period between September and December [1995] were it necessary to find it, the mother might have been described as habitually resident in Ireland. She was there as part of her regular order of life for the time being, though whether her stay there was for a settled purpose other than to stay there is debatable. But I am concerned with the position at her death. I conclude that when she returned to England in January she became habitually resident here. If I am wrong about that then certainly by the time she died that was the position. In so finding I bear in mind that it takes time in general to establish a new habitual residence. But when she returned here she was returning to her own home, and was intending as I find to make her home here.'

Again after examining in detail the evidence as to the period between January and 10 March 1996 he concluded that at the date of her death the mother was habitually resident in England.

In the Court of Appeal and before your Lordships' House the appellants, though contending that S and his mother were habitually resident in Ireland between 4 September 1995 and 16 January 1996, accepted, so that it is now common ground, that at the date of her death the mother, and therefore S, were habitually resident in England. It is accordingly unnecessary to examine in detail the evidence upon which this finding of the judge was based.

The critical question is thus whether, since he had left England on 11 March, S was still habitually resident in England on 13 March when Wall J made his order in the High Court. Had he become habitually resident in Ireland, or at any rate lost his habitual residence here even if he had not acquired an habitual residence in Ireland?

The learned trial judge found that the appellants intended to take S to Ireland without the father's knowledge and that they did in fact take S without the father's consent or knowledge. Indeed it is said that the father was ignored or brushed aside by the mother's family after her death. The judge was prepared to accept that there 'may be circumstances in which physical possession or care may determine a child's habitual residence', which is a question of fact, and that where a parent takes a child away a new habitual residence may be acquired very quickly. But he continued:

> 'I am not prepared to accept that a person with no juristic power over a child of this age can change his habitual residence within a day or two. It is not necessary to consider the position of a child kept by such a person over a significant period of time.'

In the Court of Appeal Butler-Sloss LJ, with whom the other members of the court agreed, took the same view as the trial judge. In considering the appellants' contention that S lost his habitual residence in England either when the appellants took over his de facto care on 10 March or when they took him to Ireland on 11 March she said:

> 'The death of the mother, the sole carer, would not immediately strip the child of his habitual residence acquired from her, at least, while he remained in the same jurisdiction. Once the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately clothe the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English court was seised of the case within two days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his de facto carers on arrival in Ireland.'

She rejected two further contentions of the appellants—first that a person having care of, but not having parental responsibility for, a child who did what

was reasonable for the purpose of safeguarding or promoting the child's welfare pursuant to s 3(5) of the Children Act 1989 was enabled to change the child's habitual residence; and second that, because the Dublin Circuit Court had made an order on an ex parte application giving the custody of S to his aunt who was made guardian, and prohibiting the father from moving S from Ireland, first in time, the English court could not make the order which it did make in respect of S.

There were thus concurrent findings of fact by the trial judge and by the Court of Appeal that S was habitually resident in England at the time of the court order on 13 March. By the fact of being taken out of England by his grandmother and his aunt, who had no parental rights over him, he had not lost his habitual residence in England or acquired an habitual residence in Ireland. It is only in exceptional circumstances that your Lordships' House will reject concurrent findings of fact, particularly where the finding of the trial judge is based on a substantial amount of oral evidence and where the judge's assessment of the truthfulness of the witnesses is crucial to his findings of fact. In the present case, I can see no justification for rejecting the concurrent findings of fact even if I had thought that they might possibly be wrong. I consider, however, that the judge not only came to a conclusion to which he was entitled to come but that he came to the right conclusion, on his primary findings on fact as to the events over the relevant period, that S's habitual residence remained in England.

Although it seems to me that the appellants were wrong to take S away clandestinely without the consent of the father, even without telling the father, and without the consent of the court (as Budd J put it in the Irish proceedings on the convention the rule should be 'apply, don't fly'), it is fully understandable that, in the distressing circumstances of the mother's death, the grandmother should wish to have with her the baby who had spent several months at her house in Ireland in the latter part of 1995. This desire, however, and the need for someone to look after the child cannot, in my view, mean that by merely taking S out of the jurisdiction during a period of two days they had ipso facto brought about a change in his habitual residence. Neither appellant had parental rights over the child, who was too young to form any intention as to his own future residence, and two days with the appellants in Ireland is not sufficient of itself to result in his existing habitual residence being lost and a new one gained. The position is quite different in the case of a mother, with parental rights and on whose habitual residence the child's habitual residence depends. If she leaves one country to go to another with the established intention of settling there permanently her habitual residence and that of the child may change very quickly. Such is not the present case where no parental rights were involved and where S's habitual residence did not depend on and automatically change with those of the appellants.

I agree with Butler-Sloss LJ that the powers conferred by s 3(5) of the Children Act 1989 on a person, who has care of a child but without parental responsibility, to do what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare do not include the power to change the child's habitual residence merely by taking him out of the jurisdiction. Whether it was reasonable in all the circumstances of the case to take S out of the jurisdiction for the purpose of safeguarding or promoting his welfare, quite apart from any question of a change in his habitual residence, does not fall to be decided on the present appeal.

I also agree with Butler-Sloss LJ that the English court's order was not made without jurisdiction just because a little earlier on the same day the Dublin Circuit Court had given the aunt custody of S and made her his guardian. Whether or not it is right to regard both orders as taking effect at the beginning of the day upon which they were made, it is clear that, at the time the interim order of care and control was made by the English court, S was in fact still habitually resident in England. The ex parte orders giving custody to the aunt did not change S's habitual residence so as to deprive the English court of jurisdiction.

The appellants contended before the Court of Appeal and before your Lordships that it was in any event inappropriate for Wall J to have made an order in relation to an alien child who was at the time living in the country of his nationality. In *Re P (G E) (an infant)* [1964] 3 All ER 977, [1965] Ch 568 a child was taken by his father away from the mother in England to Israel. The Court of Appeal held that the parens patriae jurisdiction of the English court could be exercised in respect of the child who was ordinarily resident within the jurisdiction, although not present there, when the proceedings were begun. Lord Denning MR said ([1964] 3 All ER 977 at 981, [1965] Ch 568 at 584):

> 'The Crown protects every child who has his home here and will protect him in respect of his home. It will not permit anyone to kidnap the child and spirit him out of the realm. Not even his father or mother can be allowed to do so without the consent of the other. The kidnapper cannot escape the jurisdiction of the court by such a stratagem.'

In that case, however, the child was stateless whereas here S was an Irish national. It is submitted by the appellants that that is a crucial distinction and that since allegiance was owed to the Irish Republic and not to the Crown the parens patriae powers could or should not be exercised by the Crown. In *Re B-M (wardship: jurisdiction)* [1993] 1 FLR 979 Eastham J had to consider the case of a child who was a German national. He was taken by his mother out of England where they had been living and where the judge found that they had their habitual residence. The mother was sole custodian of the child. On the application of the father the child was made a ward of court and the father applied for a declaration under the Hague Convention that the retention by the mother was wrongful. Eastham J said (at 984):

> '... I have come to the conclusion that the English wardship court does have jurisdiction over an alien child provided England or England and Wales is the habitual residence of the child.'

He approved the statement in Lowe and White *Wards of Court* (2nd edn, 1986) p 24, para 2-11, that although it was arguable that the decision in *Re P (G E) (an infant)* only applies if the minor is stateless:

> 'It is submitted that the decision is wider than that and extends to any alien minor who can be said to be ordinarily resident in England. Admittedly the court referred to the fact that both father and son held travel documents entitling them to return to England, issued pursuant to the Final Act and Convention relating to the Status of Stateless Persons 1954, but this plus the fact that the parties had only obtained a temporary tourist visa to visit Israel

a pointed to their being resident in England so that the decision would appear not to be confined to Stateless minors.'

But Miss Scotland QC has submitted that Eastham J's decision was erroneous.

Whilst it is correct that in *Re P (G E) (an infant)* the child in question was stateless, I do not read the statements of principle as to the court's jurisdiction by b the three members of the Court of Appeal as being based on, or limited to, that fact. In particular the statement of Lord Denning MR already quoted is in general terms (see [1964] 3 All ER 977 at 981, [1965] Ch 568 at 584). I can see no reason why as a matter of principle the court's jurisdiction should not be available to protect any child who is habitually resident here or within the jurisdiction from being 'kidnapped' and 'spirited' out of the realm. Whether it is c appropriate for that jurisdiction to be exercised will depend on the facts of the case, but in my opinion Eastham J in *Re B-M (wardship: jurisdiction)* was right to hold that the jurisdiction was not limited to stateless children and to approve the view expressed in *Lowe and White* that this jurisdiction goes beyond the protection of stateless children but 'extends to any alien minor who can be said d to be ordinarily [habitually] resident in England'. I agree with Butler-Sloss LJ that it is habitual residence and not allegiance or citizenship which is determinative of the court's jurisdiction.

Accordingly, in my opinion, on the findings of the learned trial judge and the Court of Appeal that S was habitually resident in England at the date of his order, Wall J had jurisdiction to make the order which he made on 13 March 1996.

e

The second question

As to the second question the trial judge rejected, but the Court of Appeal accepted, that on the facts of the case there had been a breach of art 3 of the Hague Convention. By that article:

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> 'The removal or the retention of a child is to be considered wrongful where—(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights g were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention ...'

The rights of custody referred to may arise, inter alia, by operation of law or by reason of a judicial decision, and, by art 4, the convention is to apply to any child who was habitually resident in a contracting state immediately before any h breach of custody or access rights. 'Rights of custody' are by art 5 to 'include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

A person claiming that a child has been removed or retained in breach of custody rights may apply to the central authority of the child's habitual j residence, or of any other contracting state, for assistance in securing the return of the child. Where a child has been wrongfully removed or retained in terms of art 3 the judicial or administering authority of the contracting state where the child is shall order the return of the child if, at the date of the commencement of the proceedings before such authority, a period of less than one year has elapsed from the date of the wrongful removal or retention (art 12). Exceptions to the

obligation of the requested state in that article are contained in art 13. They are not relevant to this case.

A child must, thus, be returned pursuant to art 12 if there has been either a wrongful *removal* or a wrongful *retention* within the meaning of art 3. These are separate events occurring on specific occasions and were said in *Re H and anor (minors) (abduction: custody rights), Re S and anor (minors) (abduction: custody rights)* [1991] 3 All ER 230, [1991] 2 AC 476 to be mutually exclusive concepts. Lord Brandon of Oakbrook said ([1991] 3 All ER 230 at 240, [1991] 2 AC 476 at 500):

> 'For the purposes of the convention, removal occurs when a child, which has previously been in the state of its habitual residence, is taken away across the frontier of that state, whereas retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state on the expiry of such limited period.'

In *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961 at 965, [1990] 2 AC 562 at 578–579 Lord Brandon gave guidance as to a number of preliminary points relevant to the application of art 3:

> 'The first point is that the expression "habitually resident", as used in art 3 of the convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.'

The preamble to and art 1 of the Hague Convention are not set out in the Schedule to the Act but it is useful to recall them. The preamble expresses the desire of the states signing the convention—

> 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ...'

The objects of the convention are stated in art 1 to be:

> '(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody

and of access under the law of one Contracting State are effectively respected in the other Contracting State.'

Your Lordships have been referred to a valuable explanatory report on the Hague Convention by Professor Elisa Pérez-Vera, Reporter to the First Commission of the Hague Conference. It is not possible to set out long extracts from that report, helpful though they are, but I draw attention to a number of points which are made in it. First, the situations envisaged by the convention are 'those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child' (para 11). Resorting to this expedient 'an individual can change the applicable law and obtain a judicial decision favourable to him' (para 15).

The route adopted by the convention 'will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal' (para 16). In para 19 it is said:

> '... the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal: this applies as much to a removal which occurred prior to any decision on custody being taken—in which case the violated custody rights were exercised *ex lege*—as to a removal in breach of a pre-existing custody decision.'

The convention is not concerned with the law applicable to the custody of children and reference is made to the law of the state of the child's habitual residence 'only so as to establish the wrongful nature of the removal' (para 36).

> '... the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody.' (See para 66.)

In para 71 it is said:

> 'Leaving aside a consideration of those persons who can hold rights of custody ... it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised ... The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.' (Pérez-Vera's emphasis.)

The father does not contend, and has not contended, that there was here a wrongful removal when the child was taken out of the jurisdiction on 11 March. In this he was right. It is plain that when the appellants removed S from London to Ireland the father had no rights of custody over S by operation of law or by reason of any judicial or administrative decision or by any binding agreement. There was therefore no wrongful removal within the meaning of art 3.

The appellants say that this in fact was a removal case and not a retention case and if the removal was lawful that is the end of the matter, but alternatively that, if this is to be treated also as a retention case, the retention was equally lawful.

I do not agree that this case is to be treated only as a 'removal' case. Even though the two are separate and mutually exclusive both can occur on the facts in relation to the same child at different times. It must, however, be necessary to point specifically to the event which constitutes the removal or the retention. This is necessarily so because of the provision of art 12 that for an order for the return of the child to be made at the date of commencement of the proceedings, a period of less than one year has elapsed 'from the date' of the wrongful removal or retention.

The appellants contend that S was retained in Dublin on his arrival there from England. That was on 11 March and they say that this was the only relevant date since his continuing retention there is not relevant for the purpose of calculating the period of one year. It follows that since the father had no rights of custody on 11 or 12 March the retention following the removal was no more unlawful than was the removal.

This argument ignores the possibility that the nature of the retention may change and may change with effect from a specific date so as to permit the calculation of one year to be made. That this can happen is in my view plain. Thus a parent or parents having rights of custody may agree that a child shall go on 1 January to stay with a friend abroad for a period of six months. The friend takes the child abroad. That is clearly not a wrongful removal. The friend keeps the child abroad until 30 June: that is clearly not a wrongful retention. On 1 July the friend keeps the child and refuses to return him. The parent's consent has gone and the retention becomes wrongful. The time runs from that date. The flaw in the appellants' argument is that it looks only at the date of retention whereas what has to be considered is the date of wrongful retention (see *Re H and anor (minors) (abduction: custody rights), Re S and anor (minors) (abduction: custody rights)* [1991] 3 All ER 230 at 239, [1991] 2 AC 476 at 499).

This example is only one way in which a lawful retention may become a wrongful retention. The same in my opinion can happen where a parent had no parental rights when a child was removed and initially retained in a way which was not unlawful. If subsequently he acquires such rights and demands the return of the child then the retention may become wrongful.

That in my opinion happened in the present case. On the basis of the finding of the trial judge that on 13 March S was habitually resident, even if not actually present, in England, when Wall J made his order giving interim care and control of S to the father and ordering that S be returned to the care and control of the father in the jurisdiction of the High Court, the father acquired rights of custody within the meaning of arts 3 and 5 of the convention. The retention of S contrary to that order and to the father's wishes thereupon became wrongful. Since no question of the limitation provision in art 12 arises it is unnecessary to decide whether the relevant date is the making of that order (13 March) or its service on the appellants (apparently 16 March). It was on any view wrongful within the meaning of the convention by the later date and was not prevented from being so by virtue of the order of the Dublin Circuit Court on the same day. Such a result is not in any way inconsistent (as the appellants argue it is) with the decision of your Lordships' House in *Re H and anor (minors) (abduction: custody*

rights) that removal and retention are single events occurring on a specific occasion and mutually exclusive concepts.

The appellants contend, however, that on the basis of the decision of your Lordships' House in *C v S* (*minor: abduction: illegitimate child*) [1990] 2 All ER 961, [1990] 2 AC 562 the retention of S was not wrongful. In that case a mother and child were habitually resident in Western Australia, the mother having sole parental rights over the child. They left Western Australia on 21 March 1990 and arrived in England on 22 March 1990 when it was found that retention of the child began. On 12 April 1990 the court of Western Australia granted sole guardianship and custody of the child to the father and declared that the removal from Australia was wrongful. In your Lordships' House it was held that the removal of the child was not in breach of any custody rights of the father nor was the retention in England during the three weeks before the Western Australia court's order, in itself, wrongful. The essential difference between that case and the present was, however, that the mother had left Western Australia, as Lord Brandon said—

> 'with a settled intention that neither she nor J should continue to be habitually resident there. It follows that immediately before 22 March 1990, when the retention of J in England began, both she and J had ceased to be habitually resident in Western Australia. A fortiori they had ceased to be habitually resident there by 12 April 1990, the date of the order of Anderson J. The consequence is that the continued retention of J in England by the mother was never at any time a wrongful retention within the meaning of art 3 of the convention.' (See [1990] 2 All ER 961 at 965, [1990] 2 AC 562 at 579.)

The critical difference between *C v S* (*minor: abduction: illegitimate child*) and the present case is that S was habitually resident in England at the time of Wall J's order. The same difference arose in *Re B-M* (*wardship: jurisdiction*) [1993] 1 FLR 979 where an unmarried mother took her child to Germany on or about 3 September and on 4 September the father obtained a wardship order which was served on the mother on 11 September. It was held by Eastham J that even if the removal was not unlawful because there was no court order in existence yet the retention was wrongful with effect from 11 September when the mother kept the child out of the jurisdiction and failed to return her in accordance with the orders of the English court, the child having been habitually resident in England at the time the wardship proceedings began.

Because the child's habitual residence at the date of the court's order in the present case remained England I do not consider that the result indicated in the present case is inconsistent with the decision of your Lordships' House in *C v S* (*minor: abduction: illegitimate child*); it is consistent with the judgment of Eastham J in *Re B-M* (*wardship: jurisdiction*) which on this point also was rightly decided.

I consider therefore that the Court of Appeal was right to hold that the retention by the second appellant was wrongful within the meaning of the Hague Convention.

The third question

As to the third question the trial judge held that there had not, the Court of Appeal held that there had, been an unlawful removal of S from the jurisdiction contrary to art 12 of the European Convention.

The purpose and structure of the European Convention is different from that of the Hague Convention and it does not follow, though it may be, that what constitutes, or does not constitute, an 'unlawful removal' for the Hague Convention, is, or conversely is not, an 'unlawful removal' for the European Convention.

As to the purpose, the member states of the Council of Europe recited that—

> 'the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children ...'

As to the structure, by art 7 of the convention:

> 'A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.'

The procedure of applying through the central authority of a contracting state is prescribed by arts 4 and 5 of the convention and expanded in ss 14 to 22 of the 1985 Act. Recognition and enforcement may be refused in the circumstances specified in arts 9 and 10 of the convention including that in art 10(1)(d):

> 'if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.'

By art 1:

> '... (c) "decision relating to custody" means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him. (d) "improper removal" means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; "improper removal" also includes: (i) the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised; (ii) a removal which is subsequently declared unlawful within the meaning of Article 12.'

By art 12:

> 'Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person.'

By s 23(2) of the 1985 Act:

> 'Where in any custody proceedings a court in the United Kingdom makes a decision relating to a child who has been removed from the United Kingdom, the court may also, on an application made by any person for the purposes of Article 12 of the Convention, declare the removal to have been

unlawful if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the United Kingdom without the consent of the person (or, if more than one, all the persons) having the right to determine the child's place of residence under the law of the part of the United Kingdom in which the child was habitually resident.'

The appellants accept that where a child is removed from the jurisdiction with the consent of the person having the right to determine the child's place of residence and subsequently to that removal the child is 'kept out' of the jurisdiction in contravention of any provision for the child's return the removal will be deemed to have been unlawful. They contend, however, that in s 23 the only person who can make an application or whose consent was relevant was that of S's mother and that art 12 cannot create rights for the person seeking the declaration which were not in being prior to the removal. The father could only be entitled to a declaration under s 12 if he had the right on 11 March 1996 to determine S's place of residence and the court had no right to determine (with retrospective effect so as to confer rights on the father) S's place of residence prior to the removal.

The trial judge accepted this approach. He said:

> 'I conclude that for a declaration to be made the child must have been taken out from or sent out or kept out of the United Kingdom without the consent of the person who *then* had the right to determine the child's place of residence. In my view the removal and retention thereafter is not unlawful within the meaning of art 12 or s 23(2) unless at the time it was without the consent of the person having the right to determine the child's place of residence (see *F v S (wardship: jurisdiction)* [1991] 2 FLR 349; not reversed on this point in the Court of Appeal [1993] 2 FLR 686).' (Lionel Swift QC's emphasis.)

The definition in art 1(d) of the convention is of 'improper removal,' a phrase which occurs only in art 10 whereas in art 12 the reference is to a declaration of 'the removal to be unlawful'. The definition, however, includes in (ii) a removal which 'is subsequently declared unlawful' and it is clear that an improper removal includes an unlawful removal. By virtue of art 1(d) a removal is improper in two different situations—first if it is in breach of a decision relating to the child's custody 'which has been given'. This I understand to mean that the removal of the child across an international frontier was improper at the time it was effected in that it was in breach of an existing decision. Secondly, it may also be an 'improper removal' if there is a failure to return the child at the end of the period during which the child had been properly or lawfully outside the jurisdiction. This is not described in the convention as an unlawful or improper 'retention' but for the purposes of the convention it makes retrospectively 'the removal' unlawful.

For the purposes of art 12 there must have been at the time of the child's removal across an international frontier no enforceable decision given in a contracting state relating to his custody. That was satisfied here as at 11 March 1996. For the convention to apply to any subsequent decision it must be one 'relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person'. The decision of Wall J on 13 March was a subsequent decision given in a contracting state relating to the custody of the child. The father was plainly an interested

person. But was the decision one 'declaring the removal to be unlawful'? On the face of it, that decision does not declare, and for the purposes of its jurisdiction in making the order of care and control and for S's return it did not need to declare, that the initial taking of S to Ireland in itself was unlawful.

The respondent contends that the removal was unlawful since removal of a child out of the jurisdiction is unlawful if there is no consent to the child's removal, even if there is no one who has the right to consent other than the court. I am not satisfied that this is right in the broad terms in which it is put or that the initial taking to her home of S by a near relative was necessarily unlawful, even if it was unwise without the consent of the court and even if the lawfulness of S's retention in Ireland could be ended by an order giving care and control to the father.

It seems to me, however, that after the making (or at the latest the service) of Wall J's order giving care and control to the father the retention of S in Ireland and the failure to return him to England became unlawful and improper and for the purposes of the convention constituted an improper removal within the meaning of art 1(d).

This result is reflected in s 23(2) of the 1985 Act, which I have already quoted. In the present case it is clear that these were custody proceedings relating to a child who had been removed from the United Kingdom and in respect of whom, before the judge, an order was sought pursuant to the European Convention that his removal was improper and unlawful within the meaning of arts 1 and 12 of the convention. The court is, by s 23(2), empowered to declare the removal to have been unlawful if it is satisfied that the applicant has an interest in the matter and that—

> 'the child has been ... kept out of the United Kingdom without the consent of the person ... having the right to determine the child's place of residence under the law of the part of the United Kingdom in which the child was habitually resident.'

The father had such an interest; S was habitually resident in England before, at and from 13 March 1996; the father from 13 March had the right to determine S's place of residence under English law; S was kept out of the United Kingdom without his father's consent from that date, if not earlier.

It follows in my opinion that s 23(2) is satisfied and that the court is empowered to declare for the purposes of the convention that S's removal was unlawful.

I would, accordingly, uphold the decision of the Court of Appeal that S was at the relevant time habitually resident in England and declare that S had been wrongfully retained out of the jurisdiction contrary to art 3 of the Hague Convention and further declare, for the purposes of s 23(2) of and arts 1 and 12 of Sch 2 to the Child Abduction and Custody Act 1985, the removal of S from the jurisdiction to have been unlawful.

LORD NOLAN. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given, I too would dismiss this appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given, I too would dismiss this appeal.

LORD HUTTON. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given I too would dismiss this appeal.

Appeal dismissed.

L I Zysman Esq Barrister.

Goldsmith and another v Bhoyrul and others

QUEEN'S BENCH DIVISION
BUCKLEY J
10, 11 JUNE 1997

Libel and slander – Parties – Right to sue – Political party – Right of political party to sue – Publication relating to political party withdrawing from General Election – Political party alleging publication defamatory of it – Whether political party entitled to sue in defamation.

The plaintiffs, a well-known politician and a political party which he had founded in order to secure a referendum on the topic of Britain's future in Europe, brought an action for damages for libel against the defendants in respect of a newspaper article concerning the first plaintiff's intention to withdraw the second plaintiff from the May 1997 General Election. The defendants applied to strike out the second plaintiff's claim on the ground, inter alia, that it disclosed no reasonable cause of action, contending that a political party had no right at common law to maintain an action for damages for defamation.

Held – In a democratic society those who held office in government or were responsible for public administration had always to be open to criticism and therefore it was contrary to the public interest to permit them to sue in defamation because that would place an undesirable fetter on freedom of speech. That principle applied also to political parties seeking power at an election and putting themselves forward for office or to govern, since defamation actions or the threat of them would similarly constitute a fetter on free speech at a time and on a topic when it was clearly in the public interest that there should be none. Accordingly, the defendants' application would be granted and the court would strike out the second plaintiff's claim (see p 270 *g* to p 271 *b*, post).

Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011 applied.

Notes

For who may sue for libel and slander, see 28 *Halsbury's Laws* (4th edn) paras 22–31.

Cases referred to in judgment

Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.

Hector v A-G of Antigua and Barbuda [1990] 2 All ER 103, [1990] 2 AC 312, [1990] 2 WLR 606, PC.

Mapp v News Group Newspapers Ltd, Gillan v News Group Newspapers Ltd, Goscomb v News Group Newspapers Ltd, Watton v News Group Newspapers Ltd (1997) Times, 10 March, [1997] CA Transcript 384.

Summons

The defendants, Anil Bhoyrul, David Rydell and Sunday Business Newspapers Ltd, applied to the court for, inter alia, an order that the action brought by the plaintiffs, Sir James Goldsmith and the Referendum Party, for damages for libel and an injunction be struck out on the grounds (i) that the article was incapable

of bearing the meanings set out in the statement of claim, and (ii) that as regards the second plaintiff's claim, the statement of claim disclosed no reasonable cause of action and/or was frivolous or vexatious or otherwise an abuse of process. The application was heard in chambers but judgment was given by Buckley J in open court. The facts are set out in the judgment.

David Price of *David Price & Co* for the defendants.

Richard Rampton QC and *The Hon Victoria Sharp* (instructed by *Peter Carter-Ruck & Partners*) for the plaintiffs.

BUCKLEY J. The first plaintiff, Sir James Goldsmith, and the second plaintiff, the Referendum Party, have started proceedings against the three defendants, Anil Bhoyrul, David Rydell and Sunday Business Newspapers Ltd, claiming damages for libel and an injunction in respect of an article which appeared in the 23 March 1997 edition of 'Sunday Business', a weekly newspaper published by the third defendant, Sunday Business Newspapers Ltd.

As appears from the statement of claim and is well known, Sir James Goldsmith founded the second plaintiff in order to secure a referendum on the topic of Britain's future in Europe. It is a company limited by guarantee but better known as a new political party which put up 547 candidates at the last election.

The defendants' summons before me seeks a determination of whether the article complained of is capable of bearing the meaning set out in the statement of claim. Mr Rampton QC, for the plaintiffs, agrees to such determination.

The summons goes on to ask for an order that the action be struck out on one or other or both of the following grounds: (1) that the article is incapable of bearing the meanings set out in the statement of claim; (2) the statement of claim discloses no reasonable cause of action and/or is frivolous or vexatious or otherwise an abuse of the process.

As to (2) above, the only point taken by Mr Price, on behalf of the defendants, is that a political party cannot sue in defamation.

As the parties made their submissions in the reverse order to the summons, I shall follow suit.

(1) *Can the second plaintiff, a political party, sue in defamation?*

For all practical purposes, the second plaintiff, although incorporated as a company limited by guarantee, is or operates as a political party. No one has suggested otherwise. In support of his submission that it could not sue, Mr Price relied primarily on *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534. Other cases to which he helpfully referred me appear in his bundle of authorities. Mr Price submitted, with reference to the decision in the *Derbyshire CC* case that it would be appropriate to adapt the words in the headnote which reflect the speech of Lord Keith so as to read:

> 'That since it was of the highest public importance that a democratically electable political party should be open to uninhibited public criticism and since the threat of a civil action for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for it to have any right at common law to maintain an action for damages for defamation.'

The original, of course, referred to a democratically elected governmental body and institutions of central or local government. *a*

Mr Rampton submitted, in effect, that Lord Keith had limited the class to such bodies; further, that far from there being a public interest in restraining a political party from suing in defamation, the reverse was the case. False statements about those seeking election should not be allowed: they were against the public interest. *b*

He also noted or asked me to note that in the passage which Lord Keith quoted from *Hector v A-G of Antigua and Barbuda* [1990] 2 All ER 103 at 106, [1990] 2 AC 312 at 318 Lord Bridge only referred to those in government or responsible for public administration (see [1993] 1 All ER 1011 at 1018, [1993] AC 534 at 548).

To use what the court may regard as the public interest to prevent a legal person, individual or corporate, from suing for libel if it might otherwise have *c* that right is an undertaking that requires great caution. It is common ground that a corporation may sue in defamation, albeit with some obvious limitations. It is likewise established that a trade union and a charity may sue. In the *Derbyshire CC* case Lord Keith distinguished the local authority from other types of corporation on the basis that it was a democratically elected body. He noted that the electoral *d* process nowadays is conducted on almost exclusively party lines and continued ([1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547):

> 'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must *e* inevitably have an inhibiting effect on freedom of speech.'

After referring to two very persuasive United States authorities and *Hector*'s case (which I have mentioned above), Lord Keith reached his conclusion ([1993] 1 All ER 1011 at 1019, [1993] AC 534 at 549):

> '... I regard it as right for this House to lay down that not only is there no *f* public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.'

Both from Lord Keith's own remarks and those appearing in the cases he cited *g* in his speech, it is clear that the principle which led to his conclusion is that in a free, democratic society those who hold office in government and/or are responsible for public administration (central or local) must always be open to criticism and it is contrary to the public interest to permit them to sue in defamation because that would place an undesirable fetter on freedom of speech. *h*

If that principle is apt to cover a political party, I see no reason not to apply it. There is no danger of the list of those who are debarred from suing in defamation growing too long since most categories of potential plaintiffs are now recognised by the common law, including corporations, unions and charities.

In my judgment, the principle should extend to political parties. *j*

Mr Rampton submitted that because a party was only seeking power at an election and could not abuse what it had not got, it could not be equated with a government body that had that power. So far as it goes, that must be right; but it seems to me that the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is also sufficiently strong to justify withholding the right to sue. Defamation actions or the threat

of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none.

In reaching this conclusion, I have also had in mind the following: (1) any individual candidate, official or other person connected with the party who was sufficiently identified could sue; (2) the party can by public announcement answer back; and (3) in this particular case, although the second plaintiff is a corporation, there is no suggestion that it has any purpose other than to act as a political party.

I will therefore accede to the application to strike out the claim by the second plaintiff.

(2) *The meaning of the article*

I do not propose to recite the whole article, although of course it must be read as a whole and I have read it. It is headed 'Goldsmith looks for dignified exit from election race'. Mr Rampton highlighted certain passages, which I will quote, without prejudice to the effect the whole article would have on its reader. Apart from the headline, these were the passages:

> 'Sir James Goldsmith has begun to pave the way for pulling his Referendum Party completely out of the General Election ... The party is officially fielding 550 candidates ... Goldsmith is understood to be disenchanted by the lack of popular support for the party and preparing the way for a dignified exit before the deadline to declare candidates expires at 4.00 p.m. on 16th April ... Goldsmith is hoping that Major will make some commitment towards the concept of a broader referendum on Europe in the hope of saving these seats, at the same time allowing the Referendum Party a graceful departure from the election ... Most Referendum Party candidates are holding back from officially registering until the last moment on 16th April with at least 200 proposed candidates still to even receive their nomination papers. However, the delay in registering the full quota of candidates has led to continuing speculation that Goldsmith will field less than half of the planned total.'

There is also a picture of Sir James underneath which it has: 'Goldsmith ready to pull out of May's election.'

The pleaded meanings in para 4 of the statement of claim, whether the natural and ordinary meaning or by way of innuendo, are:

> '(1) That the plaintiffs and each of them had lied to the electorate and/or misled them as to the true intentions of the second plaintiff by campaigning on the basis: (a) that the Referendum Party would participate fully in the General Election; and (b) that the only circumstance in which the Referendum Party would withdraw from the General Election would be if both the Conservative and Labour Parties committed themselves to a full and fair referendum on Britain's relationship with Europe. (2) That the plaintiffs and each of them had lied as aforesaid because in truth the plaintiffs and each of them, in contrast to the public position adopted by them as aforesaid, had already begun to prepare themselves to withdraw from the General Election before any such commitment from the Conservative or Labour parties had been given and because the plaintiffs intended to withdraw from the General Election if the Prime Minister merely showed more support for a referendum on the broader issues of Europe. (3) That in

pursuance of their aforesaid deception, in contrast to their public position that the Referendum Party would field candidates in seats where the leading candidates did not support a full referendum on Europe, the plaintiffs were holding back Referendum Party candidates from officially registering until the last moment on 16th April 1997. (4) That in the premise the plaintiffs and each of them had reneged on their aforesaid promises to the general public.' *a* *b*

The particulars given pursuant to RSC Ord 82, r 3, that is particulars of innuendo, are as follows:

'(a) At all material times the plaintiffs and each of them have represented to the general public/general electorate: (i) that the Referendum Party would participate in the General Election; (ii) that the only circumstance in which the Referendum Party would withdraw from the General Election would be if both Conservative and Labour Parties committed themselves to a full and fair referendum on Britain's relationship with Europe; (iii) that save in exceptional circumstances set out in (ii) above the Referendum Party would field its full complement of candidates at the forthcoming General Election in May 1997.' *c* *d*

Mr Rampton supported those particulars by reference to various party news sheets, statements of aims and leaflets which were published on a very wide scale. Mr Price correctly conceded that for present purposes he must accept the pleaded particulars: they are clearly capable of being supported by the material mentioned, which was exhibited to an affidavit. *e*

Mr Rampton submitted that because of the proximity in time of the party's own material and the article, namely during the few weeks leading to the General Election, a reader of the article could easily have the facts supporting the innuendo in front of him. So he could. His submission was that such a reader would understand from the article 'that the party were trying to con him to get his support when all along it had no intention of going ahead', a homely and convenient way of putting Miss Sharp's more elegant pleading of lies, deception and reneging on promises to the public. *f*

I am grateful to Mr Price for the reference to the judgment of Hirst LJ in *Mapp v News Group Newspapers Ltd, Gillan v News Group Newspapers Ltd, Goscomb v News Group Newspapers Ltd, Watton v News Group Newspapers Ltd* (1997) Times, 10 March. With respect, I shall accept his guidance and consider whether the range of meanings which the article can reasonably bear includes the pleaded meanings. I must adopt the standard of an ordinary reader of the Business News with knowledge of the particular matters pleaded. Mr Price submitted that any such reader would understand that circumstances change in politics. The fact that a party changes its position does not mean it necessarily lied to the public at the outset. *g* *h*

It is to be noted that whilst the article undoubtedly attributes a change of attitude to the party and to Sir James from that put out in the material I have referred to, even to the extent of paving the way for a complete withdrawal, it gives reasons. The reasons include 'mounting cost of the six week campaign', 'a lack of popular support' and 'the restriction to just one party political broadcast'. *j*

Having read the article and considered the passages highlighted by Mr Rampton but without, I hope, being over analytical I have no doubt the reasonable reader would not understand it as a charge of lying or deceit. Even

armed with the party's own publications, the reader would not so conclude, whether in their ordinary and natural meaning or by way of innuendo. I cannot hold the words capable of meaning 'The plaintiffs lied or were deceitful'. That a party reassesses its position in the light of how the campaign has gone by a certain stage does not mean and is not capable of meaning that it lied to the public when it enthusiastically embarked on that campaign. That is not what the article is saying; it is not capable of being so understood.

I think the words are capable of lesser meanings: that the plaintiffs 'bit off more than they could chew', 'they were not prepared to risk electoral humiliation' or 'continue to pay the large cost of candidates in the apparent absence of support'. Any of those may or may not be defamatory in context; in any event, they are not pleaded.

Mr Rampton at one stage in answer to me indicated that at least one of those meanings would be defamatory. Whether any lesser meaning is to be proffered by amendment I know not. I will discuss the appropriate order with the parties.

Order accordingly. Leave to appeal granted.

K Mydeen Esq Barrister.

Chief Adjudication Officer and another v Webber

COURT OF APPEAL, CIVIL DIVISION
EVANS, PETER GIBSON AND HOBHOUSE LJJ
4 JUNE, 1 JULY 1997

Social security – Income support – Entitlement – Claimant enrolled on university course of variable character – Claimant classified as part-time during second year of course – Whether claimant at material time 'student' for purposes of income support – Income Support (General) Regulations 1987, reg 61.

In September 1992 the claimant began a 'modular' course in environmental biology at a university. Attendance at the university was classified as either part-time or full-time depending on the number of modules taken by the student at any time. The student was allowed to select the modules or topics he wished to study and was allowed to spread them over the period of his choice. During the three terms of the 1992 to 1993 academic year, on the basis of his module choice, the claimant was classified by the university as a full-time student. However, he failed his examinations that year and was informed by the university that he could only start as a part-time student in his second year. During the first two terms of the 1993 to 1994 academic year, therefore, the claimant was classified as part-time; as such he was not eligible for the full local authority grant or student loan and he claimed income support. Under the relevant statutory provisions a 'student' was not entitled to income support, but reg 61[a] of the Income Support (General) Regulations 1987 defined 'student' to mean a person who was attending a full-time course and provided that a person who had started on such a course should be treated as attending throughout any period of term or vacation within it, until the end of the course or such earlier date as he abandoned it or was dismissed from it. On the adjudications officer refusing his claim, the claimant appealed to the Social Security Appeal Tribunal, which allowed his appeal on the basis that the university had to be taken to have dismissed him from his full-time course, thereby terminating his status as a 'student'. On the adjudication officer's appeal, the social security commissioner upheld the decision of the tribunal on the grounds that since it was clear that for the first two terms of the 1993 to 1994 academic year the claimant was attending what had become a part-time course, he was not a 'student' within the definition in reg 61. The chief adjudication officer and the Secretary of State for Social Security appealed, contending that reg 61 required a course to be categorised at the outset when the person enrolled and therefore the claimant was a 'student' since he had enrolled on a full-time course.

Held – The appeal would be dismissed for the following reasons—

(1) (per Evans and Peter Gibson LJJ) For the purposes of reg 61 of the 1987 regulations, a student had to attend a full-time course, and a person who started on such a course was treated as attending a full-time course during such times as were periods of term or vacation within it. Accordingly, since for the claimant's

a Regulation 61, so far as material, is set out at p 276 *c* to *e*, post

second year there was no period of term or vacation within a full-time course, it followed that he was not a student. Moreover (per Evans LJ), while reg 61 operated to treat a person as a full-time student at times when, although such a student, he was not in fact attending the course, it could not be relied on to create the status of student, or full-time student, which did not exist in fact (see p 283 *d e g j* and p 284 *b j* to p 285 *c*, post); *Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul* [1995] ELR 259 and *Driver v Chief Adjudication Officer* [1996] CA Transcript 1782 considered.

(2) (per Hobhouse LJ) For the purposes of reg 61 of the 1987 regulations, a course which did not require full-time attendance could not properly be described as a full-time course. Accordingly, although the claimant enrolled on a full-time basis, since the course was a 'mixed mode' course, it did not as such require full-time attendance and therefore was not a full-time course (see p 281 *j* and p 282 *e* to *g*, post).

Notes

For income support, see Supplement to 33 *Halsbury's Laws* (4th edn) para 856A.

Cases referred to in judgments

Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul [1995] ELR 259, CA.

Driver v Chief Adjudication Officer [1996] CA Transcript 1782.

Appeal

By notice dated 24 May 1996 the Chief Adjudication Officer and the Secretary of State for Social Security appealed with leave of the social security commissioner, Mr R A Sanders, from his decision on 9 October 1995 whereby he held that the respondent, Anthony Webber, was entitled to income support under the Income Support (General) Regulations 1987, SI 1987/1967, from 1 October 1993. The facts are set out in the judgment of Hobhouse LJ.

Rabinder Singh (instructed by the *Solicitor to the Department of Social Security*) for the appellants.

Richard Drabble QC (instructed by *Peter Turville*, Oxfordshire Welfare Rights, Oxford) for Mr Webber.

Cur adv vult

1 July 1997. The following judgments were delivered.

HOBHOUSE LJ (giving the first judgment at the invitation of Evans LJ). This is an appeal brought with leave of the social security commissioner, Mr Sanders, from his decision dated 9 October 1995, holding that the respondent, Anthony Webber, who was born on 3 April 1973, was for a period commencing 1 October 1993 entitled to income support under the Income Support (General) Regulations 1987, SI 1987/1967, as in force at that time. The question of law raised can be shortly stated: whether Mr Webber was at the material time a student as defined by the 1987 regulations.

Under s 124 of the Social Security Contributions and Benefits Act 1992 it is a requirement (subject to certain irrelevant exceptions) of entitlement to income support that the relevant person be 'available for and actively seeking employment'. Under reg 10(1) 'a claimant shall not be treated as available for

employment if ... (h) he is a student during the period of study ...' 'Student' is defined in reg 2 as having the meaning prescribed in reg 61. The phrase 'Period of Study' is also defined as meaning:

> '... the period beginning with the start of the course of study and ending with the last day of the course or such earlier date as the student abandons it or is dismissed from it; but any period of attendance by the student at his educational establishment in connection with the course which is outside the period of the course shall be treated as part of the period of study ...'

'Last Day of the Course' is defined as having the meaning prescribed by reg 61 for the purposes of the definition of the period of study. 'Course of Study' is defined as meaning: '... any full-time course of study or sandwich course whether or not a grant is made for attending it.' Regulation 61 is also a definitions regulation dealing specifically with students. The definition of 'Student' is:

> 'A person other than a person in receipt of training allowance aged less than 19 who is attending a full-time course of advanced education or, as the case may be, a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment; and for the purposes of this definition—(a) a person who has started on such a course shall be treated as attending it throughout any period of term or vacation within it, until the last day of the course or such earlier date as he abandons it or is dismissed from it; (b) a person on a sandwich course shall be treated as attending a full-time course of advanced education or, as the case may be, of study ...'

'Last Day of the Course' is defined as 'the date on which the last day of the final academic term falls in respect of the course in which the student is enrolled on'.

It will be appreciated that the general scheme of these regulations is to identify a status, the status of 'student'. The definition in reg 61 and, indeed, the definition of 'period of study' in reg 2 both indicate that that status once acquired is a continuing one. This characteristic and the policy reasons for it as reflected in the legislation have been referred to in the judgment of Hoffmann LJ in *Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul* [1995] ELR 259. This overall policy has further been underlined by the amendment of reg 61 after the decision of the Court of Appeal in *Clarke*'s and *Faul*'s case so as to remove the words 'throughout any period of term or vacation within it' from the definition of 'student'. That amendment had not been made until after the time which is relevant to the present case.

The feature of the 1987 regulations which gives rise to the problems in the present case is that the status of 'student' depends upon the categorisation of the course on which the student is enrolled. The definition of 'course of study' requires that the course shall be a 'full-time' course of study. It thus presupposes that it is possible at the outset to categorise the course as being either full-time or part-time and applies that categorisation to the whole of the period of study from the start of the course through to the last day of the course. This assumption does not accord with the practice of universities and other institutions of advanced education as the present case illustrates. A course can be one which has a fixed and determined character as a full-time course for the whole of its duration. But on the other hand courses are offered which include a large element of flexibility. They may provide for part of the course to be full-time and part part-time; they may give the student a choice which he may exercise from time to time during

the course as to whether in any given period, be it a term or a year, he decides to study full-time or part-time; further the institution may have similar options to require a student to change from full-time to part-time study as, for example, if he fails to meet the requirements of the full-time course. Any change from full-time to part-time, or part-time to full-time may, within such schemes, be followed by a further change back to the previous status. The 1987 regulations do not on their face take account of such flexibility and it is this failure which gives rise to the problems addressed in the present case. It can be commented that it appears that similar problems do not arise in relation to the entitlement to grants since the scheme there does, we are told, recognise that the entitlement may change from time to time. Similarly, the requirement that a claimant for income support be available for work also has the consequence that the student, if studying more than part-time, will not in fact be available for work to the extent required by the regulations. However, be that as it may, no doubt for reasons relating particularly to the position of students during vacations, the regulations are drafted by reference to the status of the relevant person at any given time and on the basis that the status of 'student' once acquired shall continue until terminated in one of the ways provided for in the regulations.

The primary facts of this case are not in dispute and are succinctly stated in the reasons of the commissioner and the Social Security Appeal Tribunal from which it is convenient to quote.

On 23 September 1992 the claimant began what is referred to as a 'modular course' at Oxford Brookes University. His field of study was environmental biology. Within the permitted limits of that university's regulations governing modular courses, the claimant was able to select the modules or topics to be studied and, again within certain limits, could spread them over the period of his choice. The records of the university show his 'award aim' as BSc (Hons) Modular. That aim, as I understand it would take at least three years to achieve. A student could however settle for the lesser qualifications of certificate in higher education or diploma in higher education if he terminated his studies before successfully completing all the modules necessary for the award of degree.

Attendance at the university is either full-time or part-time depending on the number of modules being taken by the student during any particular term. Regulation 15 of the university regulations governs the classification of students as full or part-time for fee assessment purposes. The current prospectus states, in relation to full-time students, that they spend their entire course except vacations on campus and that full-time first degree courses normally last three years. In relation to part-time study it states that, while patterns vary, the most common consists of one day and an evening a week during term time. The prospectus also describes 'mixed mode' courses where 'students attend the course on a full-time and part-time basis at different stages of the course'. Students are not eligible for the full local authority grant or student loan unless they are full-time and if there is a change from full-time to part-time, I understand the university will notify the grant awarding and loan making authorities.

He was accepted to study a BSc (Hons) Environmental Biology with Statistics Course. He said that he had been sent a handbook concerning the various modules and he expected that he was given a choice. He told the tribunal that there were set modules and he was able to take two each term. He would also do extra modules. There were two stages. In his first year he had to obtain nine and then a further nine in each of the last two years. He had failed two compulsories and one other module in stage one. He had resat in his third term,

but did not pass. At the end of the third term the university had told him that he could only start as a part-time student in his second year. He had to take two compulsory modules and one other in his second year. He attended lectures. So far as biology was concerned, he attended three hours of lectures and undertook two hours of practical work a week. His parents dealt with his re-application for a grant but he understood that he was not eligible. He said that he was classed as a part-time student because of the number of modules which he was doing and he registered as part-time. He said that one had to pass the modules which he was doing before one could move on. The further 18 modules to which he had previously referred was the minimum to get a degree and one had to do extra ones to get honours. He said that he had a choice in his third year again to register as part-time. This would still entitle him to get an honours degree. He was not sure as to whether there was a time limit imposed on how long it should take. He was still registered as part-time but he was not attending any lectures. He had completed all his work in the first two terms.

During the three terms of the 1992 to 1993 academic year the claimant was classified by the university as a full-time student. During the first two terms of the academic year 1993 to 1994 he was classified as part-time. He did not attend at all in the third term of that year because none of his chosen modules was taught that term. He was part-time for the first term of the 1994 to 1995 academic year and full-time for terms two and three.

These findings reflect what appears in the documents published by the university. The prospectus emphasises the flexibility in the available patterns of study identifying full-time, sandwich, part-time and mixed mode. Mixed mode is described in the following terms: 'You attend the course on a full-time and part-time basis at different stages of the course.' The university regulations distinguish between the classification of a student as full-time or part-time for the purpose of assessing the tuition fee payable by the student as depending upon whether or not in any given year or period of three consecutive terms the student was taking more that six modules. If it was six modules or less he was categorised as part-time. If it was more than six modules he was categorised as full-time.

As previously stated, in his first year Mr Webber enrolled for a course entitled 'Modular Degree DipHE and Cert (FT)'. (FT stands for full-time.) He said that he would be attending full-time. In his enrolment for the second year the title of the course was unchanged, but his attendance was put in as part-time. This was also reflected by a letter written by the university on 10 December 1993 certifying that Mr Webber had for the first term of the academic year 1993–94 been registered as a part-time student.

Commenting upon the prospectus, the commissioner said (in para 8 of his reasons):

> 'I am not sure that in the end it would necessarily make a difference but I have come to the conclusion not least because of the way the prospectus is written that the course is the whole course leading to the qualification. The prospectus in relation to full-time first degree courses says that they "normally last three years". In relation to "mixed mode", which seems to describe this claimant's course, the prospectus says that "students attend the course on a full-time and part-time basis at different stages of the course". In my view that shows at least the University regarded the course as the whole of the studies leading to the qualifications and I see no reason to take a different view.'

In argument before us Mr Rabinder Singh, who appeared on behalf of the Secretary of State, did not accept the commissioner's categorisation of the course upon which Mr Webber was enrolled as 'mixed mode', a point to which I will return.

It is clear from the facts found that the original intention and expectation was that Mr Webber would complete the course and obtain his degree within three years, attending (as would be necessary for that time scale) full-time for those three years. However, the university regulations left it open to Mr Webber to change his objective or to take longer over completing the course and in doing so to attend only part-time. Similarly, as the facts of this case demonstrated, the university had the right to require Mr Webber to cease to attend full-time and attend only part-time if at any stage he should fail to meet the requirements of the full-time course.

Mr Webber made his application for income support in October 1993. It was refused by the adjudication officer (after a review) in December of that year. Mr Webber appealed to the Social Security Appeal Tribunal, which in June 1994 allowed his appeal. It did so substantially upon the basis that the university must be taken to have dismissed Mr Webber from the full-time course so, within the terms of the definition in reg 61, terminating his status as a student. The adjudication officer appealed to the commissioner. The commissioner did not accept the approach of the tribunal. He took into account the recent decision of the Court of Appeal in *Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul* [1995] ELR 259 about continuing—

> 'in the same way and consistently with the presumed intention of the Provisions, a course which is at the material time a part-time course cannot, as it seems to me, fairly be described as a full-time course. In this case it seems to me clear that the claimant was in the first two terms of 1993 to 1994 academic year attending what had then become a part-time course and he was accordingly not then a student within the definition. In the third term of that year he was not attending the course at all; at all events he was not then attending a full-time course.'

Accordingly, though for a different reason, he upheld the decision of the tribunal.

Although the definition of 'student' has had to be considered and applied in a considerable number of cases before the tribunal and commissioners, the definition has only twice previously had to be considered by the Court of Appeal. The first case was *Clarke*'s and *Faul*'s case, to which I have already referred. In that case the students were attending a three-year degree course at the University of East Anglia. Under the regulations of that university the university could give permission to a student to 'intercalate' which as Hoffmann LJ explained is a latinate word meaning to insert an extra period into the calendar. The effect of such permission was that the student was required to leave the university and stay off the campus. The regulation told the student ([1995] ELR 259 at 260):

> '... 2. ... During your absence you will remain a member of the university, ie your name will be included in the official register of students, but your status as "student in attendance at the university" is in abeyance. 3. Your privileged access to University facilities is in abeyance ...'

The argument of the Secretary of State was that intercalation did not involve the abandonment of the course or the dismissal of the student from it, nor had the 'last day' of the course arrived: therefore under reg 61 the claimants still had the

status of 'students' despite the permission to intercalate. Hoffmann LJ based his decision in favour of the claimants on the inclusion of the words 'throughout any period of term or vacation within it' in the definition of 'student' (at 264):

> '... the claimant is a "student" for the purposes of the regulations while he is attending the course and he is deemed to attend the course not only during term time but also during any times which can be described as a period of vacation within the course. These are precisely the times for which, under the awards and loans system, he would be entitled to support. On the other hand he is not a "student" when his attendance at the course has been suspended by an intercalated period such as Ms Clarke and Ms Faul obtained. Such a period cannot be fairly described as a period of either term or vacation within the course.'

Hirst LJ disagreed with this but Glidewell LJ agreed with Hoffmann LJ. He emphasised (at 266) the same words as Hoffmann LJ:

> 'The fact that reference is made to terms and vacations is an indication, in my view, that it is to those periods, and not to an intercalated year, that the extended definition applies. In my judgment, therefore, a person who is absent from an educational establishment during an intercalated year is not "attending a full-time course of study at the establishment" within reg 61.'

All three members of the court agreed that the intercalation could not be described as an abandonment of the course. It did not have the element of finality that an abandonment would involve.

The second case was *Driver v Chief Adjudication Officer* [1996] CA Transcript 1782. This case also gave rise to a difference of opinion. Miss Driver was a student on a sandwich course at the Polytechnic of North London. The course was a sandwich course lasting for three and a half years and consisting of seven six-month semesters. She was required to devote her fifth semester to gaining work experience and in September 1991 she began an industrial placement with a firm of architects. After she had been there for no more than a month the firm ended her placement because of the recession and their resulting financial difficulties. She was left with no source of income because she was not being paid by the firm and not in receipt of a student grant for the sandwich period of her course. She applied for income support but was refused. Her argument in the Court of Appeal was based upon the decision in *Clarke*'s and *Faul*'s case. The majority of the Court of Appeal, McCowan and Peter Gibson LJJ held that her situation could not be equated to one of intercalation. She had obtained some professional experience as intended before the cesser of her employment. The fact that she was unable to obtain another placement did not affect the completion of her sandwich course. It was immaterial that the polytechnic did not give her any tuition during the remainder of her fifth semester as it had never been intended that she should receive such tuition that semester. The remainder of the fifth semester was not an intercalated period. Peter Gibson LJ said:

> 'In the case of Miss Driver, I do not see why the fifth semester, which was always intended to be a period of experience not of full-time study, cannot fairly be described as a period of term within the course of seven semesters.'

The third member of the court, Waller LJ, dissented, considering that the decision in *Clarke*'s and *Faul*'s case could be extended to apply to cover Miss Driver's case.

The present case raises a difficulty which was not discussed, nor did it need to be discussed, in either of the previous cases. The argument of Mr Drabble QC, who appeared on behalf of Mr Webber, was that the commissioner was right in his approach. Where the course had a variable character it was necessary to determine the character of the course, whether it was full-time or part-time, at each relevant stage. In the terms of the definition, Mr Webber was not during the academic year 1993–94 'attending a full-time course'; he was attending a part-time course. On the other hand Mr Rabinder Singh submitted that the definition requires that the course be categorised at its outset when the student enrols for it and that, once the status of 'student' has been acquired, it is deemed to continue through to the 'last day of the course' unless at some earlier date the student has either abandoned the course or been dismissed from it. He stresses that sub-para (a) of the definition is a deeming provision which governs the period during which the student shall be treated as attending the course whether he is in fact doing so or not.

In my judgment, the argument of Mr Rabinder Singh encounters serious difficulties when applied to a course which leaves open the degree of flexibility which is permitted by the university for this course. The course does not have a fixed and determined character at its outset. It has an uncertain length and composition. A student can start as a part-time student, convert to a full-time student and, maybe, convert back to part-time. Mr Rabinder Singh would have to accept that at its outset such a course could not be categorised as full-time because, at its outset, it was part-time and whether it ever became full-time, and if so for how long, would depend upon a decision by the student as to how he wished to complete the course, how many modules he wished to take at any one time, and what attendance he wished to make.

In the present case Mr Rabinder Singh has to base his argument upon the fact that during the first year Mr Webber chose to attempt to do the number of modules appropriate to a full-time course and attended full-time for that purpose. He argues that the choice he made for the first year, although not binding on either the university or Mr Webber nor determinative of what would be the position in subsequent years, was determinative of the categorisation of the course and of Mr Webber's status as a 'student' however long the course might last and whether or not he was attending as a part-time or full-time student. Mr Rabinder Singh's argument rightly stressed the distinction between the categorisation of the course and any choices that might thereafter be made by the student as to his attendance upon it: the former was relevant to the definition and the latter was not. Mr Rabinder Singh also stressed that, before it could be said that there had been an abandonment of or dismissal from a course there must be an element of finality and that the type of regime within which Mr Webber was operating clearly did not have that finality. Provided that he could pass the relevant modules Mr Webber was at liberty to resume full-time attendance and indeed it appears that he did so for the last term of the third year. Mr Drabble accepted that he could not in the present case rely upon the words 'abandons' and 'dismissed'.

I consider that the arguments of Mr Rabinder Singh drive one to the conclusion that a course which does not require full-time attendance cannot be described as a full-time course. The 1987 regulations include no definition of what is to be treated as a full-time course. The commissioner was in my judgment justified in describing the course which Mr Webber was following as a 'mixed mode' course. It may be that at some institutions there are very few courses which can properly

be categorised as full-time courses as opposed to courses which include an option of full-time attendance. If this situation is one which creates difficulties for those responsible for administering the system of income support and deciding how the available financial resources should be applied, that is a matter for those responsible for the revision of these regulations. If the relevant course was not a full-time course then the student is not at any time 'attending a full-time course of study' and the problem posed by the deeming provision does not arise. The relevant person never was a 'student' coming within the definition in reg 61. Indeed, the difficulty of sensibly applying the deeming provision to a mixed mode course supports the conclusion that the premise upon which the Secretary of State's case is based is mistaken.

But, in any event, the present case has to be decided under the regulation including the phrase 'throughout any period of term or vacation within it'. Following the approach in the Court of Appeal in *Clarke's* and *Faul's* case, there are difficulties in saying that the relevant period fell within 'any period of term or vacation within' the full-time course. They were periods of terms and vacation within what was at the material time a part-time course. If matters have to be considered in strict categories, the position at the material time was that Mr Webber was not on a full-time course but (on the hypothesis that he had been on a full-time course) had transferred to a part-time course.

I recognise however that any such analysis could be said both to fail to give effect to what is, after all, an arbitrary deeming provision and to involve an element of artificiality since from the point of view of the university and Mr Webber he was still pursuing the same course albeit part-time not full-time. In my judgment the answer to be preferred is to accept the overall approach of Mr Rabinder Singh to the construction of the definition in reg 61 but to recognise that a course which does not require full-time attendance cannot properly be described as a full-time course.

Therefore independently of the decision of this court in *Clarke's* and *Faul's* case and the inclusion at the material time of the phrase 'throughout any period of term or vacation within it' in the deeming provision, I prefer the view that the course upon which Mr Webber was enrolled was not a full-time course and that he never was a 'student' within the definition in reg 61 of the 1987 regulations. In my judgment the appeal of the Secretary of State should be dismissed and the decision of the commissioner upheld.

PETER GIBSON LJ. For the third time in as many years this court is required to consider the definition of 'student' in reg 61 of the Income Support (General) Regulations 1987, SI 1987/1967. The lack of unanimity in this court in the two earlier cases, *Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul* [1995] ELR 259 and *Driver v Chief Adjudication Officer* [1996] CA Transcript 1782, and the frequency with which points have arisen on that definition are an indication of the difficulties to which that definition gives rise. Indeed, I cannot help but wonder whether the draftsman of the regulations had properly in mind the wide variety of advanced education courses available to students today and the range of differing circumstances in which students who have embarked on such courses may subsequently find themselves.

Hobhouse LJ has set out the facts and the relevant legislative provisions and I need not repeat them. The essential case of Mr Singh, for the Secretary of State, is very simple: once a student starts on a full-time course the only events on the occurrence of which the regulation contemplates that the student will cease to be

a student are: (i) the arrival of the last day of the course; (ii) the abandonment by the student of the course; and (iii) the dismissal of the student from the course. Moreover, he points to the fact that para (a) in the definition of 'student' is a deeming provision which requires what is not the reality to be treated as the reality. In the present case, he submits, the commissioner rightly found that the respondent had started such a course, being the whole course leading to the qualification which the respondent was seeking, and was right to say that the tribunal erred in its conclusion of the dismissal of the respondent from the course. But he submits that as none of the three events had occurred, the commissioner was wrong to say that the respondent had at the material time become a student on a part-time course and so was not a student within the meaning of the regulation.

Mr Singh's submission, to my mind, leaves out of account the inclusion in para (a) of the words 'throughout any period of term or vacation within it' and the decision of this court in *Clarke*'s and *Faul*'s case which was based on those words. As I pointed out in *Driver*'s case:

> 'The reasoning of Hoffmann LJ was that in para (a) of reg 61 the presence of the words "throughout any period of term or vacation within [the course]" was intended to impose an additional requirement, viz that the student is treated as attending the course during such times as: (a) fall after he starts the course and before it ends or he abandons it or is dismissed; *and* (b) are periods of term or vacation; that excludes an intercalated period which cannot fairly be described as a period of term or vacation within the course ... Glidewell LJ considered that the fact that reference was made in para (a) to terms and vacations was an indication that it was to those periods, and not to an intercalated period when the student was not attending a full-time course of study, that the extended definition of attending a full-time course applied.' (My emphasis.)

Mr Singh argued that *Clarke*'s and *Faul*'s case was distinguishable because unlike the academic annus non of Ms Clarke and Ms Faul during which they were expected to stay off the university campus, the respondent's second year was unquestionably treated as an academic year by the university which required him to continue with his studies, albeit on a part-time basis, with a view to returning to the full-time course the following year. I am not persuaded by this distinction. The additional requirement recognised in *Clarke*'s and *Faul*'s case was that the period in question must be a 'period of term or vacation within it', that is to say, within the full-time course. Plainly for the respondent's second year, there was no period of term or vacation within any full-time course. Mr Singh also sought to derive help from *Driver*'s case, in which this court held that a person who had started a full-time course was to be treated as a student in a period in which she was intended to be having a period of professional experience but her placement had prematurely come to an end. He suggested that the present case in which the respondent was studying part-time was stronger than *Driver*'s case. But *Driver*'s case turned on its own particular facts, the majority of this court holding that the period in question did not cease to be a period of term within a full-time course. That cannot be said here.

For these reasons which are in substance those advanced by Mr Drabble QC, for Mr Webber, in his first argument, I would hold that this appeal falls to be dismissed.

Mr Drabble, conscious of the limited effect that a victory on that ground would achieve by reason of the subsequent amendment of reg 61, advanced a wider argument for the dismissal of the appeal. This argument was dependent on construing reg 61 in such a way that the deeming provision of para (a) is not allowed to cause what is in reality a period of a part-time course to be treated as a period within a full-time course. In view of the conclusion which I have reached on the first argument, I prefer to say nothing on this or on the other points taken by Hobhouse and Evans LJJ in their judgments.

EVANS LJ. I agree that this appeal should be dismissed, for the reasons given by Peter Gibson LJ.

We were referred after the hearing to two decisions by commissioners under the revised wording of reg 61 of the Income Support (General) Regulations 1987, SI 1987/1967; that is to say where the words 'throughout any period of term or vacation within it' no longer appear. They were deleted, it seems, in order to reverse the effect of the majority decision of this court in *Chief Adjudication Officer v Clarke, Chief Adjudication Officer v Faul* [1995] ELR 259. If that was the reason, then the object of the amendment was to deprive persons who are available for work but in fact unemployed, during their year of absence from a full-time university course, of their statutory right to claim income support, on the ground that they are deemed to be full-time students when in fact they are not.

In one of these decisions, Mr Commissioner Rowland said that he sympathised with the claimant:

> 'Like the Court of Appeal in *Clarke* and *Faul*, I can see no obvious reason why there should be an anomalous class of people left to destitution without state support of any kind.'

This situation arises because the student is not entitled to a student grant or loan in respect of the year in question. He has to repay it, if already paid, when, for example, he gives up the course due to illness shortly after it has begun (see the facts in Mr Commissioner Rowland's case CIS/14477/96).

I agree that because these further decisions were made under the revised wording, they are not directly relevant to the present appeal, which is governed by the old. We have not heard further argument by reference to them.

Whilst like Peter Gibson LJ, I do not express a concluded view on Hobhouse LJ's first ground of decision, namely that the respondent never embarked on a full-time course, nevertheless I would also hold that the respondent is entitled to succeed without relying on the words 'throughout any period of term or vacation within it'. My reasons shortly are these.

The purpose of the Social Security Contributions and Benefits Act 1992 and the 1987 regulations is to define those persons who are eligible for income support. They must be 'available for and actively seeking employment' (see s 124 of the 1992 Act). 'Students', however, are excluded during 'the period of study' (see reg 10(1)). Subsequent regulations show that only full-time students are excluded in this way. It is in this context that reg 61(a) provides that 'a person who has started on such a course shall be treated as attending it' throughout its length. This deeming provision is relied on to establish that the person is a full-time student for the purposes of the 1992 Act, even when he is not a student at all.

In my view, it is one thing to treat a person as a full-time student at times when, although such a student, he is not in fact attending the course, but quite another thing to rely on the deeming provision to create a status as student which does

not exist in fact. In *Clarke*'s and *Faul*'s case during the academic year in question the claimants were not members of the university. So far as they and the university were concerned, their year of 'intercalation' was 'annus non'. In plain English, they were given leave of absence from their course, and for that period they ceased to be students on that or any other course.

In the present case, the claimant remained a student, but in fact a part-time student whom the regulations do not exclude from entitlement to income support. By parity of reasoning, I would hold that the deeming provision in reg 61(a) cannot be relied on to create a status of full-time student which does not exist in fact. Ultimately, this is a question of statutory interpretation. It is not necessary to say that there is a general principle that a deeming provision could never have such an effect. It is sufficient that in the present case the statute is sought to be interpreted in this way in order to create, for no apparent reason, 'an anomalous class of people left to destitution without state support of any kind'. I should require express words of the utmost clarity to persuade me that Parliament intended to produce that disgraceful result.

Appeal dismissed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Practice Note

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

COLMAN J

31 JULY 1997

Costs – Taxation – Taxation of costs procedure – Abridged procedure – Commercial matters – Procedure to be followed – RSC Ord 62, rr 27(2), 29(6)(a), 33, 34, 35, App 1.

COLMAN J gave the following direction at the sitting of the court.

1. It is thought desirable that an 'abridged' taxation of costs procedure should be available in commercial matters to parties who might wish to use it. The new abridged procedure allows the parties greater flexibility to resolve differences before the matter is brought before the taxing master or taxing officer and involves a simpler and quicker taxation process using summary bills. It should, however, be emphasised that this new procedure, which is being offered for an initial trial period of one year from 1 October 1997 necessarily involves a 'broad brush' approach to taxation of costs, and all parties' solicitors should advise their clients accordingly. Attention is drawn to the fact that the greater the measure of agreement prior to the commencement of taxation proceedings, the smaller will be the taxation lodgement fee that has to be paid at the commencement of these proceedings.

2. In order to take advantage of the new abridged procedure, the consent of all parties will be required before judgment, normally no later than the hearing of the summons for directions, on the following lines:

> 'Taxation of costs awarded in the action herein shall be carried out in accordance with the abridged taxation procedure laid down in the practice direction dated 31 July 1997 ([1997] 4 All ER 286, [1997] 1 WLR 1198) and the Guide to Commercial Court Practice.'

3. In all cases such consent must be embodied in a formal order of the court.

4. When costs are referred to taxation in any case in which an order in the terms of para 2 has been made, the taxation of those costs shall be carried out by the Supreme Court Taxing Office and a commercial taxing master (or taxing officer) as appropriate in accordance with the following procedure (which shall be known as 'the abridged taxation of costs procedure') which shall be strictly adhered to.

(a) Within three months of the order for taxation, a summary bill of costs (signed by a partner) together with requisite vouchers shall be drawn up by the solicitors for the receiving party and served on the solicitors for the paying party ('the summary bill'). The summary bill of costs should briefly summarise the main areas and items of costs, and can take the form of a schedule as used in security for costs applications.

(b) The paying party's solicitors shall within 21 days of receipt of the summary bill draw up and serve on the solicitors for the receiving party a list (the response) identifying those items: (1) which are agreed; (2) which are disputed (and stating briefly the grounds of objection and the appropriate figure contended for); (3) in respect of which further information is required (and stating briefly the nature of the further information required).

(c) The receiving party's solicitors shall if so advised within 21 days of receipt of the response draw up and serve a reply to points under (2) and (3) thereto in writing (the reply).

(d) If agreement cannot thereafter be reached between the parties within seven days of the receipt of the reply (or failing service thereof, within seven days of the time limit for service of a reply), the solicitors for the receiving party shall within a further seven days (i) begin proceedings for taxation by lodging with the Supreme Court Taxing Office the following: (a) the requisite document for commencement of taxation proceedings as provided by RSC Ord 62, r 29(6)(a) and Ord 62, App 1; (b) a copy of the order of the court abridging taxation; (c) a transcript of the judgment (if available); (d) the documents exchanged between the parties; namely: (1) the summary bill and supporting vouchers, (2) the response with any supporting documents, and (3) the reply (if any) with any supporting documents; (e) a letter marked 'For the urgent attention of the commercial taxing master (or taxing officer)' containing a request that a date be fixed for the hearing of the taxation; (f) a cheque in respect of the taxing lodgement fee calculated in accordance with the current scale of fees; (g) a time estimate for the taxation which, save in exceptional circumstances, shall be limited to a maximum of half a day; (ii) notify the paying party (or its solicitors) that taxation proceedings have commenced.

(e) Within 21 days of such lodgement, the commercial taxing master shall fix a date for the hearing of such taxation which shall be as early as conveniently possible but in any event no more than three months ahead, unless agreed between the parties.

(f) The commercial taxing master (or taxing officer) can require any party to provide any further information he considers necessary for the taxation and to have the fee earner who had the conduct of the case present at the taxation.

(g) The taxation shall be heard and determined by a commercial taxing master (or taxing officer) on the basis of the material lodged under para 4(d) above and of any oral submissions made by the parties, which shall be confined to the points raised in the material lodged. A party who, in the course of the abridged taxation of costs procedure, seeks the drawing up and service of a detailed bill of costs or part thereof or a detailed response or reply must, before the hearing by the commercial taxing master (or taxing officer) apply to the commercial judge for an order which will only be granted in exceptional cases.

(h) The taxing fee (less any amount paid on lodgement) shall be payable [within] seven days of the abridged taxation.

(j) Nothing in this practice direction shall prevent a party from bringing the matter before the commercial taxing master at an earlier stage (by serving the requisite documents for the commencement of taxation as provided by RSC Ord 62, r 29(6)(a) and Ord 62, App 1) in order to obtain directions, e g delays in service, etc.

(k) The commercial taxing master (or taxing officer) may, in the exercise of his discretion under RSC Ord 62, r 27(2) as to the costs of taxation, take into account a written offer made 'without prejudice save as to the costs of taxation' at any time before the expiration of 14 days after the service of the summary bill and, where any such offer is made, the fact that it has been made shall not be communicated to the taxing master/taxing officer until the question of costs of the taxation proceedings falls to be decided.

(l) For the avoidance of doubt, nothing in this practice direction shall abrogate or otherwise affect the powers or discretion of the commercial taxing master or officer. *a*

(m) In relation to the abridged taxation procedure, the decision of the taxing master/officer shall be final.

(n) This abridged taxation of costs procedure shall be available for use, by consent, in relation to the taxation of costs of arbitrations and ADR although an order of the court providing for abridged taxation will be required in all cases. RSC Ord 62 shall apply mutatis mutandis to such taxation, save for the provisions of rr 33 to 35. *b*

K Mydeen Esq Barrister.

Dunbar (administrator of the estate of Dunbar (deceased)) v Plant

COURT OF APPEAL, CIVIL DIVISION
HIRST, PHILLIPS AND MUMMERY LJJ
12 JUNE, 23 JULY 1997

Insurance – Life insurance – Death of assured resulting from suicide – Suicide aided and abetted by beneficiary under policy who survived suicide pact with assured – Forfeiture rule – Modification of rule – Whether beneficiary precluded by forfeiture rule from benefiting under life insurance policy – Whether court should modify effect of forfeiture rule – Suicide Act 1961, s 2(1) – Forfeiture Act 1982, s 2.

In February 1991 the defendant and her fiancé, D, resolved to commit suicide together. After an initial attempt, they agreed to hang themselves by jumping from a ladder at the same time; but when they did so, while D succeeded, the defendant survived. She was not, however, prosecuted for any offence. Thereafter D's father, who was also the administrator of his estate, issued proceedings against the defendant to determine the defendant's entitlement to the house which she and D had jointly owned and to the proceeds of an insurance policy on D's life written for her benefit. The judge held that the defendant had committed the criminal offence of aiding and abetting D's suicide contrary to s 2(1)[a] of the Suicide Act 1961 and that the forfeiture rule (the rule of public policy which precluded a person who had unlawfully killed another from gaining a benefit in consequence of the killing) applied to prevent her from succeeding to D's interest in the house and from entitlement to the insurance money. However, in the exercise of his discretion under s 2 of the Forfeiture Act 1982, and 'trying to do justice between the parties', he ordered that the effect of the rule be modified so far as D's interest in the house was concerned. The defendant appealed, contending (i) that the judge had erred in finding that she had committed a criminal offence contrary to s 2(1) of the 1961 Act, (ii) that the forfeiture rule did not apply, since she had not used any deliberate, intentional and unlawful violence or threats of violence against D, and (iii) that the judge had erred in the approach he had taken to the exercise of his discretion under s 2 of the 1982 Act.

Held – (1) The forfeiture rule applied to the offence of aiding and abetting suicide contrary to s 2(1) of the 1961 Act. Moreover, since the application of the rule was not dependent on the culpability attaching to the crime and (per Mummery LJ) the presence of acts or threats of violence was not necessary, the rule applied also to aiding and abetting the suicide of another in pursuance of a suicide pact. Accordingly, since on the facts the defendant had aided and abetted D's suicide, it followed that the judge had been correct in holding that the forfeiture rule applied (see p 300 *e* to *g*, p 301 *b*, p 304 *b c*, p 311 *g h*, p 312 *b c* and p 313 *d*, post).

(2) In considering whether to exercise its discretion to modify the effect of the forfeiture rule, the question for the court under s 2(2)[b] of the 1982 Act, having regard to all the material circumstances, including the conduct of the offender and the deceased, was whether the justice of the case required it. It followed, in

a Section 2(1) is set out at p 296 *e f*, post
b Section 2(2) is set out at p 301 *f g*, post

the instant case, that, in trying to do justice between the parties, the judge had adopted the wrong approach. Exercising the discretion afresh, and having regard to all the circumstances of the case, including the fact that in the case of the survivor of a suicide pact the public interest would not normally call for forfeiture, the court would (Mummery LJ dissenting) order that there should be full relief against the effect of the forfeiture rule. Accordingly, the appeal would be allowed (see p 302 *g* to *j*, p 311 *d* and p 312 *g* to p 313 *d*, post).

Notes

For application of forfeiture rule, see 12 *Halsbury's Laws* (4th edn) para 1136.

For the Suicide Act 1961, s 2, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 297.

For the Forfeiture Act 1982, s 2, see ibid 755.

Cases referred to in judgments

Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602, [1938] AC 586, HL; *affg* [1937] 2 All ER 243, [1937] 2 KB 197, CA.

Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147, [1891–4] All ER Rep 335, CA.

Crippen (decd), Re [1911] P 108, [1911–13] All ER Rep 207.

Davitt v Titcumb [1989] 3 All ER 417, [1990] Ch 110, [1990] 2 WLR 168.

Giles (decd), Re, Giles v Giles [1971] 3 All ER 1141, [1972] Ch 544, [1971] 3 WLR 640.

Gray v Barr (Prudential Insurance Co Ltd, third party) [1971] 2 All ER 949, [1971] 2 QB 554, [1971] 2 All ER 1334, CA; *affg* [1970] 2 All ER 702, [1970] 2 QB 626, [1970] 3 WLR 108.

H (decd), Re [1991] 1 FLR 441.

Hall's Estate, Re, Hall v Knight [1914] P 1, [1911–13] All ER Rep 381, CA.

Hardy v Motor Insurers' Bureau [1964] 2 All ER 742, [1964] 2 QB 745, [1964] 3 WLR 433, CA.

Haseldine v Hosken [1933] 1 KB 822, [1933] All ER Rep 1, CA.

James v British General Insurance Co Ltd [1927] 2 KB 311, [1927] All ER Rep 442.

K (decd), Re [1985] 2 All ER 833, [1986] Ch 180, [1985] 3 WLR 234, CA; *affg* [1985] 1 All ER 403, [1985] Ch 85, [1985] 2 WLR 262.

Marles v Philip Trant & Sons Ltd (Mackinnon, third party) (No 2) [1953] 1 All ER 651, [1954] 1 QB 29, [1953] 2 WLR 564, CA.

Permanent Trustee Co Ltd v Freedom from Hunger Campaign (1991) 25 NSWLR 140, NSW SC.

R v National Insurance Comr, ex p Connor [1981] 1 All ER 769, [1981] QB 758, [1981] 2 WLR 412, DC.

Royce, Re, Turner v Wormald [1940] 2 All ER 291, [1940] Ch 514.

S (decd), Re [1996] 1 WLR 235.

Tinline v White Cross Insurance Association Ltd [1921] 3 KB 327.

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

Troja v Troja (1994) 33 NSWLR 269, NSW SC.

Whitelaw v Wilson [1934] OR 415, Ont HC.

Cases also cited or referred to in skeleton arguments

Dellow's Will Trusts, Re, Lloyds Bank Ltd v Institute of Cancer Research [1964] 1 All ER 771, [1964] 1 WLR 451.

Jones v Roberts [1995] 2 FLR 422.

Royse (decd), Re, Royse v Royse [1984] 3 All ER 339, [1985] Ch 22, CA.

Whiston v Whiston [1995] Fam 198, CA.

Appeal

By notice dated 8 January 1996 the defendant, Nanette Elizabeth Plant, appealed from the decision of Judge Howarth, sitting as a judge of the High Court in the Chancery Division, on 14 December 1995 in the Preston District Registry in proceedings brought by John Arnold Dunbar, as administrator of the estate of Tony Dunbar (deceased) whereby he held that the defendant had been guilty of aiding and abetting the suicide of the deceased contrary to s 2(1) of the Suicide Act 1961 and that the forfeiture rule prohibited her from succeeding to the deceased's share of their joint property by survivorship and from entitlement to the proceeds of a life policy, but ordered under s 2 of the Forfeiture Act 1982 that the effect of the rule be modified in respect of that share. The facts are set out in the judgment of Mummery LJ.

Nigel Thomas (instructed by *Hart Reade*, Eastbourne) for Miss Plant.

Peter Crichton-Gold (instructed by *Mendelsons*, Manchester) for the administrator.

Cur adv vult

23 July 1997. The following judgments were delivered.

MUMMERY LJ (giving the first judgment at the invitation of Hirst LJ).

INTRODUCTION

This is the first case in which the Court of Appeal has had to consider the effect of the forfeiture rule and the impact of the Forfeiture Act 1982 on the right of a survivor of a suicide pact to acquire benefits in consequence of the death of the other party to the pact.

Three questions arise for decision. (1) Was the criminal offence of aiding and abetting the suicide of another committed by the survivor, contrary to s 2(1) of the Suicide Act 1961? (2) Does the forfeiture rule apply to preclude the survivor from acquiring: (a) absolute beneficial ownership of a house previously held by the survivor and the deceased on trust for themselves as beneficial joint tenants; and (b) the proceeds of an insurance policy on the life of the deceased written for the benefit of the survivor? (3) Did the judge properly exercise his discretion under s 2 of the 1982 Act to modify the effect of the forfeiture rule in making an order limited to the deceased's interest in the house and not including the life policy proceeds: and, if not, how should that discretion have been exercised?

This cold dry summary of the legal issues does not mean that the court is insensitive to the tragic human aspects of the horrible events that happened on 24 and 25 February 1991 to two young lovers and their families. It is a matter of regret that, distressing though it may be, this appeal cannot be determined without discussion and description of the detail of those dreadful two days.

THE FACTS

In October 1987 Nanette Plant (Miss Plant) and Tony Dunbar (Mr Dunbar) met and fell in love. They were both in their early 20s. At the end of 1987 they moved into a flat above the Fairholme Restaurant in Preston operated by Miss Plant's employer, First Leisure Corp Ltd (First Leisure). Miss Plant went to work as a unit administration controller at First Leisure's Savoy Hotel in Blackpool. When the couple first met, Mr Dunbar was working as a porter. He later had a job in an advertising agency, until he was made redundant. He then became a self-employed technical illustrator.

In October 1988 they bought a house at 26 Staining Avenue, Ashton in Preston (the house) in joint names with the assistance of a mortgage from the Newcastle Building Society.

They got engaged at Christmas 1989 and planned to marry on 10 August 1991. In January 1991 things started to go seriously wrong. Miss Plant fell under suspicion of false accounting and theft from First Leisure. On Friday, 22 February 1991 she was called into the Savoy Hotel, questioned, accused of fraud and theft and threatened with imprisonment. She was questioned by hotel staff for four hours on Saturday, 23 February and was again threatened with imprisonment.

On that Saturday and on Sunday, 24 February 1991 Miss Plant and Mr Dunbar discussed their fears about the future. They thought that Miss Plant might be prosecuted and sent to prison. They did not tell the rest of the family about their problems. Late on the afternoon of 24 February Mr Dunbar talked to a representative of First Leisure, who said that Miss Plant would be arrested the next day. In the evening Miss Plant told Mr Dunbar that she had decided to take her own life. His reaction was that he could not face life without her. If she was going to end her life, he would take his too. They agreed to commit suicide.

In Miss Plant's own words:

> 'Tony and I discussed the position. The idea came to me of committing suicide. The idea was mine, but for me only. I never once said, suggested or demanded that Tony should take his life. After I had said that I was scared of living, Tony replied that he was scared of dying. I said I had nothing to live for as I was bound to go to prison. I told Tony that he would be alright (meaning that he would not go to prison). Tony then asked me how I would do it, and I said something like "the quickest and easiest way". At this point, Tony suggested that we used the car, because we would be able to curl up and die in each other's arms. We wanted to be together forever. After we had made the decision, it was not again discussed between us, except how we would carry it out. After that Tony organised everything.'

In the evening of 24 February they made their first suicide attempt. They both left notes before driving into the country. They parked their car in a field. Mr Dunbar attached a hose-pipe which he had borrowed from neighbours to the car exhaust and brought it through the driver's window of the car. They then both sat in the back of the car for three hours with the engine running. Although they suffered ill effects, the consequences of the attempt were not fatal. They drove home.

The events of the following day are described in Miss Plant's witness statement:

> 'We woke about 8.00 am. We both believed that if I left the house that day we would never see each other again. We decided to try again. Tony suggested that because the car plan had not worked, we should try something quick. I suggested hanging. Tony went to the shed outside to see what he had got. He found some wire, some cable. We went up into the loft. Tony rigged it all up. I went up into the loft with him. The phone rang a couple of times, but we ignored it, the doorbell rang. It was about 9.00 am. It was someone who had called to collect work from Tony and Tony went down and gave him the work. I waited in the loft. When he came back he tied the wire round my neck. We told each other how much we loved each other, to wait for each other. Then he tied the wire round his neck. We

counted to three, and jumped. We were each standing on a ladder and we jumped at the same time. The wires snapped. I then suggested that we used bed sheets. He went down and got them. Tony then tied them up. He first tied a sheet round my neck. I was scared that it would not be tight enough. He hugged me and told me how much he loved me. I told him the same. When he had done that, he did his own. We told each other again that we loved each other, and to wait for each other. We counted to three and we both jumped. I just felt as if I had woken up and someone was holding me. Then my noose was loose and became undone. I went over to Tony to try and get him down. I climbed up on to the ladder to feel his pulse. I could feel no pulse. I then fell through the floor, through the ceiling of the bedroom below. My legs went through the plaster. I got up and again tried to get him down, thinking he might be alive. Then the ladder went through the floor. I realised that he was dead.'

Miss Plant then made further attempts to finish her life by cutting her throat and wrists with a kitchen knife and jumping out of the back bedroom window. The judge described the injuries to Miss Plant's neck and her wrists as horrific.

Mr Dunbar was 24 at the date of his death. He was survived by his parents. His father, Mr John Dunbar (the father), is the plaintiff in these proceedings. On 8 May 1991 letters of administration to the estate of Mr Dunbar, who died intestate, were granted to the father out of the Liverpool District Probate Registry. He started proceedings against Miss Plant to determine the legal position about the ownership of the house, of various building society and bank accounts and of two insurance policies, one with General Accident Life Assurance Ltd which was charged to the building society and the proceeds of which were used after Mr Dunbar's death to pay off the mortgage on the house; and the other with Allied Dunbar Assurance plc. That policy was taken out on Mr Dunbar's life and was written for the benefit of Miss Plant. The policy matured on Mr Dunbar's death. It realised the sum which, together with interest, now amounts to £31,801. Pending the resolution of the dispute the proceeds have been placed in a joint deposit account. There was no dispute in the court below and no point was taken in this court challenging the entitlement of Miss Plant (apart from the possible operation of the forfeiture rule and the provisions of the 1982 Act) to the insurance moneys.

The house has been sold for £35,000. It is not in dispute that the forfeiture rule, unless modified under the 1982 Act, applied to effect a severance of the beneficial joint tenancy in the house and that Miss Plant was therefore entitled to an equal half share in the proceeds as tenant in common. (This concession was correctly made (see *Re K (decd)* [1985] 1 All ER 403 at 414–415, [1985] Ch 85 at 100).) There is no dispute about the use of the proceeds of the general accident policy to pay off the mortgage for the benefit of both Miss Plant and Mr Dunbar's estate (cf *Davitt v Titcumb* [1989] 3 All ER 417, [1990] Ch 110). Miss Plant was accordingly paid just over £17,000 for her half share. Almost all of that has gone in satisfaction of a default judgment obtained against her in proceedings by First Leisure to recover misappropriated funds. In later criminal proceedings Miss Plant pleaded guilty to charges of false accounting. On 8 May 1992 she received a suspended prison sentence of nine months.

THE DECISION

The case was heard by Judge Howarth, sitting as a judge of the High Court in Manchester, on 19 September 1995. The case for the father was that the couple had made a suicide pact, as a result of which his son was killed; that Miss Plant had unlawfully aided and abetted his son's death; and that it would offend public policy for Miss Plant to acquire a benefit in consequence of committing that offence.

Miss Plant's case was that she was not a party to an unlawful act; that the forfeiture rule did not apply in the circumstances to preclude her from taking the entire beneficial interest in the house by survivorship; and that if, contrary to her primary case, the forfeiture rule did apply, the court should exercise its discretion to make a modification under the 1982 Act, so as to allow her to take the joint property and the Allied Dunbar insurance moneys. The judge gave an ex tempore judgment in which he clearly and carefully set out his findings of fact and his conclusions on the legal issues. He made an order in these terms:

> '1. That, save as hereinafter provided, the forfeiture rule has precluded the Defendant from acquiring any beneficial interest in property which (apart from the forfeiture rule) the Defendant would have acquired whether by way of survivorship or otherwise in consequence of the death of the above-named Tony Dunbar deceased.
>
> 2. Pursuant to the provisions of Section 2 of the Forfeiture Act 1982 this Court doth modify the effect of the forfeiture rule so that the same shall not apply either to the proceeds of the General Accident Policy upon the life of the said Tony Dunbar deceased which was charged in favour of the Newcastle Building Society or to the estate share and interest of the said Tony Dunbar of and in the dwellinghouse premises known as 26 Staining Avenue, Preston and the net proceeds thereof.'

By notice of appeal dated 8 January 1996 Miss Plant appealed from that order. She also appealed from the costs order, which has the practical effect of depriving her of any benefit under the modification order. Both sides were legally aided and an order for taxation of their costs under the Legal Aid Act 1988 was made. The judge decided that there should be no order as to costs down to and including 9 June 1994, but that the costs of the father incurred from and after 10 June 1994 should be taxed on the standard basis, in default of agreement, and charged on the estate, share and interest of Mr Dunbar in the house and the net proceeds of sale and should be deducted from that share in the proceeds.

THE JUDGMENT

The judge's reasons for that order can be summarised as follows.

(1) *Aiding and abetting point*

He was satisfied, on applying the civil standard of proof, that Miss Plant had committed an offence in relation to Mr Dunbar's death, namely that of aiding, abetting, counselling or procuring his suicide contrary to s 2(1) of the 1961 Act. There is no challenge on this appeal to the judge's application of the civil standard of proof. There is, however, an appeal from his conclusion that, although no criminal proceedings had been against her, she was guilty of a criminal offence. He said:

a 'It seems to me inescapable that on her own evidence—which I have heard and which I have read in her witness statement—that Miss Plant must have committed an offence under s 2 of the Suicide Act.'

In the passage immediately preceding that conclusion the judge stated that the parties had made a suicide pact and that:

b 'Admittedly, Miss Plant formed the intention of committing suicide wholly and independently of Tony, but from the moment she told Tony of it and he had given a fairly instantaneous reply that if she was going to do that then he was going to do the same, it seems to be inevitable that both of them had from that point a common intention, a common agreement, that they would c each end their own lives simultaneously if they could achieve that. It was suicide pact, in my judgment, and whilst there was no counselling or procuring of the suicide of Tony Dunbar, to sit with him on the back seat of the car for three hours with carbon monoxide coming into the car, each of them holding each other's hands and hoping to die in each others arms, there is an aiding and abetting there. To go up into the roof space of a house or to d climb up a ladder with a noose around your neck, and to jointly count to "one, two, three" and then both jump, is giving a clearest, it seems to me, instance of aiding and abetting suicide of another that it is possible to have. To do it a second time merely reinforces that.'

e (2) *Forfeiture rule*

After a helpful review of the authorities the judge concluded that the forfeiture rule applied, as Miss Plant had committed a criminal offence which was deliberate, intentional and involved unlawful violence. The judge said:

f 'He [Mr Dunbar] was guilty of aiding and abetting her attempt to commit suicide and she was guilty of aiding and abetting his successful attempt to commit suicide—the commission of it itself. In that way each by aiding and abetting is aiding and abetting the other to commit deliberate and intentional and, so far as the aider and abetter is concerned, unlawful violence. But it seems to me the broadest principle which is stated in *Re Crippen (decd)* [1911] g P 108 at 112 by Evans P is the right principle to apply anyway—that no person can obtain or enforce any rights resulting to him (or her in this case) from her own crime. It seems to me that the forfeiture rule does apply in regard to this matter.'

h (3) *The 1982 Act*

After considering the relevant provisions of the 1982 Act and deciding that Mr Dunbar's half share in the house and in the proceeds of sale of the house and the proceeds of the life policy with Allied Dunbar were 'interests in property' covered j by the Act, the judge identified the issue which he had to decide. He said:

'I have to, it seems to me, then decide whether or not it is right that the forfeiture rule in this case should apply with the full severity or otherwise to Miss Plant. There is very little authority at all as to how this discretion should be exercised and if one looks through the matter one sees a number of cases.'

After referring to two cases in which the exercise of the discretion had been considered (*Re K (decd)* [1985] 1 All ER 403, [1985] Ch 85 and in the Court of Appeal [1985] 2 All ER 833, [1986] Ch 180 and *Re H (decd)* [1991] 1 FLR 441) the judge concluded that he had—

> 'no doubt at all it is right in the circumstances of this case to make an order under s 2 of the Forfeiture Act 1982. If one could bring Tony Dunbar back to life and ask him what he would want to happen in these circumstances to the money, I have little doubt in my mind that he would say that his intended wife should have it. But I do not necessarily think that that is the only consideration. Miss Plant, as I say, has no assets as a result of the sale of the house; it has all gone to a judgment creditor. On the other hand, she has already had approximately £17,000 from the sale of the house. Tony Dunbar's parents have had nothing and if the forfeiture rule were to be applied in full they would take everything. Is it right in these circumstances for me to exclude them entirely from the unwelcome windfall brought about by Tony's sudden death? I do not think it is.'

The judge then stated that, 'trying to do justice between the parties', it would be right to make the order which he proposed.

CONCLUSION

(1) *Aiding and abetting point*

Although the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit suicide (s 1), it preserved criminal liability for complicity in the suicide of another. Section 2(1) provides:

> 'A person who aids, abets, counsels or procures the suicide of another, or an attempt of another to commit suicide, shall be liable on conviction of indictment to imprisonment for a term not exceeding 14 years.'

The section also makes amendments, by reference to Sch 1 to the Act, to provisions in the Homicide Act 1957 preserving the offence of manslaughter in relation to a person who, in pursuance of a suicide pact, kills another or is party to that other person being killed by a third person (s 4 of the 1957 Act, as amended by s 3(2) of and Sch 2 to the 1961 Act).

Section 2(4) provides that no proceedings for an offence under s 2 shall be instituted except by or with the consent of the Director of Public Prosecutions. No proceedings were instituted in this case.

Mr Thomas, on behalf of Miss Plant, submitted that the judge was wrong to find that Miss Plant had committed a criminal offence, contrary to s 2(1) of the 1961 Act. His argument was that Mr Dunbar's death resulted from a course of action agreed upon by him and Miss Plant. He had made the arrangements for the first attempt by suggesting the car as a means of committing suicide and by obtaining the hose-pipe. In the later attempts he obtained the electric cable wire and tied the bed sheets into nooses. Mr Thomas also referred to extracts from the witness statements already quoted. In those circumstances, it was submitted that this was not a case of either of them aiding or abetting the other.

In my judgment, the judge applied the right standard of proof and was correct in his conclusion on this point. They had agreed to commit suicide. They made three attempts. Miss Plant participated in each of those attempts. There can be no doubt about her criminal complicity in Mr Dunbar's suicide. I would dismiss the appeal on this ground.

(2) *Forfeiture rule*

This ground of appeal raises a more substantial point. Does the forfeiture rule apply to the case of a survivor of a suicide pact who has committed the offence of aiding and abetting the death of the other party to the pact? The answer proposed by Mr Thomas to this question is that it depends on the circumstances and that, on a proper formulation and application of the forfeiture rule, the circumstances of this case do not fall within the rule. He argued that, according to recent authorities, the rule only applies where the offender is 'guilty of deliberate, intentional and unlawful violence, or threats of violence' (see *Gray v Barr (Prudential Insurance Co Ltd, third party)* [1970] 2 All ER 702 at 710, [1970] 2 QB 626 at 640, as approved by the Court of Appeal [1971] 2 All ER 949 at 956, 957, 964–965, [1971] 2 QB 554 at 568, 569, 581). On the facts of this case, Miss Plant was not guilty of deliberate, intentional and unlawful violence or threats of violence. Mr Dunbar had killed himself. Miss Plant had not used any deliberate or intentional violence or threat of violence against him.

Mr Thomas submitted that the judge had simply based his decision on his finding that Miss Plant had committed the criminal offence of aiding and abetting suicide. He had then applied what he had erroneously regarded as a definitive statement of the legal principle that 'a person cannot obtain or enforce rights resulting to him from his own crime'. The application of that principle ignored later cases which held that a person might commit a crime, such as manslaughter, but by reason of the circumstances (for example, diminished responsibility) not be subject to the forfeiture rule precluding him or her from taking a benefit in consequence of the death of the victim.

In support of his submission Mr Thomas cited the relevant authorities starting with the well-known statement of principle by Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, [1891–4] All ER Rep 335 at 340. The executors of the deceased, who had been murdered by his wife, raised an objection to her maintaining action on a trust created by an insurance policy in her favour under s 11 of the Married Women's Property Act 1882. The executors' case was that 'it is against public policy to allow a criminal to claim any benefit by virtue of his crime'.

Fry LJ said:

> 'The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour ... This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion.'

It is important to note that this is a statement of a principle of public policy, the application of which may produce unfair consequences in some cases: it is not a statement of a principle of justice designed to produce a fair result in all cases (see the observations of Lord Goff on the principle of 'in pari delicto' in *Tinsley v Milligan* [1993] 3 All ER 65 at 72, [1994] 1 AC 340 at 355). (This principle of public policy is different from, for example, the equitable maxim that 'he who comes to equity must come with clean hands', which is a principle of justice designed to prevent those guilty of serious misconduct from securing a discretionary remedy, such as an injunction.)

As observed in Goff and Jones *Law of Restitution* (4th edn, 1993) p 703 the principle of public policy which prevents a criminal from becoming the beneficiary of his own crime is imprecise and 'has not been easy to apply'. The common law principle has been recognised by statute, but it has not been enacted. The delimitation of its scope is a matter for judicial determination. Thus, s 1 of the 1982 Act refers to the 'forfeiture rule' in these terms:

> '(1) In this Act, the "forfeiture rule" means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.
>
> (2) References in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other person and references in this Act to unlawful killing shall be interpreted accordingly.'

In order to ascertain the 'certain circumstances' in which the rule of public policy applies, it is necessary to examine the cases cited by Mr Thomas, on behalf of Miss Plant, and by Mr Crichton-Gold, on behalf of the father.

All the leading English cases were discussed. It is unnecessary to review them on a case by case basis or to quote extensively from them. A summary of the salient points, which can be derived from the following authorities, will suffice: *Re Crippen (decd)* [1911] P 108, [1911–13] All ER Rep 207, *Re Hall's Estate, Hall v Knight* [1914] P 1, [1911–13] All ER Rep 381, *Gray v Barr (Prudential Insurance Co Ltd, third party)* [1971] 2 All ER 949, [1971] 2 QB 554, *Re Giles (decd), Giles v Giles* [1971] 3 All ER 1141, [1972] Ch 544, *R v National Insurance Comr, ex p Connor* [1981] 1 All ER 769, [1981] QB 758, *Re K (decd)* [1985] 2 All ER 833, [1986] Ch 180, *Davitt v Titcumb* [1989] 3 All ER 417, [1990] Ch 110, *Re H (decd)* [1991] 1 FLR 441 and *Re S (decd)* [1996] 1 WLR 235.

The following propositions relating to the scope of the principle enunciated by Fry LJ in *Cleaver*'s case [1892] 1 QB 147, [1891–4] All ER Rep 335 and recognised by s 1 of the 1982 Act may be stated.

(1) The rule applies to a case where the benefit results from the commission of murder by the intended beneficiary. Dr H H Crippen notoriously survived his wife. Between the date of his conviction for her murder and the carrying out of the death sentence passed on him, Dr Crippen made a will naming Ethel Le Neve as the sole executrix and universal beneficiary. Not surprisingly Ethel Le Neve was passed over on a motion for the grant of an administration to Mrs Crippen's intestate estate. In holding that there were special circumstances justifying this course Evans P said:

> 'It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights.' (See *Re Crippen (decd)* [1911] P 108 at 112, [1911–13] All ER Rep 207 at 209.)

(2) The principle is not confined to murder cases, as was made clear by the Court of Appeal in *Re Hall's Estate* [1914] P 1 at 6–8, [1911–13] All ER Rep 381 at 383–384. The court unanimously rejected the contention that a distinction should be drawn between cases of murder and manslaughter. Lord Cozens-Hardy MR said that he entirely failed to appreciate the supposed distinction: 'It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this.' (See [1914] P 1 at 6, [1911–13] All ER Rep 381 at 383.)

Hamilton LJ said that the principle could only be expressed in a wide form:

> 'It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter ... The distinction seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure, would be very noxious—a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.' (See [1914] P 1 at 7–8, [1911–13] All ER Rep 381 at 384.)

(3) Later cases have held that the forfeiture rule does not apply to all cases of manslaughter, any more than it applies to all other crimes regardless of their nature. It was held by the Divisional Court in *Ex p Connor* [1981] 1 All ER 769 at 774, [1981] QB 758 at 765, 766 that what matters, in deciding whether the forfeiture rule applies, is the nature and not the name of the crime. *Gray v Barr* [1971] 2 All ER 949, [1971] 2 QB 554 has been treated as introducing an important qualification to the forfeiture principle, even though that case itself was one of an indemnity claim under an insurance policy in relation to a crime and not an instance of the forfeiture rule. In *Gray v Barr* [1971] 2 All ER 949 at 964, [1971] 2 QB 554 at 581 in the Court of Appeal Salmon LJ stated: 'Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence ...'

The Court of Appeal approved the approach of Geoffrey Lane J at first instance to the rule of public policy when he said ([1970] 2 All ER 702 at 710, [1970] 2 QB 626 at 640):

> 'However, to confine the operation of public policy to cases where there was an actual intent to kill would be to exclude many cases of actual murder, ie those cases where the killing was done with intent to do grievous bodily harm, but not to kill. It would further include some cases of manslaughter, for example manslaughter where the killing was done intentionally but under the stress of provocation, or killing in pursuance of a suicide pact. The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.'

That passage was specifically approved by Lord Denning MR in the Court of Appeal ([1971] 2 All ER 949 at 956, [1971] 2 QB 554 at 568, 569). It is strongly relied upon by Mr Thomas in support of his submissions.

(4) Subsequent cases on the application of the forfeiture rule to manslaughter by the intended beneficiary follow this approach. In *Re K (decd)* [1985] 1 All ER 403, [1985] Ch 85 Vinelott J held that the forfeiture rule applied in a case where death was not brought about intentionally, but was the unfortunate consequence of deliberate threats of violence with a loaded gun. Vinelott J applied the forfeiture rule and added ([1985] 1 All ER 403 at 413, [1985] Ch 85 at 98):

> '... the court cannot go further and evaluate the degree of moral culpability to be attributed to her conduct in order to say whether the forfeiture rule applies or not.'

He proceeded to consider the 1982 Act and to make a modification order, which was upheld in the Court of Appeal. The same approach was followed in other manslaughter cases: *Re Giles (decd), Giles v Giles* [1971] 3 All ER 1141, [1972] Ch 544 and *Re Royce, Turner v Wormald* [1940] 2 All ER 291, [1940] Ch 514, in which *Gray v Barr* was not cited, and *Re S (decd)* [1996] 1 WLR 235, where it was conceded (at 237) that 'such was the deliberate nature of his violent attack on his wife that the forfeiture rule of public policy applies so as to disentitle the plaintiff from any benefit he would otherwise take as a result of his crime'.

Those cases are to be compared with *Re H (decd)* [1991] 1 FLR 441 where the forfeiture rule was not applied to a manslaughter case in which the offender, by reason of diminished responsibility, was held to have had no responsibility at all for the death. After a comprehensive review of the authorities Peter Gibson J posed the question (at 447): 'Was Mr H guilty of deliberate, intentional and unlawful violence or threats of violence?' He answered the question in the negative holding that the offender was 'not responsible for his acts which were not deliberate or intentional'. In those 'highly unusual circumstances' the judge held that, on the *Gray v Barr* test, the forfeiture rule had no application. The critical question is therefore what is the scope of the *Gray v Barr* rule? Is it necessary, as Mr Thomas asserts, for the acts of the offender to be not only deliberate and intentional but also to be accompanied by violence or threats of violence? All of the cases since *Gray v Barr* repeat the reference to acts or threats of violence. The judge in this case interpreted the formulation of the rule as requiring him to address the question of violence, which he found to be present.

In my judgment, however, the presence of acts or threats of violence is not necessary for the application of the forfeiture rule. It is sufficient that a serious crime has been committed deliberately and intentionally. The references to acts or threats of violence in the cases are explicable by the facts of those cases. But in none of those cases were the courts legislating a principle couched in specific statutory language. The essence of the principle of public policy is that (a) no person shall take a benefit resulting from a crime committed by him or her resulting in the death of the victim and (b) the nature of the crime determines the application of the principle. On that view, the important point is that the crime that had fatal consequences was committed with a guilty mind (deliberately and intentionally). The particular means used to commit the crime (whether violent or non-violent) are not a necessary ingredient of the rule. There may be cases in which violence has been used deliberately without an intention to bring about the unlawful fatal consequences. Those cases will attract the application of the forfeiture rule. It does not follow, however, that when death has been brought about by a deliberate and intentional, but non-violent, act (e g poison or gas), the rule is inapplicable. In *Whitelaw v Wilson* [1934] OR 415 Kingstone J in the High Court of Ontario applied the forfeiture rule to the survivor of a suicide pact in which both husband and wife drank arsenical poison. The wife died. The husband survived and it was held that he was not entitled to any share in his deceased wife's estate, as he was guilty of aiding and abetting, counselling and procuring his wife's suicide.

The rule was applied because no one can benefit from his own wrong. It was irrelevant that the husband, who was an accessory to his wife's suicide, did not commit the offence with the intention or motive of benefitting from her estate, cf *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140, which was rightly disapproved by the Court of Appeal in New South Wales in *Troja v Troja* (1994) 33 NSWLR 269. As Meagher JA (at 299) pointed out the rule

does not rest on 'a disapproval of greed': 'The basis of the doctrine is public policy, an abhorrence of the notion that one may profit from killing another, an odium occisionis. It is absolute and inflexible.' See also 33 NSWLR 269 at 294–297 per Mahoney JA (cf Kirby P who favoured a reformulation of the rule on a more flexible equitable basis. In my judgment, English law does not allow that approach, save under the 1982 Act).

For those reasons, I would reject Mr Thomas's submission and hold that the judge correctly held this to be a case to which the forfeiture rule applies, although Miss Plant did not use violence or threats of violence towards Mr Dunbar.

(3) *Modification order and discretion under the 1982 Act*

If, as the judge held, the forfeiture rule applies to this case, the third, final and most difficult question is whether the judge erroneously exercised his discretion under the 1982 Act in the making of the modification order. There is no challenge by Mr Dunbar by way of cross-appeal to the decision of the judge that it was right in the circumstances to make an order under s 2 of the Act. The point of difference on this appeal by Miss Plant is whether it was a proper exercise of that discretion for the judge to limit his modification order to the half interest in the house and to refuse to extend its scope to the entirety of the proceeds of the Allied Dunbar life policy.

There is common ground.

(1) By virtue of s 2(1) of the 1982 Act the judge had a discretion to make an order modifying the effect of the forfeiture rule in a case where that rule had precluded 'the offender' (Miss Plant), who had unlawfully aided and abetted the death of Mr Dunbar, from acquiring any interest in the property mentioned in s 2(4).

(2) The discretion is a wide one circumscribed only by sub-s (2), which provides:

> 'The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.'

(3) It is accepted by Mr Crichton-Gold, for the father, that both the house and the Allied Dunbar policy were, before the death of Mr Dunbar, held on trust for Miss Plant and are interests in property within the meaning of s 2(4)(b) and sub-s (8) under which 'property' includes any chose in action or incorporeal or movable property.

The argument on this appeal has focused on the manner in which the judge exercised his discretion on the scope of the modification order and on the reasons, or rather the lack of reasons, given by the judge in the passage already quoted, for making a modification order limited to the house. Mr Thomas submitted that the judge had taken a wrong approach to his exercise of discretion and had failed to give any relevant reasons for his order. He wrongly regarded himself as involved in an exercise of 'trying to do *justice between the parties*', instead of deciding whether, in all the circumstances, it was a proper case for relieving Miss Plant of all the consequences of applying the forfeiture rule. He had failed to have regard to factors relevant to the exercise of his discretion. In particular, he had not taken account of the fact that Mr Dunbar had killed himself in furtherance of a course of action on which both of them had agreed. He had not been killed by Miss

Plant. She had not used or threatened to use any violence or coercion against him. She had not urged or persuaded him to kill himself. There was no intention that he should die and that she should survive. Further, as the judge himself recognised in deciding that it was right to make an order of some kind under s 2, Mr Dunbar, if asked what he would want to happen to his money, would no doubt have said that Miss Plant, as his intended wife, should have it. The judge had wrongly taken into account the fact that Mr Dunbar's parents had had nothing from their son's estate and that, if the forfeiture rule were applied without modification, they would be entitled to everything. The judge wrongly asked himself whether it was right in the circumstances to exclude them entirely from their son's estate.

Against this, Mr Crichton-Gold argued that the judge had a wide discretion which he had exercised for the reasons given by him and that this court should not interfere, since it had not been demonstrated that he misinterpreted the relevant statutory provisions of the 1982 Act or that he erred in principle or that he reached a conclusion which was plainly wrong. He relied on the decision of the Court of Appeal in *Re K (decd)* [1985] 2 All ER 833, [1986] Ch 180, which dismissed the appeal against the exercise of discretion by Vinelott J at first instance. After hearing a detailed argument as to why the judge had not properly exercised his discretion in making a modification order which applied to all the interest accruing to a widow on the death of her husband, Griffiths LJ concluded ([1985] 2 All ER 833 at 843, [1986] Ch 180 at 196):

> 'The discretion given to the judge by s 2(1) is couched in the widest language. I, too, would like to pay tribute to the great care and lucidity with which the judge reviewed all the material circumstances in this case. I have not been persuaded that any grounds have been demonstrated which would justify this court in interfering with the exercise of his discretion.'

The same conclusion was reached by Ackner and Browne-Wilkinson LJJ.

Counsel cited three reported cases on the exercise of discretion under the 1982 Act: *Re K (decd)*, *Re H (decd)* and *Re S (decd)*.

It is apparent from those cases, as it is from the language of s 2(2) itself, that the relevant question for the court is: does 'the justice of the case require' that the effect of the forfeiture rule be modified? In my view, the judge erroneously regarded himself as under a duty to try and do 'justice between the parties'. That is not the approach required by s 2(2). The provision requires that the judge should look at the case in the round, pay regard to all the material circumstances, including the conduct of the offender and the deceased, and then ask whether 'the justice of the case requires' a modification of the effect of the forfeiture rule. Having taken the wrong approach, the judge failed, in my view, to give consideration in his reasons to all the factors material to the exercise of his discretion. In those circumstances, it is open to this court to exercise the discretion afresh on the basis of the relevant material. On doing that, I have in fact reached the same conclusion as the judge on the limited scope of the modification order. It is difficult to draw the line with confidence. The point at which the judge drew it is not obviously wrong. The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender, and the

moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule. On consideration of all those circumstances I conclude that the appeal should be dismissed on this point for the following reasons.

(1) The starting point is the application of the forfeiture rule as a rule of public policy, without regard to whether the consequences flowing from the application of the rule are just or unjust. The discretion introduced by s 2 is intended to be exercised to modify the consequences of the application of the rule and to produce a result which the justice of the case requires.

(2) One of the material circumstances is that the conduct of Miss Plant was unlawful. She committed a criminal offence which resulted in death. It is difficult to adjudicate on the relative moral culpability of her and Mr Dunbar. Mr Crichton-Gold submitted that she was more morally culpable since it was she who first brought up the question of suicide, leading Mr Dunbar to enter into the pact under which they would both commit suicide. I see the force of that point, but the pact which they made and the relationship between them was such that I find it impossible to adjudicate on the issue of relative *moral* culpability.

(3) The intention of Mr Dunbar was rightly regarded by the judge as material. Joint beneficial ownership of the house and the fact that the life policy was written for the benefit of Miss Plant, show that his intention was that she, rather than anyone else, should have that property on his death. The intention factor is not, however, determinative of the justice of the case, which must take account of the circumstances in which that intention takes effect. Miss Plant was criminally implicated in the death which attracts the application of the forfeiture rule and gives rise to the discretion to redirect the destination of the property. Mr Dunbar's intentions must be considered in that context.

(4) The wishes of the father and family of Mr Dunbar are material and should be given weight. It is significant that in the case of the modification orders in the three cases, *Re K (decd)*, *Re H (decd)* and *Re S (decd)*, those who were otherwise entitled to receive property on the application of the forfeiture rule did not oppose the making of the modification order. Mr Dunbar's father does oppose it. It is not unreasonable for him to oppose the claim by Miss Plant that an order should be made entitling her to the whole of the house and insurance moneys. Mr Dunbar's father and family were naturally distressed by what happened. The court is entitled have regard to their wishes. Miss Plant should have regard to them. They have a legitimate interest in a decision on the scope of the modification order. Justice requires due weight to be given to their wishes.

The paucity of the evidential material makes it impossible to reach any firm conclusion on other factors which may be relevant, such as the relative financial position of Miss Plant and Mr Dunbar's family. Having regard to the matters set out above, the judge would have been entitled to conclude that the justice of the case required a modification order in the form in which he made it, not some other order more generous to Miss Plant.

COSTS

Finally, Miss Plant appealed against the order for costs. The judge had a discretion on costs. It cannot be said that he erred in principle or was obviously wrong in directing that the costs should be borne by Mr Dunbar's share of the house, which would go to her, in respect of the period after 10 June 1994 when a Calderbank letter was written on behalf of the father offering to settle the matter on a 50/50 division of the property in question. Miss Plant rejected the offer and

contested the case without achieving a more generous order than was proposed in the Calderbank letter. I would dismiss the appeal against the order for costs, adding that it is unfortunate that, in a dispute about a modest amount, the costs of litigation are now such that Miss Plant will derive no benefit from the terms of the modification order.

PHILLIPS LJ. The facts of this tragic case have been recounted by Mummery LJ. For the reasons that he has given, I agree that Miss Plant committed the criminal offence of aiding and abetting the suicide of Mr Dunbar, contrary to s 2(1) of the Suicide Act 1961. The more difficult questions are whether the commission by Miss Plant of that offence brought into operation the forfeiture rule and, if it did, whether the manner in which the judge exercised the discretion granted by the Forfeiture Act 1982 is open to attack.

The forfeiture rule

The forfeiture rule is defined by s 1(1) of the 1982 Act as meaning—

> 'the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.'

The rule as so formulated is an example of a wider principle that a person cannot benefit from his own criminal act. As Evans P said in *Re Crippen (decd)* [1911] P 108 at 112, [1911–13] All ER Rep 207 at 209:

> 'It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.'

There is a difference between obtaining rights and enforcing them, and there is scope for debate as to the extent to which the forfeiture rule differs from the similar principle that a litigant cannot base a cause of action on his own wrong. The two principles are frequently confused, and I do not find it necessary in this judgment to explore the differences between them. The difficulty of so doing is exemplified by the following passage in the judgment of Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, [1891–4] All ER Rep 335 at 340:

> 'It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.'

What is important is that the neither principle is absolute. It is not every criminal offence which will bring the principle into play. The issue raised on this appeal is whether aiding and abetting the suicide of another necessarily brings the forfeiture rule into operation. That question can be considered in the context of the rule as formulated in the Forfeiture Act, ie in the context of crimes which consist of unlawfully killing another.

Unlawful killing

The forfeiture rule in relation to unlawful killing is of comparatively recent manifestation. In *Troja v Troja* (1994) 33 NSWLR 269 at 278 Kirby P explained the reason for this and made some comments on the forfeiture rule which I would indorse. Having observed that common law forfeiture in England finally disappeared with the Forfeiture Act 1870, he said:

> 'In a time of attainder, forfeiture, and common exaction of the death penalty following conviction for murder, the niceties of the civil property claims of the perpetrator of a homicide tended to be given less prominence. The abolition of criminal forfeiture, the repeal of the civil impediments upon suing, and the reduction, and final abolition, of the death penalty, have presented the legal system with new problems affecting property law. The so-called "forfeiture rule" was one of the solutions devised to fill the gaps left following the abolition of the old rule. The difficulty was that the new rule was devised by judges to solve the necessities of particular cases. It developed without a great deal of consideration, either of its scope, or of its exceptions, or of its fundamental underlying rationale. The result has been controversy as to the scope, uncertainty about the exceptions, and confusion as to the rationale.'

When the forfeiture rule was first applied by the courts any unlawful killing consisted of one or other of two crimes—murder or manslaughter, and the ambit of the crime of murder was much wider than it is today. The forfeiture rule was always applied in a case of murder and, in *Beresford v Royal Insurance Co Ltd* [1937] 2 All ER 243, [1937] 2 KB 197; *affd* [1938] 2 All ER 602, [1938] AC 586, it was applied in a case of suicide. In giving the decision of the Court of Appeal, Lord Wright MR explained the reason for the application of the rule as follows:

> '... suicide when sane is, by English law, a felony. This has been so from very early times. The law is thus succinctly stated by STEPHEN'S DIGEST OF THE CRIMINAL LAW, art. 319: "A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder." Hence, where there has been what is called a suicide pact between two persons, and one survives, the survivor is guilty of murder ... This being the nature of *felo de se* by English law, and as the plaintiff, as personal representative, stands in the shoes of the assured, who has committed, as it were, murder on himself, the present claim is equivalent technically to a claim brought by a murderer, or his representative or assigns, on a policy effected by the murderer on the life of the murdered man. In the latter case, it is, we think, clear that neither the murderer nor his estate nor his assigns could take a benefit under the policy.' (See [1937] 2 All ER 243 at 249, [1937] 2 KB 197 at 211.)

In *Re Hall's Estate, Hall v Knight* [1914] P 1, [1911–13] All ER Rep 381 the question appears to have been raised for the first time of whether the forfeiture rule applied to a person convicted of manslaughter. The Court of Appeal had no doubt that it did. Lord Cozens-Hardy MR observed, referring to *Cleaver*'s case ([1914] P 1 at 6, [1911–13] All ER Rep 381 at 383):

'It is said that that was a case of murder and not manslaughter. I entirely fail to appreciate that distinction. It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this.' a

Hamilton LJ agreed ([1914] P 1 at 7, [1911–13] All ER Rep 381 at 384):

'The principle can only be expressed in that wide form. It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter.' b

Since the cases to which I have referred were decided, there have been significant changes in the law in relation to unlawful killing which reflect the public appreciation of the different degrees of culpability that attend conduct that used to be designated as murder. In particular: (1) the Homicide Act 1957 abolished constructive malice; (2) the same Act provided for a conviction of manslaughter rather than murder in the case of diminished responsibility; (3) the same Act provided for a conviction of manslaughter rather than murder in the case of provocation; (4) the same Act, by s 4, made special provision in relation to suicide pacts. Under this section, the survivor of a suicide pact, who would previously have been guilty of murder, whether he killed the other party to the pact or merely aided, abetted, counselled or procured his suicide, became guilty of manslaughter; (5) the 1961 Act abrogated the rule of law whereby it was a crime to commit suicide and provided that a person who aids, abets, counsels or procures the suicide of another commits, not manslaughter, but an indictable offence subject to a maximum term of imprisonment of 14 years. c d e

The change in attitude reflected by the statutory gradation of offences of unlawful killing and, in particular, the mitigation that was sometimes present in cases of diminished responsibility or provocation, led to justifiable dissatisfaction with the application of the forfeiture rule indiscriminately in every case of unlawful killing. As Kirby P put it in *Troja v Troja* (1994) 33 NSWLR 269 at 282: f

'A search for a rule more flexible than the absolute legal rule stated in *Cleaver*, and in subsequent English cases, was soon seen to be necessary because of the grossly unjust consequences which that rule, in its full rigour, produced, both for the perpetrator of the homicide, and others taking through that person. In a word, the absolute rule, whilst apparently defensive of human life, paid no regard to the virtually infinite variety of circumstances in which a homicide may occur, and the ameliorative circumstances that may sometimes exist, especially in a domestic situation.' g h

A desire on the part of the courts to avoid the rigour of the forfeiture rule was first manifest in *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327. The issue in that case was whether a plaintiff, who had been convicted of manslaughter by reckless driving, was debarred by public policy from obtaining an indemnity under his insurance policy in respect of his civil liability. Bailhache J held that he was not. He observed (at 331): j

'If the law is not logical, public policy is even less logical, for, by common consent, these third party indemnity insurances have been treated as valid and effective.'

None the less it has proved possible to justify this and other similar decisions in relation to unlawful killing by the manner of driving a motor vehicle on the ground that an overriding public policy requires the existence of valid insurance in such circumstances for the benefit of the family of the victim (see the comment of Greer LJ in *Haseldine v Hosken* [1933] 1 KB 822 at 838, [1933] All ER Rep 1 at 8).

In *Hardy v Motor Insurers' Bureau* [1964] 2 All ER 742, [1964] 2 QB 745 the Court of Appeal was concerned with the question of whether insurance pursuant to the Road Traffic Act 1960 would provide valid cover for the benefit of a third party injured by deliberately criminal conduct on the part of the driver. Diplock LJ observed ([1964] 2 All ER 742 at 750–751, [1964] 2 QB 745 at 767, 768):

> 'The rule of law on which the major premise is based, ex turpi causa non oritur actio, is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right ... The court's refusal to assert a right, even against the person who has committed the anti-social act, will depend not only on the nature of the anti-social act but also on the nature of the right asserted. The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced.'

In *Gray v Barr* [1970] 2 All ER 702, [1970] 2 QB 626 counsel for the defendant made a submission which may have been inspired by this passage. Geoffrey Lane J summarised it as follows ([1970] 2 All ER 702 at 712, [1970] 2 QB 626 at 641):

> 'It was urged ... that public policy should be applied not on any broad ground of principle, but according to the view taken by the court of the degree of culpability or wickedness of the claimant in any particular case.'

In that case the defendant had used a shotgun to threaten a man and the gun had accidentally gone off and killed him. The issue was whether the defendant could recover in respect of his liability under a policy of insurance. The judge held that, on the facts, the defendant had committed manslaughter and rejected the suggestion that the defendant was not seriously culpable. He also rejected, however, the submission that culpability was the relevant test. He observed: '... however difficult it may be, nevertheless one must attempt to find some principle on which public policy can be based ...' As to that principle, the judge cited the reference of Lord Denning MR in *Hardy*'s case [1964] 2 All ER 742 at 746, [1964] 2 QB 745 at 760 to 'the broad rule of public policy that no person can claim indemnity or reparation for his own wilful and culpable crime'. The judge went on to refer to the fact that the death had resulted from 'a deliberate and intentional assault and probably also an unlawful battery' (see [1970] 2 All ER 702 at 711, [1970] 2 QB 626 at 641). That satisfied the following test that the judge had earlier advanced:

> 'The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or

threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.' (See [1970] 2 All ER 702 at 710, [1970] 2 QB 626 at 640.)

This test was approved by Lord Denning MR when the case reached the Court of Appeal ([1971] 2 All ER 949 at 956, [1971] 2 QB 554 at 568). Salmon LJ agreed that the appeal should be dismissed, but in the course of his judgment said ([1971] 2 All ER 949 at 964–965, [1971] 2 QB 554 at 581–582):

'Although public policy is rightly regarded as an unruly steed which should be cautiously ridden, I am confident that public policy undoubtedly requires that no one who threatens unlawful violence with a loaded gun should be allowed to enforce a claim for indemnity against any liability he may incur as a result of having so acted. I do not intend to lay down any wider proposition. In particular, I am not deciding that a man who has committed manslaughter would, in any circumstances, be prevented from enforcing a contract of indemnity in respect of any liability he may have incurred for causing death or from inheriting under a will or on the intestacy of anyone whom he has killed. Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts. *In the Estate of Hall, Hall v Knight and Baxter* [1914] P 1, [1911–13] All ER Rep 381 may seem to be an authority for the proposition that anyone who has committed manslaughter, in any circumstances, is necessarily under the same disability as if he had committed murder. The facts however are not stated in the report and they are of vital importance in order to understand the decision. They have now been ascertained from the record. A man named Julian Hall kept a woman named Jeannie Baxter and had made a will in her favour. They had had many quarrels. He had promised to marry her but had not done so. On 13th April 1913 she took his revolver and whilst he was in bed, shot him dead with four or five shots. She was acquitted of murder but convicted of manslaughter. It is small wonder that the court held that, on grounds of public policy, she could not take under Hall's will. The only surprising thing about the case is that she was acquitted of murder, apparently for no reason, except, perhaps, that she was defended by Mr Marshall Hall. The cases of *Tinline* [1921] 3 KB 327 and [*James v British General Insurance Co Ltd* [1927] 2 KB 311, [1927] All ER Rep 442], in which it was held that persons convicted of manslaughter for reckless and drunken driving could nevertheless recover indemnity from their insurers, were doubted in *Haseldine v Hosken* [1933] 1 KB 822, [1933] All ER Rep 1 but approved by this court in [*Marles v Philip Trant & Sons Ltd (Mackinnon, third party) (No 2)* [1953] 1 All ER 651, [1954] 1 QB 29]. It seems now to be settled law that a motorist can rely on his policy of insurance to indemnify him in respect of his liability for any injuries which he has caused otherwise than on purpose: *Hardy v Motor Insurers' Bureau* [1964] 2 All ER 742, [1964] 2 QB 745. These road traffic cases may be sui generis. In any event, although motor cars have sometimes been called lethal weapons, these cases are not in my view akin to the cases in which injuries are caused in the course of unlawfully threatening a man with a loaded gun. Public policy is not static. Even if the crime of suicide had not been abolished by statute, it may be that today *Beresford*'s case [1938] AC 586, [1938] 2 All ER 602 would have been differently decided. In any

> event, threatening violence with a loaded gun would, I am sure, now be generally regarded as much more shocking and necessary to be deterred than what the unfortunate Major Rowlandson did in *Beresford*'s case. I am confident that, in any civilised society, public policy requires that anyone who inflicts injuries in the course of such an act shall not be allowed to use the courts of justice for the purpose of enforcing any contract of indemnity in respect of his liability in damages for causing injury by accident.'

Phillimore LJ, when dealing with public policy, added ([1971] 2 All ER 949 at 970, [1971] 2 QB 554 at 587):

> 'In any case, however, I am satisfied that on the facts of this case the learned judge was right in finding that the defendant Mr Barr was precluded by public policy from recouping himself from the Prudential Assurance Co Ltd against the claim of the plaintiff. As Lord Denning MR and Salmon LJ have said manslaughter varies from conduct which is almost murder to conduct which is only criminal in the technical sense. It would be foolish to attempt to lay down any general rule. It is wiser I think to confine decision to the facts in this case.'

Despite these dicta, the full rigour of the rule against forfeiture was applied by Pennycuick V-C in *Re Giles (decd)* [1971] 3 All ER 1141, [1972] Ch 544. In that case a woman had killed her husband, but been convicted of manslaughter rather than murder on grounds of diminished responsibility. A hospital order was made under the Mental Health Act 1959. It was argued that in these circumstances the forfeiture rule should not apply. The judge rejected that argument. He said ([1971] 3 All ER 1141 at 1145, [1972] Ch 544 at 552):

> 'Now I do not think that I am concerned to analyse the ground on which the courts have established this rule of public policy. It is sufficient to say that the rule has been established and that the deserving of punishment and moral culpability are not necessary ingredients of the type of crime to which this rule applies, that is, culpable homicide, murder or manslaughter.'

Eight years later, in *Ex p Connor* [1981] 1 All ER 769, [1981] QB 758 the issue arose before the Divisional Court of whether the rule against forfeiture applied so as to disentitle an applicant from receiving a widow's allowance when she had killed her husband with a knife. She had been held guilty of manslaughter but simply placed on probation. Lord Lane CJ referred to the passage of the judgment of Salmon LJ in *Gray v Barr*, which I have cited above and commented ([1981] 1 All ER 769 at 774, [1981] QB 758 at 765):

> 'I would respectfully agree with that dictum, and I would agree that in each case it is not the label which the law applies to the crime which has been committed but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice. Where that line is to be drawn may be a difficult matter to decide, but what this court has to determine is whether in the present case what this applicant did was sufficient to disentitle her to her remedy.'

The court held that, as the applicant had been found by the jury deliberately to have stabbed her husband, the rule applied.

It is time to pause to take stock. Thus far, apart from the motor cases, there has been no instance of the court failing to apply the forfeiture rule to a case of

unlawful killing. So far as the rule is concerned, it is hard to see any logical basis for not applying it to all cases of manslaughter. Lord Denning MR himself remarked in *Gray v Barr* ([1971] 2 All ER 949 at 956, [1971] 2 QB 554 at 568): '... in manslaughter of every kind there must be a guilty mind. Without it, the accused must be acquitted ...'

In the crime of manslaughter, the actus reus is causing the death of another. That actus reus is rendered criminal if it occurs in one of the various circumstances that are prescribed by law. Anyone guilty of manslaughter has, ex hypothesi, caused the death of another by criminal conduct. It is in such circumstances that the rule against forfeiture applies.

However, the harshness of applying the forfeiture rule inflexibly to all classes of manslaughter in all circumstances is such that I do not consider that, absent the statutory intervention which occurred, the rule could have survived unvaried to the present day. The obiter dicta of Salmon and Phillimore LJJ in *Gray v Barr* and Lord Lane CJ in *Ex p Connor* were straws in the wind. The rule is a judge-made rule to give effect to what was perceived as public policy at the time of its formulation. I believe that, but for the intervention of the legislature, the judges would themselves have modified the rule. Furthermore, it seems to me that the only logical way of modifying the rule would have been to have declined to apply it where the facts of the crime involved such a low degree of culpability, or such a high degree of mitigation, that the sanction of forfeiture, far from giving effect to the public interest, would have been contrary to it. Alternative suggestions that the rule should be restricted to cases of deliberate killing, or deliberate violence leading to death, do not cater for cases of diminished responsibility or provocation, where the mitigating features may be such as to render it particularly harsh to apply the forfeiture rule.

The pressure for judicial intervention of the type contemplated was removed by the Forfeiture Act. The manner of operation of the provisions of the Act and, in particular, of s 2(5), was considered by Vinelott J in *Re K (decd)* [1985] 1 All ER 403, [1985] Ch 85. In that case a wife had used a loaded shotgun to deter a brutal husband from violence. The gun had accidentally gone off and killed him. The issue was whether she could recover under his will. Vinelott J, following the approach in *Gray v Barr*, held that the rule against forfeiture applied, but that, in the circumstances of the case, he would modify the effect of the rule so as to relieve her of its consequences altogether. As to his power to do this in the light of the provisions of s 2(5), he said ([1985] 1 All ER 403 at 414, [1985] Ch 85 at 100):

> 'Literally construed para (a) gives the court power to modify the effect of the forfeiture rule where more than one interest in property is affected by it in respect of some but not all of those interests; and under para (b) in relation to any given interest in property the court can modify the rule in respect of part of it. So it is said that the court cannot relieve the applicant from the consequence of the rule altogether. The most the court can do is to relieve against the operation of the rule if there is more than one interest in property in respect of all the interests except one (under para (a)); and then under para (b) relieve against the operation of the rule in respect of a part, however large, of the remaining interest (or the only interest if there is only one). The court, like the donee of a non-exclusive power of appointment before the passing of the Illusory Appointments Act 1830 and before the absurdities created by that Act were cured by the Powers of Appointment Act 1874 can cut off the person entitled by the operation of the forfeiture rule with a

> shilling but cannot cut him off altogether. I cannot believe that the framers of the 1982 Act intended a result as bizarre as that. The answer to this submission in my judgment is that sub-s (5) is intended to enlarge the power conferred by sub-s (1) by making it clear that the court is not bound either to relieve against the operation of the forfeiture rule altogether or not to relieve against the operation of the rule at all. The draftsman assumed that sub-s (1) alone conferred power to relieve an applicant from the operation of the rule in respect of the entirety of all interests affected by the rule. Subsection (5) then in effect enlarges the court's powers.'

The Court of Appeal ([1985] 2 All ER 833, [1986] Ch 180) upheld his decision, although the challenge was to the exercise of his discretion, rather than to his construction of the subsection.

As Vinelott J demonstrated, the Forfeiture Act has given the court a greater degree of flexibility than could have been achieved by judicial modification of the rule. That modification had been foreshadowed but had not taken place when the Act was passed. I can see no reason now for the court to attempt to modify the forfeiture rule. The appropriate course where the application of the rule appears to conflict with the ends of justice is to exercise the powers given by the Forfeiture Act.

This conclusion was not shared by Peter Gibson J in *Re S (decd)* [1996] 1 WLR 235. In that case, the plaintiff had stabbed his wife to death when under the illusion, induced by a reaction to an anti-depressant drug, that she had just committed an act of infidelity. At his trial, a plea to guilty of manslaughter by reason of diminished responsibility was accepted. A hospital order was made and the trial judge expressed the view that 'there was no responsibility left at all'. Before Peter Gibson J the issue was whether the forfeiture rule applied so as to prevent the plaintiff from inheriting from his wife. The judge held that it did not, on the basis that the plaintiff had not acted deliberately or intentionally. With respect to the judge, I do not see how this conclusion can be reconciled with the acceptance of the guilty plea. In my judgment the judge ought, on the facts of this case, to have held that the rule applied, but that in the circumstances the plaintiff should be relieved of its effect under the 1982 Act.

Aiding and abetting suicide

Thus far, I have been considering the application of the forfeiture rule in cases of manslaughter. My reasoning leads, however, to the conclusion that the rule applies equally to the offence of aiding and abetting suicide contrary to s 2(1) of the Suicide Act. This conclusion seems to have been shared by those who drafted the Forfeiture Act. Section 1(2) of the Act provides:

> 'References in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other person ...'

As the Act does not apply to the crime of murder, these words can only have been intended to apply to the crime of aiding, abetting, counselling or procuring the suicide of another, contrary to the 1961 Act. That offence can be very serious, as the maximum sentence of 14 years' imprisonment indicates. When the Act is considered, however, it gives clear indication that the circumstances in which the offence is committed may be such that the public interest does not require the imposition of any penal sanction. This, in my judgment, is the logical conclusion

to be drawn from the provision in s 2(4) of the Act that 'no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions'.

Where the public interest requires no penal sanction, it seems to me that strong grounds are likely to exist for relieving the person who has committed the offence from all effect of the forfeiture rule.

Suicide pacts

If, as I believe, the forfeiture rule applies to offences under the Suicide Act and the application of the rule is not dependent upon the degree of culpability attaching to the crime, it must follow that the rule applies to aiding and abetting the suicide of another in pursuance of a suicide pact. Such an offence is likely, however, to fall into the category of those in respect of which the public interest does not require the imposition of a penal sanction. In 1957 the Homicide Act recognised that aiding and abetting the suicide of another pursuant to a suicide pact called for a degree of leniency. Where two people are driven to attempt, together, to take their lives and one survives, the survivor will normally attract sympathy rather than prosecution. A suicide pact may be rational, as where an elderly couple who are both suffering from incurable diseases decide to end their lives together, or it may be the product of irrational depression or desperation. In neither case does it seem to me that the public interest will normally call for either prosecution or forfeiture should one party to the pact survive. In such circumstances the appropriate approach under the Forfeiture Act is likely to be to give total relief against forfeiture. Of course, this will not always be the case. One can think of instances of suicide pacts where one would not acquit the instigator of serious culpability.

Discretion under the Forfeiture Act

It is common ground that it was appropriate for the judge to make an order under the Act modifying the effect of the forfeiture rule, if it applied. The issue that arises is whether he exercised his discretion according to the correct principles. As to these, the judge had little guidance, either from the Act or from previous authority as to the relevant factors to be taken into account. Nor did he explain in any detail how he arrived at his decision. He indicated that his approach was to attempt 'to do justice between the parties'. I agree with Mummery LJ that this is not the appropriate approach to the exercise of the discretion given by the Act. The discretion is a broad one, and it is legitimate to have regard to all the consequences of the order, but it is not right to approach the exercise of the discretion as if dealing simply with an inter partes dispute. In these circumstances it is for this court to exercise afresh the discretion given by the Forfeiture Act.

The first, and paramount consideration, must be whether the culpability attending the beneficiary's criminal conduct was such as to justify the application of the forfeiture rule at all. The question of the extent to which the criminal should be blamed for committing the crime is a familiar one for the sentencing judge in the criminal jurisdiction, but not one that the judge exercising a civil law jurisdiction welcomes as the test for determining entitlement to property. I have already given my reasons for suggesting that it is likely to be appropriate to relieve the unsuccessful party to a suicide pact of all effect of the forfeiture rule. Each case must be assessed on its own facts.

Had Miss Plant's decision to take her own life been an understandable reaction to the pending consequences of her theft, a case could well have been made out for saying that this gave to her participation in the suicide pact a culpability that should properly be reflected by the application, at least to a degree, of the forfeiture rule. I do not, however, see this case in that light. The desperation that led Miss Plant to decide to kill herself, and which led to the suicide pact, was an irrational and tragic reaction to her predicament. I do not consider that the nature of Miss Plant's conduct alters what I have indicated should be the normal approach when dealing with a suicide pact—that there should be full relief against forfeiture. The assets with which this case is concerned were in no way derived from Mr Dunbar's family. They are the fruits of insurance taken out by Mr Dunbar for the benefit of Miss Plant. So far as his family is concerned, the judge rightly described the consequence of the forfeiture rule to be the conferring on them of an unwelcome windfall. While I can appreciate, and sympathise with, the emotions which I suspect underlie this litigation, I have reached the conclusion that there should be full relief against the forfeiture rule, and I would allow this appeal so as to grant that relief.

HIRST LJ. I agree with the judgment of Phillips LJ.

Appeal allowed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

R v Myers

HOUSE OF LORDS
LORD SLYNN OF HADLEY, LORD MUSTILL, LORD STEYN, LORD HOPE OF CRAIGHEAD AND LORD HUTTON
19 MARCH, 24 JULY 1997

Criminal evidence – Admissions and confessions – Answers and statements to police – Voluntary statements admitting guilt made by co-defendant to police – Co-defendant later denying making statements and implicating defendant – Statements not adduced by prosecution – Judge admitting statements as relevant to defendant's defence – Whether judge right to do so.

M and Q were charged with the murder of a minicab driver who was found fatally stabbed beside his vehicle in April 1994. While M was in police custody she made certain statements during general conversation with police officers, without first having been cautioned, admitting that she had stabbed the driver; later she denied the conversations and asserted as part of her defence that it was Q who had committed the murder. M and Q were tried jointly. The prosecution did not seek to adduce evidence of M's statements. The trial judge nevertheless ruled that since they were relevant, Q was entitled to adduce them in support of his defence. M was convicted of murder. She appealed to the Court of Appeal, which dismissed her appeal on the ground that the statements were admissible. M appealed to the House of Lords.

Held – A defendant in a criminal trial could not, in order to establish his innocence, call evidence of an out-of-court statement made by a third party admitting guilt, as the statement was hearsay. However, since a defendant had an absolute right to deploy his case as he thought fit, where such a statement was made by a co-defendant and was inconsistent with his evidence at the trial, the defendant was entitled to cross-examine him on it if it was relevant to his defence, both as to credibility and as to the facts in issue, notwithstanding that it caused him prejudice. He was also entitled to put the statement to witnesses to whom it was made, and to cross-examine them as to its terms where the question of credibility had not arisen. It followed that the judge's ruling was correct and the appeal would accordingly be dismissed (see p 324 *j* to p 325 *d h* to p 326 *h*, p 332 *h* to p 333 *b* and p 334 *b c*, post).

Dictum of Lord Bridge in *R v Blastland* [1985] 2 All ER 1095 at 1098 and of Lord Steyn in *Lobban v R* [1995] 2 All ER 602 at 612–613 applied.

Notes

For admissibility of evidence notwithstanding prejudice to a co-accused, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1075.

Cases referred to in opinions

Lobban v R [1995] 2 All ER 602, [1995] 1 WLR 877, PC.
Lowery v R [1973] 3 All ER 662, [1974] AC 85, [1973] 3 WLR 235, PC.
Lui Mei-lin v R [1989] 1 All ER 359, [1989] AC 288, [1989] 2 WLR 175, PC.
McLay v HM Advocate 1994 JC 159, HC of Just.

Murdoch v Taylor [1965] 1 All ER 406, [1965] AC 574, [19165] 2 WLR 425, HL.
Myers v DPP [1964] 2 All ER 881, [1965] AC 1001, [1964] 3 WLR 145, HL.
Perrie v HM Advocate 1991 JC 27, HC of Just.
R v Beckford, R v Daley [1991] Crim LR 833, CA.
R v Blastland [1985] 2 All ER 1095, [1986] AC 41, [1975] 3 WLR 345, HL.
R v Bracewell (1978) 68 Cr App R 44, CA.
R v Campbell [1993] Crim LR 448, CA.
R v Lake (1976) 64 Cr App R 172, CA.
R v Miller [1952] 2 All ER 667, Assizes.
R v O'Boyle (1990) 92 Cr App R 202, CA.
R v Reid [1989] Crim LR 719, CA.
R v Rice [1963] 1 All ER 832, [1963] 1 QB 857, [1963] 2 WLR 585, CCA.
R v Rowson [1985] 2 All ER 539, [1986] QB 174, [1985] 3 WLR 99, CA.
R v Treacy [1944] 2 All ER 229, CCA.
R v Turner (1975) 61 Cr App R 67, CA.
Teper v R [1952] 2 All ER 447, [1952] AC 480, PC.

Appeal

Melanie Myers appealed with leave from the decision of the Court of Appeal (Criminal Division) (Russell LJ, Bracewell J and Judge Stroyan QC) ([1996] 2 Cr App R 335) on 3 April 1996 whereby it dismissed her appeal against her conviction for murder at the Central Criminal Court before Judge Grigson and a jury on 17 February 1995 for which she was sentenced to life imprisonment. In dismissing the appeal the Court of Appeal certified that a point of law of general public importance (see p 315 *j* to p 316 *a*, post) was involved in the decision. The facts are set out in the opinion of Lord Slynn.

D Anthony Evans QC and *Rupert Overbury* (instructed by *Freedman Sharman & Co*, Borehamwood) for Myers.

Robert Harman QC and *Susan Tapping* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

24 July 1997. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, the appellant, Melanie Myers, and a man, Clifton Quartey, were charged in one count in the same indictment with the murder of a minicab driver, Muzhar Hussein, on 12 April 1994. An application by Myers for a separate trial, opposed by the prosecution and, it seems, also by Quartey, was rejected by the trial judge and on 17 February 1995, Myers was convicted of murder and Quartey of manslaughter. Myers' appeal to the Court of Appeal ([1996] 2 Cr App R 335) was dismissed but the court gave her leave to appeal to your Lordships' House and certified that the following point of law of general public importance was involved in its decision, namely:

> 'In a joint trial of two defendants A and B, is an out of court confession by A which exculpates B but which is ruled, or is conceded to be, inadmissible as evidence for the Crown nevertheless admissible at the instigation of B in

support of B's defence, or does such a confession in all circumstances offend the rule against hearsay?' a

The question arose in this way. Myers and Quartey with a young girl were driven in the cab from Wembley to Howarden Hill where Myers had lived and where she was subsequently arrested. At 9.45 pm the driver was found by a couple who lived on the Howarden Hill estate. He had been stabbed and cut in a number of places. He died later that evening in hospital, the cause of death being found on a post-mortem examination to have been a single stab which entered his heart. b

The Crown's case was that this was a joint enterprise each intending to rob the driver and each being prepared to inflict serious injury on him in the course of doing so. Quartey denied that there was any plan to rob the driver. Myers had ordered the cab and he assumed that she would pay. His evidence was that she put a knife to the driver's throat in the car and struggled with him when they were both out of the car. He took no part. Myers' case was that it was Quartey's idea to rob the driver and that he pulled a knife when they were all out of the car and stabbed the driver. c

The central problem in the case arose from the existence of statements made by Myers to police officers after her arrest. d

During a conversation with one police constable at the police station she is alleged to have said:

'I didn't do it, well I did do it ... I did not mean to stab him, I had the knife and he kept coming forward at me. We only wanted to take his money and that's all, I thought it would only have been a G.B.H.' e

When asked, 'Did you have the knife?' she replied, 'Yes I had it, I didn't mean to kill him and when I read about it in the paper I couldn't believe it so I just went to Birmingham out of the way.' To three other officers in a vehicle on the way to the magistrates' court she was alleged to have said: 'I reckon I'll get a few years for this.' Asked why she replied: 'Well I cut him didn't I he wanted to be a fucking hero so I cut him.' f

It was the possible prejudice which could arise to one or other of the defendants if these statements were, or were not, allowed in, and the dispute as to how far they were admissible, which led to the application for separate trials. Albeit recognising the difficulty which could arise from admitting these statements in one trial the judge was more than satisfied that he should not order separate trials: g

'In any event I cannot think of a case where it would be more important and more appropriate for the two defendants to be tried together. The circumstances which I briefly outlined cry out for a joint trial. One jury should determine all issues on all the relevant and available evidence between all three parties; the Crown and the two defendants.' h

That decision was challenged on appeal. The Court of Appeal referred to what was said in *R v Lake* (1976) 64 Cr App R 172 at 175 namely: j

'... a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that.' (See [1996] 2 Cr App R 335 at 339.)

They took the view that the exercise of the trial judge's discretion could on this question not be faulted—he had looked at the competing interests of both defendants in reaching his decision. There is no appeal to your Lordships directly against that decision but the admissibility of Myers' statements to the police officers in the joint trial remains in issue.

Although the prosecution relied on a confession, in similar terms to those made to the police officers, which was made to one Charles Williams, the prosecution did not seek to put before the jury either of the statements made to the police officers because there had been breaches of the Code of Practice issued pursuant to ss 66 and 67 of the Police and Criminal Evidence Act 1984. Counsel for Quartey submitted that he was entitled to adduce evidence of the confessions as being relevant to his client's case and therefore admissible. Counsel for Myers opposed the admission of the statements relying on ss 76(2)(b) and 78 of the 1984 Act. He submitted that, if Myers gave evidence, counsel for Quartey could cross-examine her on the confessions and if she denied having made them, he could call evidence of what was said pursuant to the Criminal Procedure Act 1865 (Lord Denman's Act). This would involve the jury being told that the confessions would not be evidence of the commission of the crime by her but would go to her credibility. The trial judge considered that 'It would be an impossible task for the jury to draw that distinction'.

In considering whether the statements should be admitted the judge found that there was a direct conflict between two Court of Appeal decisions, *R v Campbell* [1993] Crim LR 448 and *R v Beckford, R v Daley* [1991] Crim LR 833. Following the course that he thought right, he ruled: '... a statement against interest by one party is provable against that party by another so long as both remain parties to the particular action.' The confessions were relevant to Quartey's case and, since ss 76 and 78 did not apply, there was no fetter on counsel for Quartey adducing this evidence 'either by way of cross-examination of the officers if they are called by the Crown or by calling them as part of his case'.

The Court of Appeal ([1996] 2 Cr App R 335 at 340) accepted as trite law that—

> 'a statement made by one defendant in the absence of another cannot be evidence *against* that other. Juries have to be directed and are expected to put out of their minds any such material however compelling. But the content of any such statement may well be evidence against the maker of the statement if it amounts to an admission of guilt ... In a case such as the present, we are of the opinion that the confession was relevant to the co-defendant's case as supporting that case to the effect that responsibility did not lie with the co-defendant but solely with the statement maker. The fact that the confession, though voluntary, was made to a police officer in breach of the Police and Criminal Evidence Act 1984 does not affect the matter so far as the co-defendant was concerned. It was admissible just as much as it would have been if made to a casual passer-by.' (See [1996] 2 Cr App R 335 at 340; the court's emphasis.)

The court continued (at 341):

> 'In our view the method by which counsel for Quartey elicited the evidence, in the context of this case, is unimportant. The evidence, however elicited, was relevant to the defence, and in our view did not offend any rule of hearsay because what the appellant said amounted to a

confession made by a party to the proceedings (see for example *Cross and Tapper on Evidence* (8th edn, 1995) p. 315). It is to be contrasted with an admission made by a person not a party to the proceedings who is not called to give evidence. Such a statement is hearsay on the authority of [*R v Blastland* [1985] 2 All ER 1095, [1986] AC 41].'

The Court of Appeal found that there was a conflict between the decision in *R v Beckford, R v Daley* [1991] Crim LR 833 on the one hand and *R v Campbell* [1993] Crim LR 448 on the other which could not be validly distinguished. They preferred the reasoning in *R v Campbell* and on that basis dismissed the appeal.

The first question is whether there is a conflict between these two cases.

In *R v Beckford* three men were charged with murder. One of them, Correia, admitted in an interview with the police that he had stabbed a man near a door in a bar. His confession was not admitted by the judge because of a breach of the Code of Practice to which I have referred. Counsel for Daley applied to cross-examine the police witnesses about Correia's confession. Auld J ruled that this confession could only be introduced through cross-examination of Correia. To allow it through cross-examination of the police would breach the hearsay rule as stated in *Phipson on Evidence* (14th edn, 1990) p 557, para 21-02:

'Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them. The rule at common law applies strictly to all classes of proceedings, and there is no special dispensation for the defendant in a criminal case ...'

Auld J, with whom the Court of Appeal, in a judgment given by Watkins LJ, agreed, said:

'Counsel for Daley's application, to succeed as to relevance, must be that the statement made by Correia to the police officer is not only adverse to Correia but favourable to Daley but the exception to the hearsay rule does not permit the admission of confessions of one person in relation to the case against another, whether they are for or against that other.'

He could not create a new exception to the hearsay rule to cover that case since on the basis of *Myers v DPP* [1964] 2 All ER 881, [1965] AC 1001 and *R v Blastland* [1985] 2 All ER 1095, [1986] AC 41 the category of exceptions to the hearsay rule is now closed and could only be extended by the legislature.

He further ruled that s 76 of the 1984 Act applied only as between the prosecution and the defendant whose confession was sought to be given against him and added:

'In my view s 76 does not touch the general rule of which *R v Turner* and *R v Blastland* are examples and that the same principle applies whether or not the statement of confession sought to be adduced is made by a third party to the proceedings or by a co-defendant.'

It is, however, not without interest that the Court of Appeal felt that had Correia's confession been admitted, the jury might have taken a different view as to the cogency of evidence that it was Daley and not Correia who had struck the fatal blow and convicted Correia, acquitting Daley. They said: 'As we have said, the hearsay rule, sound though it is when usually applied is capable sometimes of obscuring—shielding even—the truth. It may have done so here.'

In the result, although the court held that the judge was right not to allow Correia's confession to be introduced through cross-examination of the police witnesses, the conviction of both men was quashed.

In *R v Campbell* [1993] Crim LR 448 one of three defendants (A) had recorded a conversation which clearly implicated him and another defendant (B) but which supported the defence of a third defendant (C). The prosecution had not known of this evidence but did not object to the evidence being given on behalf of C. A and B objected on the ground that this was inadmissible evidence though no suggestion was made that it would have been excluded under the 1984 Act if the prosecution had sought to adduce it. The trial judge ruled that the evidence could be led; it was a confession admissible against A and its admission did not adversely affect the fairness of the trial. A in evidence adopted what he had said in the tape. The jury was told that the taped conversation was not evidence against B.

On appeal A and B contended that the judge was wrong to admit the evidence of the tape and that this was a material irregularity in the trial. The Court of Appeal, in a judgment given by Hobhouse J, rejected these contentions and dismissed the appeal. Hobhouse J distinguished (a) 'straightforward hearsay statements' which are not admissible unless falling within one of the recognised exceptions when they become evidence for all purposes; (b) previous inconsistent statements admissible to challenge a witness and usable only to discredit him; and (c) a confession only admissible against the party who made it and then subject to special safeguards in criminal cases.

He distinguished the decision in *R v Beckford* from *R v Campbell* on the basis that the former was a case where the confession of one defendant had been ruled inadmissible under the 1984 Act so that another defendant could not get it in as part of his cross-examination of a police witness. In *R v Campbell* on the other hand the question raised was as to 'whether it is permissible for a defendant to adduce confession evidence against a co-defendant when the prosecution has not adduced that evidence, although there would have been no objection to its doing so'. Recognising the conflicts which can arise in a joint trial he said:

> 'Thus it is commonplace that in criminal trials one defendant's interest may be that the prosecution's case against a co-defendant should be strengthened and should succeed. A defendant is therefore entitled to lead admissible evidence which is relevant to the proof of the case against the co-defendant if in so doing the defendant is advancing his own case. [To say] that the proof against one defendant that he has confessed to the crime with which a co-defendant is also charged is not relevant to the case of the co-defendant in the same trial, that would, in our judgment, be contrary both to common sense and to the cases we have earlier referred to.'

The problem in *R v Beckford* was not relevance; it was that evidence of the confession had already been ruled inadmissible as against Correia and therefore it could only be put in evidence at the trial if it was admissible on some other basis. As the judge and the Court of Appeal held, it was not: '... it is implicit in the decision in *R v Beckford* that a co-defendant cannot be in a better position than the prosecution in relation to the proof of an inadmissible confession.' He went on:

> '*R v Beckford* is clearly distinguishable on the ground that the confession was not admissible as a confession and the question raised was whether the

appellant could independently adduce the out-of-court statement. Here the question is whether the proof of a confession which was admissible against the appellant was a material irregularity in the trial of the appellant because the evidence by which it was proved was led by a co-defendant not the prosecution. Accordingly we consider that the decision in *R v Beckford* does not preclude us from reaching a conclusion in the present case that the admission of the confession did not amount to an irregularity during the trial material to the conviction of either appellant.' a b

The situations in *Beckford* and *Campbell* were, I agree, different. The *Beckford* case was concerned with the admissibility of a confession which the prosecution could not put in because of breaches of the police Code of Practice, whereas in the *Campbell* case there was no suggestion of any such breach, the issue being whether there was some other irregularity in the trial because of the admission of the tape which it was sought to put in as a confession by one defendant to be used against and only against that defendant. c

Yet it seems to me, as it did to the Court of Appeal in the present case, that on the issue crucial to the present case the two decisions of the Court of Appeal are in conflict. In *Beckford* Auld J and the Court of Appeal rejected the submission that in a joint trial a defendant could rely on another defendant's confession to support his own case albeit it was not evidence against the maker of the statement. In *Campbell* the Court of Appeal held the statement of one defendant to be admissible as a confession furthering the case of the co-defendant. In both cases the evidence was clearly relevant. d e

Since the specific grounds of exclusion of a confession in s 76(2) of the 1984 Act relate to confessions which the prosecution proposes to put in evidence that section does not apply to the present case where it is the co-accused seeking to put in the confession. Section 78 of the 1984 Act provides for the exclusion of 'evidence on which the prosecution proposes to rely' where the judge thinks that the admission of the evidence would lead to unfairness. That again does not apply to the present case. f

It is therefore necessary to consider whether other authorities indicate that the decision in *R v Campbell* or that in *R v Beckford* is the one which ought to be followed.

In *R v Blastland* [1985] 2 All ER 1095, [1986] AC 41 a defendant charged with the murder of a young boy sought to call witnesses to say that another man, M, had told them before the boy's body had been discovered that a young boy had been murdered. The trial judge refused the application on the basis that such evidence was hearsay and inadmissible. The Court of Appeal upheld the judge's decision. Two questions were certified as involving points of law of general importance ([1985] 2 All ER 1095 at 1098, [1986] AC 41 at 42–43): g h

'(1) Whether the confession by a person other than the Defendant to the offence with which the Defendant is charged is admissible in evidence where that person is not called as a witness (*R v Turner* ((1975) 61 Cr App R 67)). (2) Whether evidence of words spoken by a third party who is not called as a witness is hearsay evidence if it is advanced as evidence of the fact that the words were spoken and so as to indicate the state of knowledge of the person speaking the words if the inference to be drawn from such words is that the person speaking them is or may be guilty of the offence with which the Defendant is charged.' j

Leave to appeal was given only on the second question, but as to the first question Lord Bridge of Harwich, whilst repeating that a refusal of leave to appeal by an Appeal Committee of the House is not the equivalent of an authoritative decision of the House affirming the decision of the Court of Appeal, stated ([1985] 2 All ER 1095 at 1098, [1986] AC 41 at 52–53):

> 'However the decision of the Court of Appeal, Criminal Division in *R v Turner* (1975) 61 Cr App R 67, which an appeal on the first certified point would call in question, was itself based on the majority decision of your Lordships' House in *Myers v DPP* [1964] 2 All ER 881, [1965] AC 1001, which established the principle, never since challenged, that it is for the legislature, not the judiciary, to create new exceptions to the hearsay rule. To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called as witnesses would be to create a very significant and, many might think, a dangerous new exception.'

As to the second question, Lord Bridge accepted that statements made to a witness by someone other than the accused were not excluded by the hearsay rule when they were put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made (see [1985] 2 All ER 1095 at 1099, [1986] AC 41 at 54). Yet he said that such a principle can only apply when the particular state of mind 'is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial'. In that case the state of mind of M was not in issue or directly relevant to the issue whether the defendant killed the boy since M may have acquired knowledge of the death in a number of ways.

That part of Lord Bridge's decision is not relevant to the present case but the passage which I have quoted as to the first question confirms that the accused cannot call evidence of a third party's out of court admission of guilt in order to establish his own innocence. The justification for this rule is based, said Lord Bridge, on the principle stated by Lord Normand in *Teper v R* [1952] 2 All ER 447 at 449, [1952] AC 480 at 486:

> 'The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost.'

In *R v Turner* (1975) 61 Cr App R 67, where it was sought to produce evidence of a statement by one person that he rather than one of the defendants had taken part in the robbery, it was said (at 87, 88):

> 'This Court is of opinion that the ruling of the learned judge in refusing to admit in evidence the statement made to a third party by a person not himself called as a witness in the trial was clearly correct ... This Court does not find in any [of the cases cited] any authority for the proposition advanced in this case that hearsay evidence is admissible in a criminal case to show that a third party who has not been called as a witness in the case has admitted committing the offence charged. The idea, which may be gaining prevalence in some quarters, that in a criminal trial the defence is

entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous.' a

In those two cases it was the statement of a third party which was held to be inadmissible. These are clearly hearsay. On the other hand there are decisions where it has been held that one defendant is entitled to cross-examine a co-defendant as to the latter's confession which is inconsistent with his evidence at the trial. b

Thus in *R v Miller* [1952] 2 All ER 667, where counsel for one alleged conspirator to import goods unlawfully sought to ask a prosecution witness whether another conspirator was not in prison at a time when no illegal importations took place, Devlin J (at 668) said that questions as to previous character and convictions were not normally admissible 'not primarily for the reason that they are prejudicial, but because they are irrelevant'. The judge may exclude questions of that sort if the prosecution seeks to ask them even if they are relevant in circumstances where the prejudice outweighs the relevance. Devlin J added however (at 669): c

'No such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else.' d

A similar principle was stated in *R v Bracewell* (1978) 68 Cr App R 44 at 50, where Ormrod LJ giving the judgment on the Court of Appeal said: e

'The problem generally arises in connection with evidence tendered by the Crown, so that marginal cases can be dealt with by the exercise of the discretion. "When in doubt, exclude," is a good working rule in such cases. But when the evidence is tendered by a co-accused, the test of relevance must be applied, and applied strictly, for if irrelevant, and therefore inadmissible evidence is admitted, the other accused is likely to be seriously prejudiced, and grave injustice may result.' f

On the basis of this decision it seems that relevance is the appropriate test even if the admission of relevant evidence at the suit of one defendant will cause prejudice to the other accused.

To similar effect is a statement in *Lowery v R* [1973] 3 All ER 662, [1974] AC 85 g in the Privy Council. In that case evidence by a psychiatrist of one defendant's aggressiveness was admitted to rebut his statement that he was not the sort of person who would have committed the murder. It was evidence which could be relied on by the co-accused to show that his version of the facts was more probable than that of the other. Lord Morris of Borth-y-Gest approved a h statement in the judgment of the Supreme Court of Victoria from which the appeal came, to the following effect:

'It is, however, established by the highest authorities that in criminal cases the Crown is precluded from leading evidence that does no more than show that the accused has a disposition or propensity or is the sort of person likely j to commit the crime charged ... It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the

innocence of an accused person.' (See [1973] 3 All ER 662 at 671–672, [1974] AC 85 at 102.)

See also *R v Reid* [1989] Crim LR 719, where it was held that it was proper for one co-defendant to seek to undermine the appellant's defence insofar as that consisted in blaming the co-defendant.

An analogous point arose in *Murdoch v Taylor* [1965] 1 All ER 406, [1965] AC 574 in relation to s 1(f)(iii) of the Criminal Evidence Act 1898, which provides that a person charged with an offence, and giving evidence on his own behalf, may not be asked questions tending to show that he has committed or been convicted of or charged with some other offence unless 'he has given evidence against any other person charged with the same offence'. If the prosecution sought to avail themselves of the proviso then the judge had a discretion as to whether in the interests of a fair trial the prosecution should be allowed to cross-examine as to character or previous convictions.

> '... but when it is the co-accused who seeks to exercise the right conferred by proviso (f)(iii) different considerations come into play. He seeks to defend himself; to say to the jury that the man who is giving evidence against him is unworthy of belief; and to support that assertion by proof of bad character. The right to do this cannot, in my opinion, be fettered in any way.' (See [1965] 1 All ER 406 at 416, [1965] AC 574 at 593 per Lord Donovan, with whom Lord Reid and Lord Evershed agreed.)

Lord Donovan's speech was relied on by the Court of Appeal in *R v Rowson* [1985] 2 All ER 539, [1986] QB 174, although the case was not concerned with s 1(f) of the 1898 Act. There three men were charged with assault causing grievous bodily harm with intent. The Court of Appeal in a judgment delivered by Robert Goff LJ held that one defendant (Keating) who had made a previous inconsistent statement that he had had a piece of wood with which he had hit the person injured could be cross-examined as to that statement by the other defendants. This was a matter, it was said, which was material to the defence of the two Rowsons because—

> 'since there was an issue whether the injury to Williamson was caused by a blow from the piece of wood, it was relevant for the Rowsons to establish that at no time did any of them have the piece of wood in his possession. That being so, we know of no principle of law which justified the judge in limiting the cross-examination by counsel for the Rowsons on this matter, thereby inhibiting two of the defendants in pursuing it as part of their defence.' (See [1985] 2 All ER 539 at 542, [1986] QB 174 at 180.)

The court distinguished *R v Treacy* [1944] 2 All ER 229 and *R v Rice* [1963] 1 All ER 832, [1963] 1 QB 857 as being cases where the prosecution was not allowed to cross-examine on the basis of a statement which had been ruled, or conceded, to be inadmissible against the accused person because it was involuntary or obtained in breach of the judge's rules.

The judgment in *R v Rowson* was approved by the Privy Council in *Lui Mei-lin v R* [1989] 1 All ER 359, [1989] AC 288 and found to be consistent with the principles annunciated in *Murdoch v Taylor* [1965] 1 All ER 406, [1965] AC 574 and *R v Miller* [1952] 2 All ER 667. In *Lui Mei-lin v R* a defendant was not allowed to cross-examine a co-defendant on a statement incriminating the defendant which the judge had ruled inadmissible as part of the prosecution case because it was

not made voluntarily. Having referred to s 5 of the Criminal Procedure Act 1865 (Lord Denman's Act) the Privy Council, in the opinion of Lord Roskill, said ([1989] 1 All ER 359 at 362, [1989] AC 288 at 297): *a*

> 'The only limit on the right of a co-accused to cross-examine another co-accused in these circumstances is, in their Lordships' opinion, relevancy. If one co-accused has given evidence incriminating another it must be relevant for the latter to show, if he can, that the former has on some other occasion given inconsistent evidence and thus is unworthy of belief.' *b*

He stressed, however, that the judge must warn the jury—

> 'that they must not use the statement in any way as evidence in support of the prosecution's case and that its only relevance is to test the credibility of the evidence which the maker of the statement has given against his co-accused.' (See [1989] 1 All ER 359 at 362–363, [1989] AC 288 at 298.) *c*

It is to be noted that in *Perrie v HM Advocate* 1991 JC 27 at 31 the Court of Justiciary in the opinion given by the Lord Justice Clerk (Ross) accepted the view of Lord Bridge in *R v Blastland* [1985] 2 All ER 1095 at 1098, [1986] AC 41 at 52–53 that a statement by a third party not called as a witness could not be admitted, but considered that an exception to the hearsay rule existed for statements by an accused person: *d*

> 'This exception is allowed because an accused is a party to the proceedings and an admission is a statement against interest, and is thus more likely to be true than false ... An accused person is a party to proceedings in a way in which an incriminee is not; he is entitled to the full protection which the law gives to accused persons.' *e*

That opinion, however, has to be read subject to the view of the Court of Justiciary that, contrary to what was said in *R v Turner* (1975) 61 Cr App R 67 and in *R v Blastland* [1985] 2 All ER 1095, [1986] AC 41, in the law of Scotland the categories of hearsay evidence are not closed. *f*

It is, however, clear that in the cases referred to a distinction has been drawn between statements by parties to the proceedings and by third parties, the former, if relevant and voluntary, being admissible the latter not being admissible. *g*

On the other hand it is to be noted that in the *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Commission consultation paper No 138) (1985) para 7.44 it is stated:

> 'The fact that someone else has confessed to the offence is logically relevant to the issue of whether the defendant committed it or not: this is so whether the other person is a co-defendant who gives evidence, a co-defendant who exercises his right not to give evidence, a co-defendant who is tried separately, or a person who is never caught or never prosecuted.' *h*

j

It seems to me that there is force in that comment despite Lord Bridge's anxiety that if confessions by third parties were admitted it would only be too easy for fabricated confessions to produce unjustified acquittals. Accepting Lord Bridge's view in *R v Blastland* that statements by third persons are not admissible, there is a long line of authority showing that a defendant must be allowed to

cross-examine a co-accused as to a previous inconsistent confession so long as the material is relevant to the defendant's own defence. In my opinion a defendant should also be allowed to put a co-defendant's confession to witnesses to whom the confession was made so long as the confession is relevant to the defendant's defence and so long as it appears that the confession was not obtained in a manner which would have made it inadmissible at the instance of the Crown under s 76(2) of the 1984 Act. There may be doubt as to whether the co-accused will be called (so that it may not be possible to put the confession to the co-accused directly) and not to allow the defendant to introduce it by way of cross-examination of prosecution witnesses could lead to great unfairness.

This seems to me to be consistent with the opinion of the Privy Council in *Lobban v R* [1995] 2 All ER 602 at 612–613, [1995] 1 WLR 877 at 888–889. There it was said:

> 'The principled objection to the discretion envisaged by counsel [i e of the judge at the request of one defendant to exclude evidence tending to support the defence of another defendant] is that it conflicts with a defendant's absolute right, subject to considerations of relevance, to deploy his case asserting his evidence as he thinks fit.'

This seems to me the position whether or not the judge and the Court of Appeal in *R v Beckford* were right to hold that s 76(1) of the 1984 Act only applies to evidence which the prosecution seeks to adduce, a question which is still subject to debate and on which it is not necessary to rule in this case, particularly since the Law Commission has recommended that 'the admissibility of a confession by one co-accused at the instance of another should be governed by provisions similar to section 76 of PACE, but taking into account the standard of proof applicable to a defendant' (see recommendation 19 of the *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245) (1997).

In *R v Rowson* [1985] 2 All ER 539 at 542 [1986] QB 174 at 180 the evidence was said to be relevant 'in the sense that it went to the credibility to be attached to evidence given by Keating on a material issue' and in *Lui Mei-lin v R* [1989] 1 All ER 359 at 362–363, [1989] AC 288 at 298, it was said that the judge should warn the jury 'that its only relevance is to test the credibility of the evidence which the maker of the statement has given against his co-accused'. The previous statement by Keating in *R v Rowson* was, however, regarded as not only relevant to Keating's credibility but it was also material to the Rowsons' defence that they did not at any time have any wood in their possession.

A confession may be relevant both as to credibility and as to the facts in issue and it does not cease to be admissible because it does so. Indeed, so long as it is relevant to establish his defence or to undermine the prosecution case against him, a defendant should in my view be allowed to cross-examine a co-defendant as to his confession which goes to the facts in issue rather than only to the credibility of the maker of the statement. He should not less be allowed to cross-examine the person to whom a statement is made as to the terms of the confession even though, since the co-defendant has not given evidence, the question of credibility has not arisen.

In *R v Rowson* and *Lui Mei-lin v R* the Court of Appeal and the Privy Council respectively stressed that the judge must tell the jury that weight should not be placed on such statement in considering the prosecution case against the maker of the statement; it was considered that the jury would be able to understand the

difference and give effect to the judge's direction. On the other hand for a jury to make this distinction may not always be easy as has been fully recognised by the trial judge in the present case, by Lord Lane CJ in *R v O'Boyle* (1990) 92 Cr App R 202 and by academic commentators. But even allowing for a risk of prejudice to the maker of the statement in the mind of the jury, the authorities to which reference has been made make it plain that a defendant must be allowed to cross-examine a co-defendant as to, and in appropriate circumstances to introduce, relevant evidence of a previous confession made by the co-defendant.

In the present case Myers' previous confessions to the police officers were relevant to the question whether her assertion that it was Quartey who had murdered the cab driver was to be believed and therefore was clearly relevant to Quartey's defence that it was not he who had killed. It was obviously either one or the other who had killed the driver and justice required that Quartey should be allowed to bring out the earlier confession in his defence as casting doubt on Myers' denial. For Myers to deny the confession in evidence would have allowed the police officers to be called by Quartey pursuant to s 4 of the Criminal Procedure Act 1865. It seems to me that it was also relevant and admissible for the police officers who were not called, but were tendered, by the prosecution to be asked about the confession on behalf of Quartey. It was not suggested that the confessions were obtained in the circumstances referred to in s 76(2) of the 1984 Act, and the fact that the prosecution was not able to introduce the evidence because of breaches of the police Code did not preclude Quartey's counsel from doing so.

The question certified goes much wider than the facts of the present case and it is neither necessary nor desirable to answer it further than in the present context.

Myers' appeal should accordingly be dismissed.

LORD MUSTILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he has given, I too would dismiss this appeal.

LORD STEYN. My Lords, I have had the privilege of reading the speech prepared by my noble and learned friend Lord Slynn of Hadley in draft. For the reasons he has given I would also dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the benefit of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley. I agree with him that this appeal should be dismissed. I also would decline to answer the certified question, for reasons which do not arise on the facts of this case but which I should like to set out in some detail in order to define my understanding of the limits of the proposition which the question was designed to express.

The question which is before us raises a point of law of general importance relating to the law of evidence. Two defendants went to trial charged with murder in one count on the same indictment. The circumstances were such that the murder, which was by stabbing, could have been committed by only one, not both, of them. The case for each defendant was conducted on the basis that the other was solely to blame for the murder. One of the defendants, who in the event was found guilty only of manslaughter, gave evidence to this effect. The

other defendant, who also gave evidence, was found guilty of murder. It is at her instance that the appeal has been taken.

The Crown were in possession of certain statements which were alleged to have been made by the appellant to police officers shortly after her arrest. In the course of these statements she had admitted that it was she who had stabbed the deceased. These statements were not relied on by the Crown because they had been obtained in breach of the Code of Practice issued under s 66 of the Police and Criminal Evidence Act 1984. The Crown did not seek to put them before the jury, so the trial judge was not required to make any ruling about their admissibility in a question as between the Crown and the appellant. But they had been disclosed to the other defendant, whose counsel sought to lead evidence of the statements from the police officers on the ground that they were relevant to his client's case and therefore admissible as part of his defence. The trial judge decided to admit the statements, saying that they could be elicited either by way of cross-examination of the police officers or by calling the police officers as part of his case. The appellant, who was a party to the same proceedings in this joint trial, was of course not a compellable witness for the other defendant. She was entitled to decline to give evidence, so the only way in which the other defendant could be sure that her admissions would be put in evidence was through the evidence to be given by the police officers during the Crown case.

In the Court of Appeal two points were considered. The first was whether the fact that the statements were made in breach of the Police and Criminal Evidence Act 1984 and were thus inadmissible as evidence for the Crown meant that they were inadmissible also at the instance of the co-defendant. They answered this question in the negative, on the ground that, as the admissions were voluntary, the breach of the Act did not affect the matter so far as the co-defendant was concerned. In their opinion they were as admissible in the same way as statements made to a casual passer-by would have been admissible. The second was whether to elicit the evidence from the police officers offended against the rule about hearsay evidence. They answered this question in the negative also, on the ground that as the appellant was a party to the proceedings the leading of this evidence did not offend any rule of hearsay.

In my opinion it is necessary to examine each of these two points separately in order to answer the question which we have been asked to decide. It is also necessary to distinguish the issues which arise in this case from those which arise where the question is whether a defendant who has chosen to give evidence in a joint trial and blames a co-defendant can be cross-examined on behalf of that co-defendant, by putting to him an inconsistent statement made to the police which, at the instance of the Crown, is inadmissible. In that situation there is no question of leading hearsay evidence. The purpose of putting the inconsistent statement is also different. It is to challenge the credibility of the defendant's evidence against the co-defendant. In the present case the credibility of the appellant was not in issue, because it was not known whether she was to give evidence when the decision was taken by the trial judge. In the event she did give evidence. But she denied making the statements to the police, and it appears that she was not cross-examined on them by counsel for the co-defendant.

In *R v Rowson* [1985] 2 All ER 539, [1986] QB 174 it was held that there was no principle that prevented a defendant from cross-examining a co-defendant on a

statement that was relevant to the trial. The statement in question in that case had been made by the co-defendant in breach of r 3(b) of the Judges' Rules (see [1964] 1 All ER 237 at 238, [1964] 1 WLR 152 at 154), and it was not led by the Crown. It contained an admission of guilt which was inconsistent with the evidence which he gave at the trial, in which he denied hitting or kicking the victim. The reason why it was held that the trial judge ought to have allowed him to be cross-examined on his statement was that it was evidence which went to his credibility on a matter which was relevant to an issue in the trial and the defence of the other defendants. Robert Goff LJ ([1985] 2 All ER 539 at 542, [1986] QB 174 at 180) noted that the case was different from two previous cases where the question whether an accused could be cross-examined on an inadmissible statement had been considered. In *R v Treacy* [1944] 2 All ER 229 it was held that such a statement could not be used by the prosecution in its cross-examination of the defendant. Humphreys J said (at 236): 'In our view, a statement made by a prisoner under arrest is either admissible or it is not admissible ... If it is not admissible, nothing more ought to be heard of it ...' In *R v Rice* [1963] 1 All ER 832, [1963] 1 QB 857 this principle was applied in favour of a co-defendant of the maker of such a statement. But in *R v Rowson* it was counsel for the co-defendants who wished to use the statement in cross-examination, as it was relevant to the credibility to be attached to evidence given by the defendant on an issue which was material to their defence.

In *Lui Mei-lin v R* [1989] 1 All ER 359, [1989] AC 288 the decision in *R v Rowson* was held by the Privy Council to be entirely in line with the principles which had been expressed in two previous cases where the co-accused had been seeking to exercise the right to cross-examine conferred by s 1(f)(iii) of the Criminal Evidence Act 1898: see *R v Miller* [1952] 2 All ER 667 and *Murdoch v Taylor* [1965] 1 All ER 406, [1965] AC 574. In those cases it was decided that, once a co-accused had given evidence against another co-accused, the latter was under the statute entitled without restriction to cross-examine him as to his character and his previous convictions. In *Lui Mei-lin v R* [1989] 1 All ER 359 at 362, [1989] AC 288 at 297 Lord Roskill said that the only limit on the right of a co-accused to cross-examine another co-accused is that of relevancy. In my opinion however different considerations apply where the co-accused is seeking to adduce evidence from the police about statements made by another co-accused which are inadmissible against that other co-accused who has not given, or who has yet to give, evidence. The principles which have been developed under reference to the right to cross-examine the co-accused as to his credibility do not apply in these circumstances. The hearsay rule, which has no application where a co-accused is being cross-examined about his own statements, has to be considered because the contents of a statement made to the police by a third party are hearsay evidence as to the truth of those contents. If the evidence is admissible, it must be by way of an exception to the hearsay rule. And the inadmissibility of the statement at the instance of the Crown has to be considered also, in a quite different context from that which applies where the maker of the statement is in the course of giving his evidence.

I shall deal first with the hearsay rule. It appears that on this issue there is a conflict of authority. In *R v Beckford, R v Daley* [1991] Crim LR 833 it was held that it would be a breach of the hearsay rule for the police witnesses to be cross-examined by counsel for one of the defendants about a confession made by the co-defendant in a police interview. The trial judge had held that that

confession was inadmissible against the co-defendant because of a breach of the Code of Practice, so the evidence could not have been led by the prosecutor. He held that it could only be introduced by cross-examination of the co-defendant if he were to give evidence. The Court of Appeal held that to have allowed it to be put to the police officers would have been to create a new exception to the hearsay rule, contrary to the decision in *Myers v DPP* [1964] 2 All ER 881, [1965] AC 1001 that it was for the legislature, not the judiciary, to create such exceptions.

In *R v Campbell* [1993] Crim LR 448 the question about the hearsay rule did not arise directly. The evidence in question was a tape recording of a conversation in which Campbell implicated himself and Williams in the crime but supported the defence of a third defendant. The prosecutor did not lead this evidence because he had not been aware of it. The question arose when counsel for the third defendant sought to lead the evidence about the tape recording from his father in the face of objections from the other two co-defendants. The trial judge allowed the evidence to be led, on the ground that it was an admission which was admissible against Campbell. When Campbell gave evidence he adopted what he had said on tape as part of his evidence. The jury were told that the taped conversation was not evidence against Williams. Following their conviction Campbell and Williams appealed on the ground that the trial judge was wrong to admit the evidence of the tape recording. The Court of Appeal dismissed the appeals on grounds which were, in part, inconsistent with what was said in *R v Beckford, R v Daley* [1991] Crim LR 833. Hobhouse J, who delivered the judgment of the court, sought to distinguish that case on a different ground, namely that the statement which the co-accused was not allowed to elicit had been held by the trial judge to be inadmissible at the instance of the prosecutor. But he made it clear that in his opinion the evidence, so long as it was not inadmissible on some other ground, could have been led under one of the recognised exceptions to the hearsay rule which enables an admission made by a party to a litigation to be led in evidence against him.

It seems to me that two issues arise for decision on this part of the case. The first is how to resolve the conflict between *R v Beckford* and *R v Campbell* [1993] Crim LR 448. The second, which it is convenient to deal with first, is whether to hold that there was no breach of the hearsay rule in such circumstances would be in conflict with what was said in your Lordships' House in *R v Blastland* [1985] 2 All ER 1095, [1986] AC 41. In that case the appellant sought to call a number of witnesses to give evidence that a third party, who was not on trial with him as a co-defendant, had said things tending to show that he was guilty of the crime with which the appellant had been charged. He also sought to call the third party and to treat him as a hostile witness—the implication being that he would not be willing to admit the truth of these statements and perhaps also that he would deny making them. The evidence to be led from the other witnesses was therefore plainly hearsay evidence, and it was held to be inadmissible on this ground. When the Court of Appeal dismissed the appellant's appeal against his conviction they certified as a question of general public importance the question whether the confession by a person other than the defendant to the offence with which the defendant is charged is admissible in evidence where that person is not called as a witness. The Appeal Committee of the House of Lords refused leave to appeal on this ground, but granted leave on another point. Commenting on this matter before moving to the other point, Lord Bridge of Harwich observed

that this would involve creating a new exception to the hearsay rule and said ([1985] 2 All ER 1095 at 1098, [1986] AC 41 at 52–53): a

> 'To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called as witnesses would be to create a very significant and, many might think, a dangerous new exception.' b

The situation in the present case is, however, not the same as that in *R v Blastland*. The statements which counsel for the appellant's co-accused was allowed to lead in evidence from the police witnesses were statements by his co-defendant, not by a person who could properly be described as a third party because he was not a party to the trial. There was no other way of eliciting this c evidence because the maker of the statements was not a compellable witness for the co-defendant. It was evidence which was relevant to his defence, because it related to one of the crucial issues at the trial, namely whether it was the appellant or the co-defendant who had stabbed the deceased. Why then—leaving aside for the moment the second question which relates to its inadmissibility as prosecution evidence—should it be held to be inadmissible as d evidence for the co-defendant?

On this issue—which relates more directly to the conflict between *R v Beckford, R v Daley* [1991] Crim LR 833 and *R v Campbell* [1993] Crim LR 448—some assistance can, I think, be gained from two recent decisions from Scotland in the High Court of Justiciary. These two cases, *Perrie v HM Advocate* 1991 JC 27 e and *McLay v HM Advocate* 1994 JC 159, were both concerned with the question whether confessions made by a third party after the trial could be relied on as additional evidence for the purposes of an appeal against conviction, on the ground that additional evidence which was not available at the trial had now become available. In *Perrie v HM Advocate* the confession was said to have been made by a person whom the appellant had named at the trial as the person who f had committed the crime. In *McLay v HM Advocate* the confession was said to have been made by a person who had been tried together with the appellant on a charge of murder but had been acquitted. There was, however, this feature in common, that in the event of a new trial neither of the two persons who were said to have made the confessions would have been on trial with the appellant. g The evidence of the persons to whom they were said to have made the confessions would have been hearsay evidence from third parties, just as in *R v Blastland* [1985] 2 All ER 1095, [1986] AC 41.

In *Perrie v HM Advocate* the appeal was refused for the same reason as in *R v Blastland*, and in *McLay v HM Advocate* a court of five judges approved of the h decision and, applying it to the facts of the case, also refused the appeal. In *Perrie v HM Advocate* 1991 JC 27 at 29 the Lord Justice Clerk (Lord Ross), said that the law of England was an uncertain guide as, unlike the position in England as described in *R v Blastland* where the categories of exceptions to the hearsay rule were said to be closed, that was not so in the law of Scotland. But in *McLay v HM Advocate* 1994 JC 159 at 166 the Lord Justice Clerk (Lord Ross) said that any j alteration to the hearsay rule as applied in criminal cases would have to be made by Parliament, so on this point I think that the law of the two countries can be taken to be virtually indistinguishable. The real interest to be found in these two Scottish cases is in the discussion, particularly in the five-judge case of *McLay v HM Advocate* 1994 JC 159, of the reasons why the hearsay rule has never been

held in a Scottish case to prevent an accused from leading evidence from police and other witnesses of statements made to them by his co-accused which assisted his case although they were against the interest of the co-accused. Each of the five judges, all of whom were very experienced in the conduct of criminal trials, commented on this matter. But the most detailed discussion is to be found in the opinions of Lord McCluskey (at 169–170) and Lord Sutherland (at 176).

These opinions make it clear that the following are the reasons which are commonly given for admitting this evidence. First, the evidence could—leaving aside the question of other objections—have been led by the Crown, because it is relevant to the Crown's case against the accused who made the statement and it has always been competent to lead evidence of admissions made by the accused as part of the Crown's case. Second, evidence which tends to incriminate the accused who made the statement is relevant also to the defence of the co-accused, where only one of them could have committed the crime. Third, as the statement contains an admission against the interest of the person who made it, it is more likely to be true than false and it is therefore evidence which should be made available at the trial. Fourth, the evidence of those to whom the statement was made or heard it being made is the best evidence of the fact that the statement was made, as the person who made it is not a compellable witness at his own trial. And fifth, as the accused is a party to the proceedings at which the evidence is to be led, he or she has the protection which the law gives to accused persons in cases where evidence is to be led which may be incriminating.

The following passage from the judgment of Hobhouse J in *R v Campbell*, which was quoted by Russell LJ ([1996] 2 Cr App R 335 at 342–343) in his judgment in the present case, sets out an approach to the problem which is consistent with that which has been taken in Scotland:

> 'If the judge is saying that the proof against one defendant that he has confessed to the crime with which a co-defendant is also charged, is not relevant to the case of the co-defendant in the same trial, that would, in our judgment, be contrary both to common sense and to the cases we have earlier referred to. The defendants are being tried together and the jury are entitled to take into account the strength of the case against one defendant when considering whether that weakens the case against another. One defendant is entitled to add to the strength of the case against a co-defendant with evidence admissible against that co-defendant if it assists his own defence to do so. The problem in *Beckford* was not relevance; it was that the evidence of the confession had already been ruled inadmissible as against Correia and therefore it could only be put in evidence at the trial if it was admissible on some other basis. As the judge and the Court of Appeal held, it was not. Correia never gave evidence so no opportunity arose to put it to him in cross-examination under the principle stated in *Rowson* ([1985] 2 All ER 539, [1986] QB 174), and *Lui Mei Lin v. R.* ([1989] 1 All ER 359, [1989] AC 288). It is implicit in the decision in *Beckford* that the co-defendant cannot be in a better position than the prosecution in relation to the proof of an inadmissible confession as a confession.'

I respectfully agree with Russell LJ that the reasoning on the issue of hearsay which is contained in *R v Campbell* [1993] Crim LR 448 is to be preferred to that in *R v Beckford, R v Daley* [1991] Crim LR 833. But the point on which Hobhouse

J's observations in *R v Campbell* were in agreement with what he took to be the decisive point in *R v Beckford*, namely that the co-defendant cannot be in a better position than the Crown in relation to the proof of a confession which is inadmissible against the defendant, must also be considered. This is the second issue, to which I now turn. In the Court of Appeal it was held that the inadmissibility of the police admissions at the suit of the Crown because of breaches of the Code of Practice did not affect the co-defendant, as it was never suggested that the statements were inadmissible because they were other than voluntary. Russell LJ said ([1996] 2 Cr App R 335 at 340):

> 'In a case such as the present, we are of the opinion that the confession was relevant to the co-defendant's case as supporting that case to the effect that responsibility did not lie with the co-defendant but solely with the statement maker. The fact that the confession, though voluntary, was made to a police officer in breach of the Police and Criminal Evidence Act 1984 does not affect the matter so far as the co-defendant was concerned. It was admissible just as much as it would have been if made to a casual passer-by.'

In *R v Beckford, R v Daley* [1991] Crim LR 833 the statement was ruled by the trial judge to be inadmissible under s 78 of the 1984 Act because it was made in the absence of a solicitor. It does not appear from the report that it was suggested that there were grounds for holding it to be inadmissible under s 76(2) of the Act. But the objection was upheld on the ground that the circumstances in which it was made were such that it would have such an effect on the fairness of the proceedings that the court ought not to admit it. In *R v Campbell* [1993] Crim LR 448 Hobhouse J made it clear that he approved of the proposition which he held to be implicit in the decision in *R v Beckford*, that the co-defendant could not be in a better position than the prosecution in relation to the proof of a confession which was inadmissible. At first sight, the decision of the Court of Appeal in the present case is not consistent with that approach.

The grounds on which a confession may be held to be inadmissible in a criminal trial are set out in ss 76(2) and 78 of the 1984 Act. A confession is defined in s 82(1) as including—

> 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise ...'

The primary rule is that in s 76(1), namely that in any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings. If however the prosecution proposes to give in evidence a confession which was or may have been obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable, and it is unable to prove the contrary, the court is required by s 76(2) not to allow the confession to be given in evidence.

That subsection does not refer to the position of a co-defendant who might wish to lead the same evidence. But it is hard to see why a co-defendant should be in a better position than the Crown if the confession was obtained in such circumstances. A confession which has been obtained by oppression or which, for other reasons, was not freely given and is unreliable, is worthless evidence. It is beyond question, as a general rule, that an accused person has the absolute right to lead all relevant evidence in his defence. He is not subject to

discretionary control by the court, which has no power to exclude such evidence on the ground that it may prejudice a co-defendant or because it was obtained by improper or unfair means. This point was recently reaffirmed in *Lobban v R* [1995] 2 All ER 602, [1995] 1 WLR 877. As Lord Steyn explained ([1995] 2 All ER 602 at 613, [1995] 1 WLR 877 at 889), the principled objection to the argument that there is a discretion to exclude such evidence is that it conflicts with a defendant's absolute right, subject to considerations of relevance, to deploy his case asserting his innocence as he thinks fit. Thus the trial judge does not have a discretionary power, as between co-defendants, to exclude relevant evidence on the ground that he is choosing the course which involves the lesser injustice as between the defendants. But there was no suggestion in that case that the statement by the co-defendant which, in part, was self-incriminating had been obtained from him by unfair means or was other than voluntary. It is at least open to question whether the rule extends to a case where the evidence which the defendant wishes to put in evidence consists of a confession which was made by a co-defendant in the circumstances which s 76(2) of the 1984 Act describes. While it would appear not to be accurate to describe such a confession as irrelevant, in a case where the defendant's case is that the offence was committed by the co-defendant, the circumstances in which it was obtained may be said to have been such as to render it worthless for all purposes, whoever it is who seeks to rely on it. On this view it would be a proper exercise of his discretion by the trial judge to exclude such evidence even although the other defendant wished it to be put in evidence.

Section 78 of the 1984 Act, on the other hand, is a provision of a different character. This is the provision under which, as Mr Harman QC for the Crown pointed out, the trial judge in this case would be likely to have held that the statements to the police ought not to be admitted in evidence if the prosecution had sought to lead that evidence. But once counsel for the co-defendant had made it clear that he wished to lead that evidence from the police officers, the trial judge was faced with a situation to which s 78 makes no reference. That section refers only to evidence on which the prosecution proposes to rely. It does not confer a discretion on the trial judge to exclude evidence of the kind which it describes on which a co-defendant wishes to rely.

The Court of Appeal approached this matter on the assumption that the trial judge had an overriding discretion to exclude the evidence on the ground of unfairness (see [1996] 2 Cr App R 335 at 343 per Russell LJ). They held that the exercise of the judge's discretion was not in any way flawed. It was not suggested in this case that the confession was obtained in circumstances which would have rendered it inadmissible at the Crown's instance under s 76(2)—Russell LJ (at 341) observed that it was not suggested that it was other than voluntary, which I take to be another way of saying the same thing. So I agree with the Court of Appeal that the trial judge did not err in admitting that evidence. It would perhaps be more accurate to say that he had no discretion to do otherwise, as this was relevant evidence on which the co-defendant wished to rely as part of his case, and there were no grounds for taking the view that it was evidence on which no reasonable jury could rely because it was worthless evidence. I would not wish to be taken as being of the view that a request by a co-defendant to be allowed to bring out evidence of a confession which had been obtained in breach of the Code of Practice should be acceded to in all

circumstances. But this is a point on which we did not hear argument, and it is not necessary to reach a view on it in order to reach a decision in this case. *a*

The certified question does not, in my opinion, sufficiently analyse the issues which have arisen in this case. It does not distinguish between confessions which are inadmissible on grounds of oppression or unreliability and confessions which are held to be inadmissible on other grounds, and it approaches the matter as if it can be resolved simply by considering whether to admit the evidence would offend the rule against hearsay. I would therefore decline to answer it. But, as I agree with the way in which the Court of Appeal have disposed of this case, I also would dismiss the appeal. *b*

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley. I agree that, for the reasons which he gives, this appeal should be dismissed. *c*

Appeal dismissed.

Celia Fox Barrister. *d*

Connelly v RTZ Corp plc and another

Connelly v RTZ Corp plc and another

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD LLOYD OF BERWICK, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD AND LORD CLYDE

24, 28, 29 APRIL, 24 JULY 1997

Practice – Stay of proceedings – Foreign causes of action – Appropriate forum – Forum in which case can be tried more suitably for parties' interests and ends of justice – Forum with which action has most real and substantial connection – Plaintiff's cause of action arising in Namibia – Plaintiff relying on legal aid to fund proceedings but ineligible for legal aid in Namibia – Plaintiff commencing proceedings in England – Whether availability of legal aid in competing jurisdictions relevant in determining whether English proceedings should be stayed – Legal Aid Act 1988, s 31(1).

The plaintiff was employed for several years by the defendant company as a foreman fitter in a uranium mine in Namibia. On his return to Scotland, the plaintiff developed cancer of the throat as a result of which he became permanently disabled. Being wholly without means, the plaintiff was not in a position to cover the costs of legal proceedings in Namibia and accordingly issued proceedings against the defendant and one of its subsidiaries in England, where they were registered and where he was eligible for legal aid, claiming damages arising from the defendants' negligence in failing to provide a reasonably safe system of work affording protection from the effects of uranium ore dust. The defendants sought a stay of the English proceedings on the ground that the courts of Namibia represented the more appropriate forum and relied in particular on s 31(1)(b) of the Legal Aid Act 1988, which provided that the rights conferred by the Act on a legally-aided person 'shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court ... is normally exercised'. A stay was granted and the plaintiff appealed to the Court of Appeal, contending principally that, since legal aid was available to him in England but not in Namibia, it was a practical impossibility for him to fund litigation in Namibia and that the court could not therefore be satisfied that Namibia represented a forum in which the case could be tried more suitably for the interests of all the parties and the ends of justice. The Court of Appeal dismissed his appeal on the grounds that the judge had correctly treated the non-availability of legal aid in Namibia as irrelevant to his discretion pursuant to s 31(1)(b) of the 1988 Act. Thereafter the plaintiff entered into a conditional fee agreement with his solicitors and on that basis he applied for the stay to be lifted. The judge dismissed the application, but the Court of Appeal allowed his appeal on the grounds that, since he would able to proceed without recourse to legal aid, s 31(1)(b) had no application, and that the interests of justice weighed strongly in favour of the forum in which the plaintiff could assert his rights, namely England. The defendants appealed to the House of Lords from that decision and the plaintiff appealed from the earlier Court of Appeal decision.

Held – (1) On its true construction, s 31(1)(b) of the 1988 Act did not prevent the court from taking the receipt by a plaintiff of legal aid into account in considering whether to grant a stay of proceedings on the grounds of forum non conveniens (see p 342 *a* to *c*, p 347 *h j* and p 349 *d* to *g* post); *Fakes v Taylor Woodrow Construction Ltd* [1973] 1 All ER 670 doubted.

(2) Where a clearly more appropriate forum overseas had been identified, the plaintiff, in general, had to take that forum as he found it, even if it was in certain respects less advantageous to him that the English forum. However (Lord Hoffmann dissenting), the availability of financial assistance in England might exceptionally be a relevant factor, where the plaintiff could establish that substantial justice would not be done if he had to proceed in the appropriate forum where no financial assistance was available. Having regard to the nature and complexity of the instant case, it was clear that it could not be tried without the benefit of financial assistance, since the plaintiff would require professional legal assistance and evidence from expert scientific witnesses. In those circumstances, the case could not be tried in Namibia; whereas if the case was tried in England the plaintiff would obtain legal aid or receive the benefit of a conditional fee agreement with his solicitor. Substantial justice could not therefore be done in the appropriate forum, but could be done in England where the necessary resources were available. It followed that the plaintiff's appeal would be allowed and the defendants' appeal would be dismissed (see p 345 *e* to *h*, p 346 *g* to *j*, p 347 *c d h* and p 349 *d* to *g* post); *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843 considered.

Decision of Court of Appeal [1996] 1 All ER 500 reversed.

Notes

For stay of proceedings and forum non conveniens, see 37 *Halsbury's Laws* (4th edn) para 444, and for a case on the subject, see 37(2) *Digest* (2nd reissue) 437, *1849a.*

For the nature and scope of civil legal aid, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1894.

For the Legal Aid Act 1988, s 31, see 24 *Halsbury's Statutes* (4th edn) (1989 reissue) 48.

Cases referred to in opinions

Abidin Daver, The [1984] 1 All ER 470, [1984] AC 398, [1984] 2 WLR 196, HL.

Amchem Products Inc v Workers' Compensation Board (1993) 102 DLR (4th) 96, Can SC.

Anderson Tulloch & Co v J C & J Field Ltd 1910 1 SLT 401, Ct of Sess.

Andrews (Trustee of the property of) v Brock Builders (Kessingland) Ltd [1997] 3 WLR 124, CA.

Fakes v Taylor Woodrow Construction Ltd [1973] 1 All ER 670, [1973] QB 436, [1973] 2 WLR 161, CA.

Ford v Clarksons Holidays Ltd [1971] 3 All ER 454, [1971] 1 WLR 1412, CA.

Goodman v Winchester and Alton Rly plc [1984] 3 All ER 594, [1985] 1 WLR 141, CA.

Jones v Thyssen (GB) Ltd (1991) 57 BLR 116, CA.

Lane v Foulds (1903) 11 SLT 118.

Oppenheimer v Louis Rosenthal & Co AG [1937] 1 All ER 23, CA.

Saxton (decd), Re, Johnston v Saxton [1962] 3 All ER 92, [1962] 1 WLR 968, CA.

Sim v Robinow (1892) 19 R (Ct of Sess) 665.

Smith v Pearl Assurance Co Ltd [1939] 1 All ER 95, CA.

Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1986] 3 All ER 843, [1987] AC 460, [1986] 3 WLR 972, HL.

Appeals

The plaintiff, Edward Connelly, appealed with leave from the decision of the Court of Appeal (Neill, Waite and Swinton Thomas LJJ) ([1996] 1 All ER 500, [1996] QB 361) delivered on 18 August 1995 dismissing his appeal from the decision of Sir John Wood, sitting as a deputy judge of the High Court in the Queen's Bench Division, on 25 February 1995, whereby he ordered that the plaintiff's action against the defendants, RTZ Corp plc and RTZ Overseas Services Ltd, be stayed on the grounds that the appropriate forum for the trial of the action was Namibia and that consideration of the availability of legal aid if the action was litigated in England was inconsistent with s 33(1)(b) of the Legal Aid Act 1988. The defendants also appealed with leave granted by the Appeal Committee on 4 February 1997 from the decision of the Court of Appeal (Sir Thomas Bingham MR, Evans and Ward LJJ) delivered on 2 May 1996 to lift the stay after the plaintiff undertook not to apply for legal aid on the basis that his solicitors had agreed to act for him under a conditional fee agreement. The facts are set out in the opinion of Lord Goff.

Michael Burton QC, Graham Read and *Anna Thomas* (instructed by *Leigh Day & Co*) for the plaintiff.

Sydney Kentridge QC, Brian Doctor and *Charles Gibson* (instructed by *Davies Arnold Cooper*) for the defendants.

Their Lordships took time for consideration.

24 July 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, there are before your Lordships two appeals, both arising out of the same proceedings. The plaintiff in the action is Edward Connelly, who is domiciled in Scotland. In 1971, when he was 21 years old, he went to South Africa. For a period of about five and a half years, between 1977 and 1982, he was employed by Rossing Uranium Ltd (RUL), which carried on the business of mining uranium at Rossing in Namibia. He returned to Scotland in about 1983. In 1986 it was discovered that he was suffering from cancer of the larynx. He subsequently underwent a laryngectomy, and has since breathed through a tube in his throat. He claims that his cancer was the result of inhaling silica uranium and its radioactive decay products at the mine.

RUL is a subsidiary of the first defendant, RTZ Corp plc (RTZ), which is an English company with its registered office in London. In March 1988 Scottish solicitors acting for the plaintiff wrote to RTZ raising the question of compensation. RTZ replied that the claim should be addressed to RUL, and forwarded the letter to RUL in Namibia. RUL's insurers denied liability. In February 1990 the Legal Assistance Centre of Windhoek in Namibia lodged a claim for compensation on behalf of the plaintiff under the Workmen's Compensation Act 1941 of South Africa and Namibia. However the Workmen's Compensation Commissioner rejected the claim.

On 15 December 1993 the plaintiff obtained a legal aid certificate to bring proceedings against RTZ in England, and the writ and statement of claim in the present action were served on RTZ on 19 September 1994. It was alleged that RTZ had devised RUL's policy on health, safety and the environment, or alternatively had advised RUL as to the contents of the policy. It was further alleged that an employee or employees of RTZ, referred to as RTZ supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine. Following receipt of information from RTZ's solicitors that certain of these 'RTZ supervisors' had been transferred to another subsidiary of RTZ, RTZ Overseas Services Ltd (RTZ Overseas) which was also an English company registered in London, the plaintiff obtained leave to amend his writ and statement of claim to join RTZ Overseas as second defendants. This was duly done.

The course of the proceedings

On 28 October 1994 RTZ applied to the High Court in London for a stay of the proceedings on the ground that Namibia was the appropriate forum for the trial of the action. It was later conceded by the plaintiff that Namibia was prima facie the jurisdiction with which the claim had the most real and substantial connection. The application for a stay came before Sir John Wood, sitting as a judge of the High Court. He gave his judgment on 28 February 1995. He referred in particular to s 31(1) of the Legal Aid Act 1988, which provides:

> 'Except as expressly provided by this Act or regulations under it ... (b) the rights conferred by this Act on a person receiving advice, assistance or representation under it shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.'

He held that, in deciding whether to exercise his discretion to grant a stay, he was bound by that subsection to disregard the fact that the plaintiff was in receipt of legal aid in this country; and, having regard to the close connection of the claim with Namibia, he decided to stay the action, notwithstanding that there was no financial assistance, in the form of legal aid or otherwise, available to the plaintiff in Namibia to enable him to pursue his claim there. The plaintiff was refused leave to appeal. On 18 August 1995 the Court of Appeal (Neill, Waite and Swinton Thomas LJJ) ([1996] 1 All ER 500, [1996] QB 361) gave the plaintiff leave to appeal, but dismissed his appeal. The principal judgment was delivered by Waite LJ. He concluded that Sir John Wood was right to treat the non-availability of legal aid in Namibia as irrelevant to his decision, the exclusion of consideration of legal aid being consistent with s 31(1)(b) of the Legal Aid Act 1988. Neill and Swinton Thomas LJJ considered that the subsection placed an insuperable obstacle in the way of the plaintiff.

On 2 October 1995 the plaintiff's solicitors informed the defendants that the plaintiff would not proceed with a petition for leave to appeal to this House; but that the solicitors had entered into a conditional fee agreement with the plaintiff, and that therefore a summons would be issued seeking the lifting of the stay. Conditional fee agreements between legal advisers and clients had been authorised by s 58 of the Courts and Legal Services Act 1990, and by the Conditional Fee Agreements Order 1995, SI 1995/1674, which came into force on 5 July 1995. The plaintiff's legal aid certificate was discharged; but his solicitors

later made it plain that they could not rule out the possibility that at some point in the future the plaintiff might again apply for legal aid. The defendants expressed the opinion that it was only a matter of time before the plaintiff was back on legal aid again, in view of the size, scope and cost of the proposed trial. Indeed it became apparent that at that time the conditional fee agreement was limited to the application to discharge the stay and any appeal from it, and certainly did not extend so far as to include the trial of the action.

The plaintiff's application to lift the stay came before Mr David Steel QC, sitting as a deputy judge of the High Court, on 27 October 1995. Before him, the plaintiff's solicitors stated that they would enter into further conditional fee agreements if that was 'the only way of ensuring that the plaintiff gets justice'. Mr Steel accepted that this statement was made in good faith, but he concluded that it was, to put it at its lowest, astonishingly ambitious. He took a realistic view of the situation, and considered that it was almost inevitable that an application for legal aid would in due course be made. It followed that in reality the situation had not changed. He therefore dismissed the plaintiff's application, and refused leave to appeal.

The plaintiff applied ex parte to the Court of Appeal for leave to appeal from Mr Steel's order. On 29 January 1996, the plaintiff having offered undertakings that he would not apply for legal aid and that his solicitors would continue the conditional fee agreement on appropriate terms until the conclusion of the trial or earlier order, the Court of Appeal (Millett and Ward LJJ) granted him leave.

On 2 May 1996 the Court of Appeal (Sir Thomas Bingham MR, Evans and Ward LJJ) allowed the plaintiff's appeal. The leading judgment was delivered by Sir Thomas Bingham MR. He rejected the realistic approach adopted by Mr Steel, especially as the limited conditional fee agreement was supported by the undertakings given by the plaintiff's solicitors on the application for leave to appeal. The plaintiff was able to proceed without recourse to legal aid, and so s 31(1)(b) of the 1988 Act no longer stood in his way. Accordingly the court considered the matter on the basis of the principles stated by your Lordships' House in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460. On 2 May 1996 they decided to allow the appeal. The decisive consideration is to be found in the following passage from the judgment of Sir Thomas Bingham MR:

> 'But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.'

The defendants petitioned this House for leave to appeal from this decision, and the plaintiff then petitioned for leave to appeal out of time from the decision of the Court of Appeal of 18 August 1995. Your Lordships' House gave leave in both cases.

There followed a minor complication. The plaintiff lodged a notice of appeal, but did not post the required security. Accordingly on 3 March 1996 his appeal stood dismissed pursuant to Practice Direction 11.1. The plaintiff then petitioned for his appeal to be restored, and his petition was granted.

Section 31(1)(b) of the Legal Aid Act 1988

I propose to turn at once to consider the relevance of this subsection. It was regarded as decisive, both by Sir John Wood and by the Court of Appeal, in relation to what I will call the first appeal. There is no comparable statutory provision in respect of conditional fee agreements, and so no argument of this kind is available to RTZ in respect of the second appeal. This of itself presents a remarkable contrast between the two appeals.

I have already set out the terms of the subsection. The suggestion is that the subsection has the effect that, in the case of an application for a stay of proceedings on the principle of forum non conveniens, the fact that the plaintiff is in receipt of legal aid in this country cannot be taken into account because the subsection provides that the receipt of legal aid 'shall not affect ... the principles on which the discretion of any court or tribunal is normally exercised'. I feel bound to say that I find it surprising that the subsection should have this effect. I can fully understand that, in matters arising in the course of legal proceedings in this country, the fact that one party is in receipt of legal aid should not be allowed to distort the legal process, whether as regards the rights or liabilities of other parties, or as regards the principles on which judicial discretions are exercised. The limited purpose of legal aid is, after all, to enable a person, who would otherwise lack the means to do so, to litigate; and it is understandable that his receipt of legal aid should not be allowed to have any such effect. But when it comes to an application by the other party to stay proceedings brought in this country by a legally aided plaintiff on the ground of forum non conveniens, it is difficult to see why the *fact* that the plaintiff is legally aided, which would in the circumstances be a relevant fact to be taken into account on the application, should be excluded. In such circumstances it is the exclusion of that fact, rather than its inclusion, which would have the fact of distorting the legal process.

In approaching the question whether the subsection has the effect of excluding the receipt of legal aid from the relevant considerations in cases of forum non conveniens, it is of some interest to consider the analogous situation where a stay of proceedings is sought to enable the matter in dispute to go to arbitration pursuant to an arbitration agreement between the parties. Under s 4(1) of the Arbitration Act 1950 (formerly s 4 of the Arbitration Act 1889) the court had a discretion to grant a stay of proceedings brought in breach of an arbitration clause; and, provided the statutory conditions for the grant of a stay were satisfied, the court would grant a stay unless the person resisting the application could persuade the court that good reason existed why a stay should not be granted. (For the present law, see s 9 of the Arbitration Act 1996.)

For present purposes the relevant authorities on this subject begin with *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95, decided before legal aid was made available by the Legal Aid and Assistance Act 1949, in which the provisions of s 31(1)(b) of the 1986 Act first appeared in identical terms in s 1(7)(b) of 1949 Act. In *Smith's* case the plaintiff claimed that, by reason of his poverty, he could obtain assistance from the Poor Persons Committee in court proceedings, but that such assistance was not available to him in arbitration. The Court of Appeal nevertheless stayed his action to enable the matter to go to arbitration under an arbitration clause binding on him, holding that poverty did not of itself justify the court to refuse to give effect to the agreement to arbitrate. A similar conclusion was reached in *Ford v Clarksons Holidays Ltd* [1971] 3 All ER 454, [1971] 1 WLR 1412, in which no question of legal aid arose. The party resisting a stay in that case simply claimed that the cost of arbitration was much greater than the cost of

a county court action. The Court of Appeal, following the earlier decision in *Smith*, held that this was not a good reason for refusing a stay.

In *Re Saxton (decd), Johnston v Saxton* [1962] 3 All ER 92, [1962] 1 WLR 968 the Court of Appeal duly gave effect to s 1(7)(b) of the 1949 Act, not in connection with an arbitration clause, but with an order made in the course of proceedings in court. An application was made by the plaintiff to the trial judge for an order that the defendants should produce certain documents for examination by a handwriting expert instructed by the plaintiffs. The judge granted the application but, having regard to the fact that the plaintiffs were legally aided, imposed a condition that the plaintiffs should disclose to the defendants any report by the expert. The Court of Appeal deleted the condition, holding that s 1(7)(b) of the 1949 Act required the court to disregard the fact that the defendants were legally aided. However, in *Fakes v Taylor Woodrow Construction Ltd* [1973] 1 All ER 670, [1973] QB 436 the application of s 1(7)(b) arose in an acute form with reference to an arbitration clause. The plaintiff acted as plumbing subcontractor to the defendants, and claimed a large sum, amounting to over £80,000, from them. The defendants invoked an arbitration clause in the subcontract. The plaintiff however contended that, by reason of the defendants' default, he himself had been made insolvent and his business ruined. Legal aid was available to him in the High Court, but not in arbitration proceedings; and he claimed that, as a result of the defendants' default, he lacked the means to fight the arbitration proceedings, or even to take up an arbitration award in his favour. The Court of Appeal decided by a majority to refuse a stay. Lord Denning MR considered that if, as the plaintiff claimed, his insolvency arose as the result of the defendants' breach of contract, it would be a denial of justice to require him to go to arbitration, which he could not afford, instead of proceeding in the High Court, where he could get legal aid. Sir Gordon Willmer agreed, holding that there was sufficient material to justify the conclusion that there was a reasonable probability that the defendants' breaches of contract induced the plaintiff's poverty. They both concluded that s 1(7)(b) of the 1949 Act did not compel them to reach a different conclusion. Megaw LJ, who dissented, held that that subsection did indeed compel the court to grant a stay. The decision in *Fakes* was later followed in *Goodman v Winchester and Alton Rly plc* [1984] 3 All ER 594, [1985] 1 WLR 141, and considered in *Trustee of the property of Andrews v Brock Builders (Kessingland) Ltd* [1997] 3 WLR 124, though without reference to the point arising under the Legal Aid legislation. I need not dwell upon the reasons given by Lord Denning MR in *Fakes'* case for holding that s 1(7)(b) did not stand in the way of his conclusion, though I am compelled to say that, as Parker LJ was subsequently to hold (see *Jones v Thyssen (GB) Ltd* (1991) 57 BLR 116 at 123–125), that reasoning was not persuasive. Yet the justice of the decision of the majority of the Court of Appeal was very strong; and it is startling that s 1(7)(b) should have the effect of compelling the court to refuse to do justice in a case of this kind. This prompts the question whether the decision of the majority of the Court of Appeal in *Fakes'* case can be justified on the basis that the subsection has no application in the case of an application for a stay under the Arbitration Act, where the discretion falls to be exercised not in the course of the proceedings themselves (as in *Re Saxton (decd), Johnston v Saxton* [1962] 3 All ER 92, [1962] 1 WLR 968), but in deciding whether or not the action should be permitted to proceed at all in court.

For the present purposes it is not necessary for your Lordships to consider that question, which does not directly arise for decision in the present appeal. It is enough that I should record that I entertain serious doubts whether the

subsection was intended to apply in that situation. I am, however, satisfied that the subsection was never intended to apply in the case of applications for a stay of proceedings on the ground of forum non conveniens. In such a case, the question at issue is whether 'the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice': see *Sim v Robinow* (1892) R (Ct of Sess) 665 at 668, per Lord Kinnear, cited with approval in *The Spiliada* [1986] 3 All ER 843 at 853, [1987] AC 460 at 474. It would, in my opinion, be strange indeed if the application of so broad a principle of justice should be artificially curtailed by s 31(1)(b) of the Legal Aid Act 1988, so that the receipt by the plaintiff of legal aid is automatically excluded from the range of relevant considerations. Certainly the policy underlying the subsection, as I have identified it, provides no explanation, still less justification, for so curtailing it. For the reasons I have given I am satisfied that on its true construction, the subsection does not have any such effect.

My noble and learned friend Lord Hope of Craighead, has drawn my attention to the comparable provisions of the Scottish legal aid legislation. The original Scottish Act, the Legal Aid and Solicitors (Scotland) Act 1949, received the Royal Assent on the same day as the English Act, the Legal Aid and Assistance Act 1949. The long titles of the two Acts are virtually identical, as are many provisions of the two Acts. Section 1 of each of the two Acts contains only one material distinction, which is that there is no provision in the Scottish Act equivalent to s 1(7)(b) of the English Act. This difference has persisted, so that there is still no provision in the present Legal Aid (Scotland) Act 1986 equivalent to s 31(1)(b) of the English 1988 Act.

I do not know why this distinction exists between the English and Scottish legal aid legislation. Whatever the reason, it must transcend any consideration relating to a stay of proceedings under the Arbitration Act or on the ground of forum non conveniens. Nevertheless, the result is that in Scotland, the native home of the principle of forum non conveniens now adopted in English law, there is nothing in the legislation to prevent the availability of legal aid being taken into account when that principle is invoked. This being so, it would be most remarkable if in England alone that principle was to be curtailed by excluding any consideration of the availability of legal aid. I add for good measure that, if s 31(1)(b) has that effect, this would also lead to the extraordinary result that conditional fee arrangements can be taken into account in this context, but not the availability of legal aid. These consequences fortify me in the view that s 31(1)(b) of the 1988 Act (and its predecessor s 1(7)(b) of the 1949 Act) were, on their true construction, never intended to have any such effect.

It follows that, in my opinion, for the purposes of considering the question in the present case, s 31(1)(b) can be disregarded as irrelevant. Accordingly the question arising on the two appeals can be considered simply on the basis of the principles applicable in cases of forum non conveniens, in relation to the availability either of legal aid or of a conditional fee agreement. To those principles I now turn.

Forum non conveniens

There are, as I have said, two appeals before your Lordships, one concerned with the impact of a conditional fee agreement, and the other with the impact of the availability of legal aid. In the former the defendants are the appellants, and in the latter the plaintiff is the appellant. In point of time, it was the former

(which I have called the second appeal) which came first before your Lordships' House, with the leave of this House, although the relevant decision of the Court of Appeal was later than the decision of the Court of Appeal (in what I have called the first appeal) concerned with legal aid. The appeal from the latter decision was only added later when your Lordships' House granted leave to appeal to enable the two related matters to be considered together. As a result, the defendants' written case was primarily directed towards the second appeal, concerned with the conditional fee arrangement.

The cases advanced by the two parties before your Lordships presented diametrically opposed points of view. Those representing the plaintiff are plainly concerned with what they see as a potential denial of justice to their client. Their simple position, which was accepted as decisive by Sir Thomas Bingham MR on the conditional fee appeal, is that it is impossible for their client's case to be presented without financial assistance, indeed very substantial financial assistance; and as such assistance is not available to him in Namibia, but is available to him in this country, justice requires that there should be no stay of his action here, as it is only here that his case can be tried at all. The commitment of the plaintiff's advisers to his case is shown, not only by his solicitors' willingness to enter into a very substantial conditional fee agreement, but also by his barristers' readiness to act pro bono in the proceedings. Moreover, your Lordships were told that at least some of the expert witnesses who were expected to give evidence on his behalf in the proceedings were also prepared to act on a conditional fee basis; though the propriety of any such arrangement was questioned by the defendants.

From the defendants' point of view the matter appeared very differently. They see the plaintiff's claim as being highly speculative. The first defendant, your Lordships were told, is a holding company which has never traded, and has never employed anybody. The second defendant had transferred to it the contracts of employment of certain senior employees of RUL from 1 January 1980, to provide them with a measure of security in the prevailing political situation and to protect their pension entitlements; its only business was to second these employees to RUL, which exercised full direction and control over them. The defendants also claim that the medical evidence supporting the allegation that the defendants caused the plaintiff's cancer is very thin, as is the evidence for the plaintiff's assertion that the first defendant devised the health and safety policy at Rossing. In addition, the plaintiff's claim is out of time, with the result that an English court will only hear it if it is prepared to exercise its discretion to do so under s 33 of the Limitation Act 1980, and to decline to apply the relevant Namibian time bar (as required by s 1 of the Foreign Limitation Periods Act 1984). Furthermore, having regard to the ambitious scope of the action envisaged by the plaintiff's solicitors, involving a very wide range of expert evidence, the defendants' solicitors estimate that the costs of the trial could run into millions of pounds, whereas the plaintiff has contended that, even if he is completely successful, he will recover less than £400,000 including interest. So far as the conditional fee agreement is concerned, the defendants not only assert that the plaintiff's solicitors' expressed willingness to enter into such an agreement for the whole action is, as Mr David Steel QC held, astonishingly ambitious, but also that it is relevant to consider what arrangement the plaintiff's solicitors have made to cover the defendants' costs in the event of the plaintiff losing the action, bearing in mind that the only insurance available for this purpose from the Law Society

is to cover causes of action arising in this country and is in any event limited to £100,000.

The unstated implication underlying these matters must be that the defendants see the purpose of the action as being to put them in the position where it would pay them to settle what they see to be the plaintiff's very weak claim for a substantial sum, rather than contest the action, however strong a defence they may have, and if successful in their defence find themselves faced with irrecoverable costs far exceeding the maximum amount of the claim.

Faced with these diametrically opposed points of view your Lordships should, I suggest, approach the appeals as follows. First, the question of a stay of proceedings must be considered on the basis of the applicable principles. These principles are concerned with the identification of the appropriate forum for the trial. They are not concerned with the strength of the plaintiff's claim, as to which your Lordships are not at present in any position to form a judgment. If it is decided that a stay should not be granted, then there are mechanisms available within the English trial process, such as an order for a preliminary issue, which can be invoked with a view to shortening the trial and saving costs. Second, if I am right in my view that s 31(1)(b) of the Legal Aid Act 1988 has no application in these appeals, it will follow that, given a favourable decision by the Legal Aid authorities, the plaintiff would in all probability pursue his claim with the support of legal aid rather than on the basis of a conditional fee agreement.

With this by way of introduction, I turn to consider the applicable principles.

The applicable principles

It is accepted on both sides that these are to be found in the decision of your Lordships' House in *The Spiliada* [1986] 3 All ER 843, [1987] AC 460. I take the liberty of repeating that the underlying principle, drawn from the judgment of Lord Kinnear in *Sim v Robinow* (1892) 14 R (Ct of Sess) 665 at 668, was stated to be that—

> 'a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.' (See [1986] 3 All ER 843 at 854, [1987] AC 460 at 476.)

It was further stated that the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. For that purpose, he has to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum in which jurisdiction has been founded by the plaintiff as of right. In considering that question, the court will look first to see what factors there are which point in the direction of another forum, ie connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection. This is the first stage. However, even if the court concludes at that stage that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage.

Before your Lordships it was accepted by the plaintiff that the defendants had discharged the burden on them at the first stage of establishing that Namibia was the jurisdiction with which the action had the closest connection, with the effect

that prima facie a stay should be granted. The crucial question arose, therefore, whether a stay should nevertheless be refused because justice so required, on the grounds that the plaintiff could not proceed with the trial without financial assistance and that, whereas no such assistance was available in Namibia, it was available in England, in the form either of legal aid or, failing that, a conditional fee agreement. The question therefore arises whether these circumstances are capable of justifying a refusal of a stay in favour of the appropriate forum and, if so, whether the Court of Appeal was justified in holding that for that reason a stay should be refused on the facts of the present case.

In *The Spiliada* [1986] 3 All ER 843 at 856, [1987] AC 460 at 478 it was stated that, at the second stage of the inquiry, the court will consider all the circumstances. Certainly the court is not restricted at this stage to considering factors which may connect the litigation with the English jurisdiction. In support of this proposition, reliance can properly be placed on *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23, a case concerned with service out of the jurisdiction in which the Court of Appeal refused to set aside the service of the writ in Germany in circumstances in which the plaintiff, a German national of the Jewish faith, might not have been entitled to the services of an advocate in the German court and would have run a grave personal risk if he travelled to Germany to conduct his case in person. A similar point was considered, but rejected on the facts, by the House of Lords in *The Abidin Daver* [1984] 1 All ER 470, [1984] AC 398, a case concerned with lis alibi pendens. Furthermore, some guidance was given in *The Spiliada* [1986] 3 All ER 843 at 859, [1987] AC 460 at 482 as to the impact of specific advantages which the plaintiff might derive from the English jurisdiction, if a stay was not granted, viz damages on a higher scale; a more complete system of discovery; a power to award interest; a more generous limitation period. From the discussion which followed, a general principle may be derived, which is that, if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, and are in consequence lacking in financial resources compared with our own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay: see *The Spiliada* [1986] 3 All ER 843 at 859, [1987] AC 460 at 482.

I wish to interpolate at this stage that there is no question of the plaintiff in this case having founded jurisdiction against the defendants on what may be described as an extravagant basis. In a case where the plaintiff has done so, for example by serving proceedings on an individual defendant while on a brief visit to this country, the court may not be prepared to assist him by refusing a stay to enable him to keep the benefit of an advantage available to him in this country. Certainly in Scotland there has been a marked tendency to grant a stay, despite the availability of an advantage to the plaintiff in that country, where jurisdiction has been founded on the extravagant basis of arrestment of the defendant's assets within the jurisdiction: see eg *Lane v Foulds* (1903) 11 SLT 118 and *Anderson*

Tulloch & Co v J C & J Field Ltd 1910 SLT 401. Here, however, the plaintiff founded jurisdiction as of right by serving the two defendants in this country, both of them being English companies registered here. No doubt their domicile in this country, coupled with the availability of financial assistance here, has encouraged him to select them as defendants in place of RUL. But I cannot see that that of itself exposes the plaintiff to criticism. If he was going to sue these defendants, this was an appropriate jurisdiction in which to serve proceedings on them. It is then for the defendants to persuade the court, as they are seeking to do, that the action should be stayed on the ordinary principles of forum non conveniens.

I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would of itself justify the refusal of a stay on the ground of forum non conveniens. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even since that date it has been only available for persons with limited means. People above that limit may well lack the means to litigate, which provides one reason for the recent legalisation of conditional fee agreements.

Even so, the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.

This is in effect what was urged upon your Lordships in the present case. It is clear that the nature and complexity of the case is such that it cannot be tried at all without the benefit of financial assistance. There are two reasons for this. The first is that, as Sir Thomas Bingham MR recognised, there is no practical possibility of the issues which arise in the case being tried without the plaintiff having the benefit of professional legal assistance; and the second is that his case cannot be developed before a court without evidence from expert scientific witnesses. It is not in dispute that in these circumstances the case cannot be tried in Namibia; whereas, on the evidence before the Court of Appeal and before your Lordships, it appears that if the case is fought in this country the plaintiff will either obtain assistance in the form of legal aid or, failing that, receive the benefit of a conditional fee agreement with his solicitor. With regard to the latter I am, like the Court of Appeal, not prepared to doubt the sincerity of the statement made by the plaintiff's solicitor, Mr Meeran, on oath, that he is prepared to enter into a conditional fee agreement to cover the conduct of the action, up to and including the trial. In these circumstances I am satisfied that this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available.

If the position had been, for example, that the plaintiff was seeking to take advantage of financial assistance available here to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum, it might well have been necessary to take a different view. But this is not the present case. There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.

Conclusion

For these reasons, I would allow the plaintiff's appeal in the first (legal aid) appeal, and dismiss the defendants' appeal in the second (conditional fee agreement) appeal. The defendants should, in my opinion, pay the plaintiff's costs of the first appeal here and below, and his costs of the second appeal before your Lordships' House.

Postscript

I wish to record that the argument that s 31(1)(b) of the Legal Aid Act 1988 should be held to be inapplicable in the case of an application for a stay of proceedings on the ground of forum non conveniens was not explored in depth before the Appellate Committee. In ordinary circumstances, therefore, the Committee might invite further submissions on the point before concluding that it should affect the outcome of the appeal. I have, however, come to the conclusion that in the present appeal it is, exceptionally, unnecessary and inappropriate for that course to be taken. First, the argument has no impact on what I have called the second appeal, which is concerned not with legal aid but with a conditional fee agreement. Moreover, the present position is that the plaintiff has the benefit of such an agreement, but is not in receipt of legal aid. It follows that the defendants' application for a stay must in any event fail, regardless of this argument. Second, this interlocutory battle has continued for nearly three years, and it is highly undesirable that it should be prolonged by yet another hearing. For these reasons, and bearing in mind that it is in the public interest that the point should be addressed and decided, I would not invite further submissions on the point.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley. I agree with it and for the reasons which he gives I would also allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Goff of Chieveley. I agree with his opinion on the construction of s 31(1)(b) of the Legal Aid Act 1988. I am however in the somewhat invidious position of not being in agreement with my noble and learned friend's application of the principles stated in his own classic judgment in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460. In my view, the existence of neither legal aid nor a conditional fee agreement is sufficient to displace the prima facie conclusion that Namibia is the

appropriate forum for the trial of this case. Since none of your Lordships share this view, I shall state it with brevity.

In principle I understand your Lordships to accept that the availability in England of one form or another of financial assistance to carry on litigation is not a reason for refusing a stay when another country is so much more closely connected with the subject-matter of the litigation as to make it clearly the more appropriate forum. But, it is said, there are circumstances which make this an exceptional case. These consist of a combination of three factors.

First, the plaintiff's lack of means and the complexity of the litigation make it in practice impossible for him to present his case effectively before the courts of Namibia. This was regarded as the determining factor by Sir Thomas Bingham MR:

> 'Faced with the stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights.'

My Lords, of course I sympathise with the plaintiff, who has contracted a serious disease while employed in another country and considers that he can demonstrate that it was caused by the conditions under which he worked and these are attributable to the culpable neglect of the defendants. But I do not think that the refusal a stay on this ground can be based upon any defensible principle. It means that the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same transaction will not. It means that the more speculative and difficult the action, the more likely it is to be allowed to proceed in this country with the support of public funds. Such distinctions will do the law no credit. For my part, I prefer the eminently rational principle stated by Sopinka J in *Amchem Products Inc v Workers' Compensation Board* (1993) 102 DLR (4th) 96 at 110–111:

> 'The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.'

In my view, the plaintiff while employed in Namibia had no legitimate expectation that litigation arising out of the circumstances of his employment would take place in England. He had abandoned his Scottish domicile of origin and emigrated to South Africa. He had then moved to Namibia. His position was therefore no different from that of a native Namibian. Apart from the fact that his employer formed part of a multinational group of companies with its headquarters in England, the transaction had no connection with England.

The second factor relied upon is that the defendants are English companies properly served within the jurisdiction. The English court therefore has personal jurisdiction over them. But, my Lords, that is always the starting point for the

exercise of the jurisdiction on the ground of forum non conveniens. It is the reason why the burden is on the defendant to satisfy the court, by reference to the subject-matter of the litigation, that there clearly another more appropriate forum. If, however, the defendant has satisfied the burden, I do not see how the existence of personal jurisdiction can without more be a factor to cast into the balance. I say, 'without more', because there may be other reasons why the defendant not only can be sued here but why his presence in the jurisdiction makes it more appropriate to sue him here. But there is no such factor in this case. The defendant is a multinational company, present almost everywhere and certainly present and ready to be sued in Namibia. I would therefore regard the presence of the defendants in the jurisdiction as a neutral factor. If the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world.

Third and last, there is the fact that the plaintiff has, since leaving his employment, taken up residence and resumed his domicile of origin in Scotland. In my view, this change which has taken place since the events forming the subject matter of the litigation cannot affect the question of whether the plaintiff had a legitimate expectation of being able to invoke the English jurisdiction.

For these reasons, I would have allowed the conditional fee appeal and dismissed the legal aid appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Goff of Chieveley. I entirely agree with it, and for the same reasons I also would allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Goff of Chieveley. I agree with it, and for the reasons which he gives, would also allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.

Plaintiff's appeal allowed; defendants' appeal dismissed.

Celia Fox Barrister.

Practice Note

COURT OF APPEAL, CRIMINAL DIVISION

LORD BINGHAM OF CORNHILL CJ, POTTS AND BUTTERFIELD JJ

9 OCTOBER 1997

Criminal law – Trial – Previous convictions – Police – Duty to provide particulars – Particulars of previous convictions – Standard for provision of antecedent information in Crown Court and magistrates' courts – Standard forms – Provision of information to court and parties.

LORD BINGHAM OF CORNHILL CJ gave the following direction at the sitting of the court.

The practice direction (crime: antecedents) ([1993] 4 All ER 863, [1993] 1 WLR 1459) issued on 25 October 1993 is hereby revoked. New arrangements for the provision of information of antecedents in the Crown Court and in the magistrates' courts following the introduction of computerised information from the police national computer is annexed to this direction and is to apply henceforth.

Standard for the provision of information of antecedents in the Crown Court and magistrates' courts

1. These procedure have been agreed by the Senior Judiciary, Lord Chancellor's Department, Magistrates' Association, Justices' Clerks Society, Crown Prosecution Service (CPS) and the Association of Chief Police Officers, and will assist the prosecution in presenting antecedents to both the Crown Court and the magistrates' courts. They replace those attached to the practice direction (crime: antecedents) issued on 25 October 1993. They allow for the provision of information of antecedents in respect of previous convictions and cautions to be provided by the police directly from the police national computer (PNC). The procedures set the standard as to the level of information to be provided.

2. In the Crown Court the police will provide brief details of the circumstances of the last three similar convictions and/or of convictions likely to be of interest to the court, the latter being judged on a case by case basis. This information should be provided separately and attached to the antecedents as set out below.

3. Where the current alleged offence is within the meaning of an existing community order eg probation order, and it is known that that order is still in force then, so far as the Crown Court is concerned, to enable the court to consider the possibility of revoking that order, details of the circumstances of the offence leading to the community order should be included in the antecedents as set out below.

4. PREPARATION OF ANTECEDENTS AND STANDARD FORMATS TO BE USED

Magistrates' courts and Crown Court

• Personal details and summary of convictions and cautions	PNC Court/Defence/Probation Summary Sheet.
• Previous convictions	PNC Court/Defence/Probation printout, supplemented by Form MG16 if the police force holds convictions not shown on PNC.
• Recorded cautions	PNC Court/Defence/Probation printout, supplemented by Form MG17 if the police force holds cautions not shown on PNC.

and in addition in the Crown Court

• Circumstances of last three similar convictions	Form MG(c). The detail should be brief and include the date of the offence.
• Circumstances of offence leading to community order still in force	

5. PROVISION OF ANTECEDENTS TO THE COURT AND PARTIES

Crown Court

- The Crown Court antecedents will be prepared by the police immediately following committal proceedings, including committals for sentence, transfers under s 4 of the Criminal Justice Act 1987, or s 53 of the Criminal Justice Act 1991, or upon receipt of a notice of appeal, excluding non-imprisonable motoring offences.
- Seven copies of the antecedents will be prepared in respect of each defendant. Two copies are to be provided to the CPS direct, the remaining five to be sent to the Crown Court. The court will send one copy to the defence and one to the Probation Service. The remaining copies are for the court's use. Where following conviction a custodial order is made one copy is to be attached to the order sent to the prison.
- The antecedents must be provided as above, within 21 days of committal or transfer in each case. Any points arising from them are to be raised with the police by the defence solicitor as soon as possible and, where there is time, at least seven days before the hearing date so that the matter can be resolved prior to that hearing.
- Seven days before the hearing date, the police will check the record of convictions. Details of any additional convictions will be provided using the standard format above. These will be provided as above and attached to the documents already supplied. Details of any additional outstanding cases will also be provided at this stage.

Magistrates' courts

- The magistrates' court antecedents will be prepared by the police and submitted to the CPS with the case file.
- Five copies of the antecedents will be prepared in respect of each defendant and provided to the CPS who will be responsible for distributing them to others at the sentencing hearing. Normally two copies will be provided to the court, one to the defence and one to the Probation Service when appropriate. Where following conviction a custodial order is made, one of the court's copies is to be attached to the order sent to the prison.
- In instances where antecedents have been provided to the court some time before the hearing the police will, if requested to do so by the CPS, check the record of convictions. Details of any additional convictions will be provided using the standard format above. These will be provided as above and attached to the documents already supplied. Details of any additional outstanding cases will also be provided at this stage.

6. The above arrangements whereby the police provide the antecedents to the CPS for passing on to others will apply unless there is a local agreement between the CPS and the court that alters that arrangement.

N P Metcalfe Esq Barrister.

Soden and another v British and Commonwealth Holdings plc (in administration) and another

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD LLOYD OF BERWICK, LORD STEYN, LORD HOFFMANN AND LORD HOPE OF CRAIGHEAD

21 JULY, 16 OCTOBER 1997

Company – Voluntary winding up – Distribution of company property – Distribution under scheme of arrangement – Priority of claims – Claims by shareholder – Claims for damages against company for misrepresentation inducing purchase of shares – Whether damages sum due to member of company 'in his character of a member' – Test to be applied – Insolvency Act 1986, s 74(2)(f).

In 1988 B & C purchased for £434m the whole of the share capital of A plc. The acquisition proved to be disastrous. Both companies subsequently went into administration. The administrators of B & C brought an action against, inter alia, A plc for damages for negligent misrepresentations allegedly made by A plc so as to induce B & C to acquire its shares and against BZW for negligent advice given in relation to the acquisition of A plc shares. The liabilities of A plc greatly exceeded its assets and, in 1994, the court approved a scheme of arrangement to which B & C was not a party which provided that, subject to the payment of preferential liabilities, the scheme assets should be distributed pari passu between the scheme creditors as if A plc were in liquidation. The administrators applied to the court for directions as to whether the damages and costs recoverable by B & C and BZW, if the actions succeeded, would be subordinated to the claims of the other creditors of A plc by virtue of being sums due to a 'member of the company (in his character of a member)' within s 74(2)(f)[a] of the Insolvency Act 1986 and, if so, whether the subordinated claims of B & C and BZW fell to be treated as scheme liabilities under the scheme of arrangement. The judge held that B & C's claim was not subordinated to the claims of the other creditors, that BZW's claim was not so subordinated and that if, contrary to his views, the claims were subordinated they did not rank as scheme liabilities under the scheme of arrangement. The administrators appealed to the Court of Appeal against the judge's decision in relation to the B & C claim; and B & C cross-appealed against his decision on the question whether its claims were scheme liabilities. The Court of Appeal upheld the judge's decision on both points and dismissed both the appeal and cross-appeal. The administrators appealed to the House of Lords on the issue of whether B & C's claims, if successful, should be subordinated to the claims of the general creditors of A plc by virtue of s 74(2)(f) of the 1986 Act.

Held – Section 74(2)(f) of the 1986 Act required a distinction to be drawn between sums due to a member in his character of a member by way of dividends, profits or otherwise, and sums due to a member of a company otherwise than in his character as a member. In the absence of any contrary

a Section 74, so far as material, is set out at p 356 *b* to *d*, post

indication, sums due to a member 'in his character of a member', were only those sums falling due under and by virtue of the statutory contract between the members and the company and the members inter se constituted by s 14(1)[b] of the Companies Act 1985. That construction accorded with the principle that the rights of members as members came last, in that rights founded on the statutory contract were, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of actions. In the instant case, it was clear that the sum, if any, due to B & C was not due to it in its 'character of a member' of A plc within s 74(2)(f) of the 1986 Act; the claim stood on exactly the same footing as any other claim by B & C against A plc which was wholly unrelated to the shares in A plc. Accordingly the appeal would be dismissed (see p 357 *d e g h*, p 358 *a b* and p 360 *h* to p 361 *d*, post).

Re Addlestone Linoleum Co (1887) 37 Ch D 191 and *Webb Distributors (Aust) Pty Ltd v State of Victoria* (1993) 11 ACSR 731 distinguished.

Decision of the Court of Appeal [1996] 3 All ER 951 affirmed.

Notes

For distribution of assets in general, see 7(3) *Halsbury's Laws* (4th edn reissue) para 2563, and for cases on the subject, see 9(2) *Digest* (2nd reissue) 142, 443, *4299*, *6368* and 10(2) *Digest* (2nd reissue) 39, 41, 272, *9868*, *9882–9884*, *11467*.

For the Companies Act 1985, s 14, see 8 *Halsbury's Statutes* (4th edn) (1991 reissue) 135.

For the Insolvency Act 1986, s 74, see 4 *Halsbury's Statutes* (4th edn) (1987 reissue) 769.

Cases referred to in opinions

Addlestone Linoleum Co, Re (1887) 37 Ch D 191, Ch D and CA.
Dale & Plant Ltd, Re (1889) 43 Ch D 255.
Eutrope (W H) & Sons Pty Ltd (in liq), Re [1932] VLR 453, Vic SC.
Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317, HL.
Leicester Club and County Racecourse Co, Re, ex p Cannon (1885) 30 Ch D 629.
New British Iron Co, Re, ex p Beckwith [1898] 1 Ch 324.
Ooregum Gold Mining Co of India Ltd v Roper, Wallroth v Roper [1892] AC 125, HL.
Webb Distributors (Aust) Pty Ltd v State of Victoria (1993) 11 ACSR 731, Aust HC.

Appeal

John Francis Soden and Peter Sheldon Padmore, the administrators of Atlantic Computers plc (Atlantic), appealed with leave from the decision of the Court of Appeal (Russell, Hirst and Peter Gibson LJJ) ([1996] 3 All ER 951, [1997] 2 WLR 206) delivered on 15 May 1996 dismissing the administrators' appeal from the decision of Robert Walker J ([1995] 1 BCLC 686) on 27 April 1995, whereby he determined that various damages claims brought by the first and second defendants, British and Commonwealth Holdings plc (in administration) (B & C) and Barclays de Zoete Wedd Ltd (BZW), against Atlantic for negligence and misrepresentation, were not within s 74(2)(f) of the Insolvency Act 1986, and even if they were, B & C was not bound by the scheme of arrangement made by the court in respect of Atlantic under s 425 of the Companies Act 1985. BZW took no part in the appeal. The facts are set out in the opinion of Lord Browne-Wilkinson.

b Section 14(1) is set out at p 357 *e f*, post

Robin Potts QC and *Dan Prentice* (instructed by *Cameron McKenna*) for the administrators.

William Stubbs QC and *Catherine Roberts* (instructed by *Stephenson Harwood*) for B & C.

Their Lordships took time for consideration.

16 October 1997. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, in 1988 British and Commonwealth Holdings plc (B & C) purchased for some £434m the whole of the share capital of Atlantic Computers plc (Atlantic). The acquisition proved to be disastrous. Atlantic went into administration in 1990. The administrators of Atlantic are the appellants in your Lordships' House. B & C is also in administration. It has brought proceedings against, inter alia, Atlantic (the main action) for damages for negligent misrepresentations said to have been made by Atlantic so as to induce B & C to acquire its shares. B & C has also brought proceedings against Barclays de Zoete Wedd Ltd (the BZW action) for damages for negligent advice given in relation to the acquisition of the Atlantic shares. BZW has issued third party proceedings against Atlantic for contribution and damages.

Quite apart from the claims in the main action and the BZW action, the liabilities of Atlantic greatly exceed its assets. On 30 March 1994 the court approved a scheme of arrangement to which B & C was not a party. It provided that, subject to the payment of preferential liabilities, the scheme assets should be distributed pari passu between the scheme creditors broadly on the same basis as if Atlantic were in liquidation.

Neither the main action nor the BZW action has yet come to trial. In these proceedings the administrators have applied to the court by originating summons for directions (a) whether the damages and costs recoverable by B & C and BZW, if the actions succeed, will be subordinated to the claims of the other creditors of Atlantic by virtue of being sums due to a 'member of the company (in his character of a member)' within s 74(2)(f) of the Insolvency Act 1986 and (b) if so, whether the subordinated claims of B & C and BZW fall to be treated as scheme liabilities under the scheme of arrangement. In one sense, the originating summons raises hypothetical questions since, unless the main action and the BZW action succeed, the priority of those claims will not be a material factor. However, the courts below and your Lordships were satisfied that it is proper to decide these points at the present time. The claims in the main action and the BZW action, if successful, may give rise to enormous damages (in the region of £500m). The status of the claims in these actions vis-à-vis the other creditors of Atlantic has an immediate and profound impact on the way in which the scheme of arrangement is now to be administered.

The trial judge, Robert Walker J ([1995] 1 BCLC 686) held, first, that B & C's claim was not subordinated to the claims of the other creditors; second, that BZW's claim was not so subordinated; third, that if contrary to his views such claims were subordinated they did not rank as scheme liabilities under the scheme of arrangement. The administrators appealed to the Court of Appeal against the judge's decision in relation to the B & C claim but not against his decision on the BZW claim. B & C cross-appealed against the judge's decision on the question whether its claims were scheme liabilities. The Court of Appeal

(Russell, Hirst and Peter Gibson LJJ) ([1996] 3 All ER 951, [1997] 2 WLR 206) upheld the judge on both points and dismissed both the appeal and the cross-appeal. B & C has not appealed to your Lordships against the decision on its cross-appeal by the Court of Appeal. Therefore the only point remaining for decision by your Lordships is whether B & C's claims in the main action (if successful) are by virtue of s 74(2)(f) subordinated to the claims of the general creditors of Atlantic.

Section 74 of the 1986 Act is the first of a group of sections cross-headed 'Contributories'. So far as relevant it provides:

> '(1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves.
>
> (2) This is subject as follows ... (f) a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves ...'

The legislative history of this section can be traced back to s 38 of the Companies Act 1862, in which s 38(7) corresponds to s 74(2)(f) of the 1986 Act.

The critical question is whether any damages ordered to be paid to B & C by Atlantic for misrepresentation by Atlantic inducing the purchase by B & C of Atlantic shares would constitute a sum due to a member of Atlantic (i e B & C) in its character of a member by way of dividends, profits or otherwise within the meaning of s 74(2)(f). If so, B & C's claim will be subordinated to that of Atlantic's general creditors.

Mr Potts QC, for the administrators of Atlantic, submitted that the basic principle applicable was that 'members come last', i e the members of a company can take nothing until the outside creditors have been paid in full. He further submitted that in the present case there would be a manifest absurdity if B & C, as shareholder in its wholly owned subsidiary Atlantic, could circumvent that rule by claiming as damages sums quantified by reference to the worth of the Atlantic shares payable in respect of a misrepresentation leading to the acquisition of such shares. This would be to enable B & C to convert its position from that of a holder of worthless shares in its wholly owned subsidiary into that of a creditor ranking pari passu with ordinary creditors of that subsidiary.

Mr Potts, of course, accepted that there could be sums due to a member otherwise than in his character of a member, e g loans made by a member to the company or sums due to a member under a contract for the sale of goods by the member to the company. He submitted that a claim is not a claim 'in his character of a member' where it arises on an independent dealing or contract with the company and relies on s 149(2)(a) of the 1986 Act. That section permits the set-off against calls made on a contributory of 'any money due to him ... on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit ...' He submitted that a dealing or contract is not independent of the corporate nexus of membership or of the character of membership where such dealing or contract itself brings about the status of membership whether by way of subscription for

shares or transfer of shares. In particular, he submits, a claim is maintained in the character of a member where the claimant seeks to recover from the company the price which he has paid for his shares on the basis that such shares are not worth what they were warranted or represented by the company to be worth. The claimant who is induced to acquire his shares by subscription falls within the class of those who are not allowed to compete with general creditors: see *Re Addlestone Linoleum Co* (1887) 37 Ch D 191 and *Webb Distributors (Aust) Pty Ltd v State of Victoria* (1993) 11 ACSR 731. There is no reason, he submitted, why a claimant who is induced to acquire his shares by purchase (as opposed to allotment) should be in a different position. In short, he submits that a sum is due to a person in his character as a member of a company where it is due to him under the bundle of rights which constitute his shares in the company or by reason of a warranty or misrepresentation on the part of the company going to the characteristics or value of the shares which induces him to acquire those shares.

I cannot accept these submissions. Section 74(2)(f) requires a distinction to be drawn between, on the one hand, sums due to a member in his character of a member by way of dividends, profits or otherwise and, on the other hand, sums due to a member otherwise than in his character as a member. In the absence of any other indication to the contrary, sums due in the character of a member must be sums falling due under and by virtue of the statutory contract between the members and the company and the members inter se constituted by s 14(1) of the Companies Act 1985:

> 'Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.'

A contract to similar effect was prescribed by s 16 of the 1862 Act and all Acts since then. To the bundle of rights and liabilities created by the memorandum and articles of the company must be added those rights and obligations of members conferred and imposed on members by the Companies Act. For ease of reference I will refer to the combined effect of s 14 and the other rights and liabilities of members imposed by the Companies Acts as 'the statutory contract'. In my judgment, in the absence of any contrary indication sums due to a member 'in his character of a member' are only those sums the right to which is based by way of cause of action on the statutory contract.

That this is the correct interpretation is supported by the words in s 74(2)(f) 'by way of dividends, profits or otherwise'. There was some discussion in the judgment of the Court of Appeal whether these words disclose a genus requiring a sum 'otherwise' due to be given a narrow construction under the ejusdem generis rule and as to what, if any, genus was disclosed by the words 'by way of dividends, profits'. In my view that is not the right approach to the section. The words 'by way of dividends, profits or otherwise' are illustrations of what constitute sums due to a member in his character as such. They neither widen nor restrict the meaning of that phrase. But the reference to dividends and profits as examples of sums due in the character of a member entirely accords with the view I have reached as to the meaning of the section since they indicate rights founded on the statutory contract and not otherwise.

Moreover, the construction of the section which I favour accords with principle. The principle is not 'members come last': a member having a cause of action independent of the statutory contract is in no worse a position than any other creditor. The relevant principle is that the rights of members *as members* come last, ie rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action. The rationale of the section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors.

If this is the correct dividing line between sums due in the character of a member and those not so due, there is no room for including in the former class cases where membership, though an essential qualification for acquiring the claim, is not the foundation of the cause of action. This is illustrated by the decisions on directors' remuneration. After an early aberration (*Re Leicester Club and County Racecourse Co, ex p Cannon* (1885) 30 Ch D 629) it is now clearly established that directors' fees are not due to a director 'in his character of a member' even where the articles of the company require a director to hold a share qualification and provide for the remuneration of the directors: *Re Dale & Plant Ltd* (1889) 43 Ch D 255, *Re New British Iron Co, ex p Beckwith* [1898] 1 Ch 324 and *Eutrope (W H) & Sons Pty Ltd (in liq)* [1932] VLR 453. Although membership is a necessary qualification for appointment as a director, the cause of action to recover the remuneration is not based on the rights of a member but on a separate contract to pay remuneration.

Mr Potts placed great reliance on the *Addlestone* and *Webb* cases in both of which it was held that a sum due in respect of damages payable for breach of contract or misrepresentation made by the company on the occasion of the *issue* (as opposed to the purchase) of its shares was excluded by the section. Before considering these cases, there are two background points to be made. First, there was a principle established in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 that a shareholder could not sue for damages for misrepresentation inducing his subscription for shares unless he first rescinded the contract and that once the company had gone into liquidation such rescission was impossible. This principle has now been modified by s 111A of the Companies Act 1985. Second, it was not until the decision of this House in *Ooregum Gold Mining Co of India Ltd v Roper, Wallroth v Roper* [1892] AC 125 that it was established that a company had no power to issue shares at a discount.

In the *Addlestone* case (1887) 37 Ch D 191 the company had issued £10 shares expressed as being fully paid at a discount of £2 10s. Upon the company going into liquidation a call of £2 10s per share was made. The shareholders paid the call and then sought to prove in the winding up for damages of £2 10s per share 'for breach of contract or otherwise in respect of the shares.' Kay J held that the claim was excluded by s 38(7) of the 1862 Act. He said (at 197–198):

> 'Now, unquestionably the Applicants—retaining these shares and claiming damages because the shares are not exactly what they were represented to be—are making such claims in the character of members of the company, and the only question is whether such claims are for sums due "by way of dividends, profits, or otherwise." ... Practically, what these Applicants are seeking to recover by their proof is a dividend in respect of the £2 10*s.* per share which they have been compelled to pay in the winding up. But as shareholders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors whose debts are not due to

a them as members of the company—that is, they are practically admitting their liability to pay the £2 10*s.* per share to such other creditors and yet seeking to get part of it back out of the pockets of those very creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, b accordingly, it comes within the words "or otherwise," which I have read from sect. 38.'

He also decided that the claim was excluded by the *Houldsworth* principle.

In the Court of Appeal, the point under s 38(7) received little attention. Cotton LJ decided that the shareholders could not prove because the issue of c shares at a discount (if it had occurred) was unlawful and that in any event the claim failed under the *Houldsworth* principle. As to the s 38(7) point he said, obiter (at 205):

'... I think it would have been very difficult to come to the conclusion that d they could compete with the outside creditors.'

Lindley LJ decided the case solely on the *Houldsworth* principle. Lopes LJ said that he agreed with the construction put by Kay J on s 38(7).

If there had been a cause of action in the *Addlestone* case, it must, as it seems to me, have been based upon the statutory contract between the member and the e company. 'Dividends' and 'profits' represent what might be called positive claims of membership; the fruits which have accrued to the member by virtue of his membership. But the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of f compensation for misrepresentation or breach of contract. These, too, are claims necessarily made in his character as a member. But, in any event, the reasons given by Kay J for treating the case as falling within s 38(7) are directed exclusively to matters relevant to a claim involving the issue of shares by the company but irrelevant to a claim relating to the purchase of fully paid shares from a third party. Under the statutory contract (including the obligation in the winding up g to pay all sums not previously paid on the shares) the claimants were bound to pay the unpaid £2 10s in respect of each share. If such a payment were not made the capital of the company would not be maintained and the general body of creditors would be thereby prejudiced. If, in such a case, the member could recover by way of damages for breach of the contract to issue the shares at a h discount the same amount as he was bound to contribute on the winding up that would indirectly produce an unauthorised reduction in the capital of the company. Such a failure to maintain the capital of the company would be in conflict with what Lord Macnaghten (in the *Ooregum* case [1892] AC 125 at 145) said was the dominant and cardinal principle of the Companies Acts i e 'that the j investor shall purchase immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit'.

There is nothing in the *Addlestone* case to justify the application of that decision to cases where the claim against the company is founded on a misrepresentation made by the company on the purchase of existing shares from a third party. To allow proof for such a claim in competition with the general body of creditors does not either directly or indirectly produce a reduction of capital. The general

body of creditors are in exactly the same position as they would have been in had the claim been wholly unrelated to shares in the company.

The decision of the High Court of Australia in the *Webb* case (1993) 11 ACSR 731 stands on exactly the same footing. Section 360(1)(k) of the Companies Code of Victoria was in substantially the same terms as s 38(7) of the English 1862 Act and s 74(2)(f) of the 1986 Act. The court held that s 361 was applicable to building societies as well as to limited companies. Three societies had issued non-withdrawable shares. The claimants were claiming to prove for damages in the winding up of the building societies such damages being based on misrepresentations made by the societies on the issue of such shares to the effect that the shares were redeemable 'like a deposit'. The High Court held that the claim was excluded by the *Houldsworth* principle and held that the proposition deducible from that case was that a shareholder may not directly or indirectly receive back any part of his or her contribution to the capital save with the approval of the court. The High Court further relied on the *Addlestone* case and s 360(1) but carefully delimited its application to cases of contracts to subscribe for shares. They held (at 741) that the claim in that case 'falls within the area which section 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company.' It is therefore quite clear that both the decision and the reasoning of the High Court were dependent upon the same factors as those in the *Addlestone* case ie the protection of creditors from indirect reductions of capital. Those are factors relevant to cases of subscription for shares issued by the company but wholly irrelevant to purchases from third parties of already issued shares.

I express no view as to the present law of the United Kingdom where the sum due is in respect of a misrepresentation or breach of contract relating to the issue of shares. Section 111A of the 1985 Act provides:

> 'A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares.'

It is plain that this section operates so as, at least in part, to override the *Houldsworth* principle. But to what extent and with what consequential results is not yet clear. All that is necessary for the decision of the present case is to demonstrate, as I have sought to do, that the decisions in *Addlestone*, 37 Ch D 191 and *Webb*, 11 ACSR 731 do not apply to claims other than those relating to the issue of shares by the company.

For these reasons, which are substantially the same as those given by the trial judge and the Court of Appeal in their admirable judgments, I am clearly of the opinion that the sum if any due to B & C is not due to it in its 'character of a member' of Atlantic within s 74(2)(f). The claim stands on exactly the same footing as any other claim by B & C against Atlantic which is wholly unrelated to the shares in Atlantic. In the circumstances, it is unnecessary to deal with the further point relied upon by B & C (but rejected by the Court of Appeal) that B & C's claim being unliquidated is not 'a sum due' within the meaning of the section.

I would dismiss the appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he has given I would also dismiss the appeal.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he has given I would also dismiss the appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives, I, too, would dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given I also would dismiss the appeal.

Appeal dismissed.

Celia Fox Barrister.

Abraham and another v Thompson and others

COURT OF APPEAL, CIVIL DIVISION

MILLETT AND POTTER LJJ

22 MAY, 24 JULY 1997

Maintenance of action – Identity of maintainer – Disclosure of identity of maintainer – Plaintiff commencing action against defendants for damages for assisting or procuring breaches of contract – Plaintiff refusing to accede to defendants' requests to disclose identity of any third parties providing funds for his legal costs – Whether court having jurisdiction to order disclosure of identity of person maintaining action – Whether court having power to stay proceedings on grounds concerning financing of action.

The plaintiff issued proceedings against the defendants claiming damages against the fifth and sixth defendants for assisting or procuring breaches of contract. The fifth and sixth defendants suspected that the costs of the action were being provided for out of one or more offshore trusts with which the plaintiff was connected, and although beneficiaries of an indemnity in respect of their costs by the company of which they were executive directors, were concerned that an order for costs against the plaintiff might be difficult to enforce. On that basis, they asked the plaintiff to disclose the identity of any third parties providing funds for his legal costs. The plaintiff refused to do so and the defendants thereafter applied to the court for an order for such disclosure so that they could apply for the proceedings to be stayed unless the third parties provided security or agreed to accept liability for the defendants' costs in a satisfactory manner. The judge granted the defendants' application holding that the court had inherent jurisdiction to stay proceedings where it was apparent that the plaintiff was being funded by a third party who would not or could not accept liability to pay the costs of the action in a satisfactory manner and in aid of that power could also order the disclosure of the identity of any such party. The plaintiff appealed.

Held – Where a defendant applied to stay proceedings funded by a third party unless the third party provided security or agreed to accept liability for the defendant's costs in a satisfactory manner, the court only had an inherent jurisdiction to grant a stay where the situation amounted to an abuse of process. Moreover, in such a case the better course of action was to let the action proceed to trial and then consider making an order for costs against the third party under s 51(1)[a] of the Supreme Court Act 1981. In the instant case, since inter alia the defendants' application was merely a fishing expedition to see if a case of abuse could be made out and the defendants were indemnified in respect of their costs and would not themselves suffer any financial hardship if a costs order could not be enforced, the judge should have declined to make the order sought and have left the matter to be dealt with by means of an application under s 51(1) of the 1981 Act after the trial. Accordingly the appeal would be allowed (see p 376 *e* to p 377 *d* and p 379 *b c*, post).

a Section 51(1), so far as material, is set out at p 368 *c d*, post

Dictum of Kennedy LJ in *Condliffe v Hislop* [1996] 1 All ER 431 at 440 applied.

A J Bekhor & Co Ltd v Bilton [1981] 2 All ER 565 and *Singh v Observer Ltd* [1989] 2 All ER 751 distinguished.

Notes

For the court's inherent jurisdiction to stay proceedings generally, see 37 *Halsbury's Laws* (4th edn) para 442.

For the Supreme Court Act 1981, s 51, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1019.

Cases referred to in judgments

Bekhor (A J) & Co Ltd v Bilton [1981] 2 All ER 565, [1981] QB 923, [1981] 2 WLR 601, CA.

Bowring (C T) & Co (Insurance) Ltd v Corsi Partners Ltd [1994] 2 Lloyd's Rep 567, CA.

Broxton v McClelland (6 November 1992, unreported), QBD.

Broxton v McClelland [1995] EMLR 485, CA.

Condliffe v Hislop [1996] 1 All ER 431, [1996] 1 WLR 753, CA.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

Fitzgerald v Williams, O'Regan v Williams [1996] 2 All ER 171, [1996] QB 657, [1996] 2 WLR 447, CA.

Grovewood Holdings plc v James Capel & Co Ltd [1994] 4 All ER 417, [1995] Ch 80, [1995] 2 WLR 70.

Hill v Archbold [1967] 3 All ER 110, [1968] 1 QB 686, [1967] 3 WLR 1218, CA.

McFarlane v E E Caledonia Ltd (No 2) [1995] 1 WLR 366.

Martell v Consett Iron Co Ltd [1955] 1 All ER 481, [1955] Ch 363, [1955] 2 WLR 463, CA; *affg* [1954] 3 All ER 339, [1955] Ch 363, [1954] 3 WLR 648.

Metalloy Supplies Ltd (in liq) v MA (UK) Ltd [1997] 1 All ER 418, CA.

Murphy v Young & Co's Brewery plc [1997] 1 All ER 518, CA.

Roache v News Group Newspapers Ltd (1992) Times, 23 November, [1992] CA Transcript 1120.

Singh v Observer Ltd [1989] 2 All ER 751; *rvsd* [1989] 3 All ER 777, CA.

Tharros Shipping Co Ltd v Bias Shipping Ltd (No 3) [1995] 1 Lloyd's Rep 541.

Trendtex Trading Corp v Crédit Suisse [1980] 3 All ER 721, [1980] QB 629, [1980] 3 WLR 367, CA; *affd* [1981] 3 All ER 520, [1982] AC 679, [1981] 3 WLR 766, HL.

Wild v Simpson [1919] 2 KB 544, [1918–19] All ER Rep 682, CA.

Cases also cited or referred to in skeleton arguments

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409, [1986] AC 965, HL.

Giles v Thompson [1993] 3 All ER 321, [1994] 1 AC 142, HL.

Appeal

By notice dated 16 May 1997 the first plaintiff, Roger Adrian Abraham, appealed with leave from the decision of Lloyd J on 12 May 1997 whereby he ordered that the first plaintiff disclose to the fifth and sixth defendants, Domingos Antonio Martins Da Silva and Jose Humberto Mendonca De Sousa, the identity of any third parties providing all or any of the funds for an action brought by him and the second plaintiff, Eramon Securities Corp, against, inter alia, the fifth and sixth

defendants. The second plaintiff took no part in the appeal. The facts are set out in the judgment of Potter LJ.

Stanley Burnton QC and *Kenneth MacLean* (instructed by *Clifford Chance*) for the first plaintiff.

Michael Bloch and *Camilla Bingham* (instructed by *D J Freeman*) for the fifth and sixth defendants.

At the conclusion of the argument the court announced that the appeal would be allowed for reasons to be given later.

24 July 1997. The following judgments were delivered.

POTTER LJ (giving the first judgment at the invitation of Millett LJ).

Introduction

This is an appeal by the plaintiffs against an order of Lloyd J made on 12 May 1997 that the first plaintiff disclose to the fifth and sixth defendants on affidavit whether any, and if so what, third party or parties had provided all or any substantial part or parts of the money used to fund this action as regards costs incurred by him from the date when they were added as parties. When the matter came before us on 22 May 1997, it was one of some urgency because the trial was fixed for 3 June 1997 with a hearing estimated to last four weeks. On 22 May 1997 we indicated to the parties our decision to allow the appeal, stating that we would give our reasons later. We do so now.

The first plaintiff is a former stockbroker and retired businessman who has lived in Portugal since 1988. The second plaintiff is a company incorporated in Panama, the formation of which was arranged in 1985 by the trustees of a settlement of a British Virgin Islands trust of which the plaintiff is a discretionary beneficiary.

They sue a number of defendants for wide-ranging relief including very substantial sums alleged to be due pursuant to, and as damages for breach of, various agreements arising out of a joint venture between the first plaintiff and the first and second defendants in relation to development of golf and leisure complexes in Portugal.

The fifth and sixth defendants (to whom I shall refer simply as 'the defendants') are both Portuguese nationals and residents and are the two executive directors (but not shareholders) of a Portuguese company known as Planal which is not a party in the action but is the subject of some of the major allegations in it.

The action was started in 1995 but the defendants were not joined as parties until 1 April 1996. They were joined and served at a time when they came to England to attend a board meeting of Planal convened in order to pass resolutions for the sale of certain of its major assets which the first plaintiff says was at a substantial undervalue and therefore involved breaches of contractual obligations of which they were well aware. The second plaintiff is not concerned with the claim against the defendants. I shall therefore refer to the first plaintiff hereafter simply as 'the plaintiff'.

The plaintiff obtained an ex parte injunction restraining the holding of the Planal board meeting. However, this was not continued because, at the inter partes hearing, Evans-Lombe J took the view that damages would be an adequate

remedy and that it was questionable whether the plaintiff would be good for his liability under the cross-undertaking in damages. The defendants became parties to the action upon being served with the ex parte injunction.

The original version of the statement of claim served on the defendants was the subject of a striking out application which was not in fact proceeded with. In September 1996, a revised pleading was put forward claiming damages from the defendants for the tort of assisting or procuring various breaches of the contract. There was a brief hiatus after service of the claim and, in December 1996, after some prompting, the plaintiff stated his intention of proceeding against the defendants. Directions were agreed and a defence served on behalf of the defendants on 22 January 1997. In February the defendants served a request for further and better particulars and, on 25 February 1997, a witness statement of the plaintiff was served. That statement, together with an affidavit sworn by the plaintiff in opposition to an application by other defendants in 1996 for security for costs which was unsuccessful, gave rise to concern on the defendants' part as to whether the plaintiff was paying his own costs of the action from his own resources and whether he would be good for the defendants' costs if he were ordered to pay them at trial.

The defendants' application

Because the plaintiff is resident in Portugal, the above-mentioned application for security had failed on the grounds of his being resident within the European Union and hence subject to similar considerations in respect of security as a plaintiff resident in the United Kingdom (see *Fitzgerald v Williams, O'Regan v Williams* [1996] 2 All ER 171, [1996] QB 657). The defendants were themselves the beneficiaries of an indemnity in respect of their costs by Planal which is a company of substance. However, motivated by their concern as to whether, if they were successful, an inter partes order for costs would be met by the plaintiff (as opposed to having to resort to their indemnity), the defendants' solicitors wrote to the plaintiff's solicitors on 26 March 1997 setting out chapter and verse for their concern and asking for disclosure of the identity of the person or persons who they assumed were providing the funds for the plaintiff's legal costs, stating that if the funder were not resident in the European Union, an application would be made against the plaintiff for security for costs. On 8 April 1997 the plaintiff's solicitors replied saying that all their costs and disbursements to date had been funded by the plaintiff. They also stated their view that the possibility of a claim for security against the plaintiff was hopeless on the basis of the modern authorities and concluded by declining to accede to the request.

On 21 April 1996 the defendants applied on motion for an order that within seven days the plaintiff disclose on affidavit whether any third party has provided the moneys or any substantial part of the moneys used to fund the action and, if so, the identity of the funder. By way of evidence, the defendants relied on an affidavit from their solicitors. In that affidavit the application was put on the basis—

> 'it [is] probable that the action [is] being funded by one or other of the offshore trusts in which Mr Abraham seems to have an interest or expectation. Mr Abraham maintains that, for tax purposes, these trusts are wholly separate from him and in my submission they should therefore be regarded as independent third parties who should be treated as maintainers if they were funding the action. If the action were being funded by an

offshore entity it would be [the defendants'] intention to apply for security for their and Planal's costs.' a

It was later stated:

'... no direct claim is made by Eramon against the [defendants] ... Even if successful in an application against Eramon, it is unlikely that the Court would order any very significant sum. I do not believe, however, that should b prevent the proper securing of the [defendants'] and Planal's costs if this action is in fact being funded by a third party on Mr Abraham's behalf.'

The plaintiff chose not to put in any evidence dealing with the substance of the matters raised, but to take his stand on the argument that the court lacked any jurisdiction to make the order sought, alternatively that the deficiencies in the c defendants' case were such that the court should, as a matter of discretion, refuse to make such an order.

The judgment of Lloyd J

The judge gave an admirably clear judgment in which he recited the d arguments of counsel and the authorities to which he had been referred. He rejected the argument for the plaintiff that, since the plaintiff was not a person against whom an award of security of costs could be made subject to a stay under RSC Ord 23, the court lacked jurisdiction to do so. In reliance in particular on the decision at first instance in *Broxton v McClelland* (6 November 1992, unreported) and dicta of the Court of Appeal in the recent case of *Condliffe v Hislop* [1996] 1 All e ER 431, [1996] 1 WLR 753, and by analogy with previous decisions relating to champerty, he rested his decision upon the inherent jurisdiction of the court. In the key passage of his judgment he stated as follows:

'In my judgment the court does have power to stay proceedings on f grounds concerned with the way in which they are being brought or prosecuted. This is clearly the case if the plaintiff is being funded in circumstances which amount to champerty which is illegal as a matter of public policy (see *Grovewood Holdings plc v James Capel & Co Ltd* [1994] 4 All ER 417, [1995] Ch 80). But I do not think it is necessarily limited to a case where the support is champertous. There are of course cases where the g court has recognised that it is legitimate for a third party to support one party to the litigation without incurring liability for the other's costs if the supported party is ordered to pay those costs: *Condliffe v Hislop* is one, where the supporter was the plaintiff's mother, and another is *Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518, where the supporter was a company h paying under a legal expenses insurance policy with limited cover. However, it seems to me that there are circumstances, including but not limited to champerty, in which the court might stay the plaintiff's action because of the way it is being financed. I therefore reject Mr MacLean's submission that the court has no power, before trial, to make an order staying the action if it were apparent that the plaintiff was being funded by a j third party who would not or could not accept (in a satisfactory manner) liability to pay the costs of the fifth and sixth defendants if they were successful at trial. If there is power to make such an order, as was made, so it seems, in *Broxton*'s case and approved as being at least possible in *Condliffe*'s case, there must be power in aid of that to make the order sought by the fifth

and sixth defendants in the present case, so that the defendants can consider whether it is a case in which a stay might be ordered and, if they take that view, apply accordingly.'

In relation to the question of whether he should exercise his discretion on the basis that such jurisdiction existed, he referred to the fact that it appeared that the plaintiff had sought in the past to divest himself of income and capital assets in order to avoid liabilities to UK tax, using offshore trusts and companies for that purpose, including three trusts which he had himself set up, but that, from a personal point of view, he had apparently been for some years in a position of financial difficulty. He referred also to the paucity of the plaintiff's disclosure as to his assets and his failure to put in evidence to show that he would be good for a cross-undertaking in damages in respect of the interlocutory injunction earlier sought. The judge inferred that it was likely that the plaintiff was paying for the conduct of the litigation not out of his own personal funds but from funds obtained from a third party which might well be one or more of the offshore trusts. He went on:

'It seems to me that there is reason to suspect that it may be a case in which, if the plaintiff were to lose and an order were made against him, an order for costs would be difficult to enforce against the maintainer, if that turns out to be the trustees of one or more of the offshore trusts. Even if their identity is known, there may be practical and legal difficulties, including limits on the powers of the trustees, in the way of such enforcement. Accordingly, it seems to me that, on the facts, the fifth and sixth defendants have shown a sufficient prospect that it might be a case where the court's jurisdiction might be exercised, as envisaged by Kennedy LJ in *Condliffe v Hislop*, to stay the proceedings in advance of judgment unless a sufficiently solid undertaking to answer for the defendants' costs were given by the maintainer. It is therefore appropriate to consider the exercise of the ancillary jurisdiction to order disclosure of the information.'

He then dealt with the question of whether or not he should order disclosure in relation to questions of lateness and the relative position of the parties in the litigation. He stated that he regarded as 'material, but not decisive' that the defendant had the benefit of an indemnity from Planal. So far as the lateness of the application was concerned, he did not regard the defendants in fault in that respect, but said:

'... although it is by no means certain that the time remaining before trial will be sufficient to allow the defendants to make an effective application for the further relief they want once provided with the information they seek, I do not regard it as being so unlikely that they could do so as to justify withholding from them the relief which, having regard to all other circumstances, I consider they should be granted ...'

Jurisdiction

It has not been in issue before us that, if the fifth and sixth defendants succeed at trial and get an order for costs against the plaintiff and, if the plaintiff's own costs have been funded by a third party, the court would have jurisdiction on the defendants' application (should proper grounds be shown) to make an order for costs against that third party under s 51(1) of the Supreme Court Act 1981. That

being so, the defendants have contended that the court also has ancillary jurisdiction to make an order against the plaintiff requiring him to disclose whether there is such a third party funder. They rely on the decision of Macpherson J in *Singh v Observer Ltd* [1989] 2 All ER 751 and an order of the Court of Appeal mentioned by Longmore J as having been made in *McFarlane v E E Caledonia Ltd (No 2)* [1995] 1 WLR 366 at 373, coupled with the principle stated by Ackner LJ in *A J Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565 at 577, [1981] QB 923 at 942 that 'where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective'.

It is clear that a similar argument was advanced before the judge. However, it finds no mention in the part of his judgment setting out the reasons for his decision, which would seem to indicate that he did not accept the argument, at any rate in those simple terms. I consider he was right not to do so.

Section 51(1) of the 1981 Act accords to the court: 'Subject to ... rules of court ... full power to determine by whom and to what extent the costs are to be paid.' That power arises at the stage when the costs of and incidental to the relevant proceedings have been incurred and the question arises as to who should be ordered to pay them. *Singh*'s case does no more than demonstrate that, *once the occasion for the exercise of that power has arisen*, the court, in order to enable it to be fully and appropriately exercised, will investigate so as to establish the identity of a third party maintainer of the unsuccessful party, and the liability of that maintainer in respect of the successful party's costs. The same appears to be true of *McFarlane v E E Caledonia Ltd (No 2)*.

That is not the position in this case. Here, the defendants are not applying on the basis that they have been successful in the litigation and seek payment of an established entitlement to costs, but on the basis that they seek security against an entitlement which may never arise. Nor can resort to *A J Bekhor & Co Ltd v Bilton* assist them in such circumstances. In that case, the court was concerned with its inherent jurisdiction to make an ancillary order for the purpose of ensuring that an order of the court previously made should not be rendered nugatory or ineffective. The defendants' application in this case is in aid of security against an order for future costs which may never be made and not of any *established* right to such costs.

In that regard, Mr Burnton QC, for the plaintiffs, submits (and Mr Bloch, for the defendants, has not disputed) that the sole purpose of the defendants' application is to obtain a stay of proceedings unless security or at least some undertaking as to costs is provided by the third party funder. Yet, as the judge recognised, it is not open to the defendants to apply for security for costs against a third party funder, because Ord 23 (taken with the statutory provisions of s 726 of the Companies Act 1985) provides a complete regime in relation to orders for security (see *C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567). That being so, Mr Burnton submits that it would be wrong for the court to seek, by reference to its inherent jurisdiction, to make good the omission of the Rules of the Supreme Court to provide for security in such a case by granting the defendants' application to stay the proceedings unless or until security is provided or the third party agrees to accept liability for the defendants' costs in a 'satisfactory manner'. A fortiori, he submits that there can be no necessity or justification for an order of disclosure in aid of an exercise in respect of which the court lacks jurisdiction.

As to the provision of security under Ord 23, in the *Bowring* case, the plaintiff had obtained a Mareva injunction which was later discharged by agreement. The defendant applied for an inquiry as to damages on the cross-undertaking given when the injunction was granted, alleging that it had suffered substantial loss. The hearing of that application was expected to last some five days and the plaintiff applied under s 726 of the 1985 Act for an order for security on the grounds that the defendant would be unable to pay any costs awarded against him. The Court of Appeal held that Ord 23 (together with s 726) provided a complete and exhaustive code as regards the award of security and excluded the possibility of relying on inherent jurisdiction to award security against a defendant. It stated also that, if another category of case emerged in which it was felt that security should be available, it had to be provided for by legislation (see [1994] 2 Lloyd's Rep 567 at 570, 571 and 574 and at 577 and 580 per Dillon and Millett LJJ).

On the question whether there might be some wider discretion to achieve the same effect by a different route, the court stated that, because the ordering of an inquiry was a matter of discretion, if the plaintiff could show that the application amounted to an abuse of process the court might either refuse to order an inquiry, or order it only on terms. In the latter case, Millett LJ observed (at 581) that the court might be persuaded to impose a term requiring the giving of security as an earnest of good faith if it were in real doubt as to the genuineness of the defendant's claim, but that this possibility would only be available in an extreme case and should not be regarded as letting in by the back door a general inherent jurisdiction to order security which does not exist. Sir Michael Kerr agreed explicitly with those views (at 582).

Those observations are in my view no more than a recognition that the court will, in appropriate cases, grant a stay of proceedings which are in substance, or by reason of the manner of their conduct, an abuse of process. That is not a proposition with which Mr Burnton takes issue. However, he submits that the prevention of 'abuse of process' marks both the area and the limit of the court's inherent jurisdiction to order security in a case of this kind, and that the nature and circumstances of the defendants' application are such that to grant it would indeed be to let in by the back door an inherent jurisdiction to order security which does not exist.

It was on the ground of 'abuse of process' that, in *Grovewood Holdings plc v James Capel & Co Ltd* [1994] 4 All ER 417, [1995] Ch 80, Lightman J granted a stay in an action being funded pursuant to a champertous arrangement by the liquidator. He held that, whether or not the expressions of opinion in *Martell v Consett Iron Co Ltd* [1955] 1 All ER 481, [1955] Ch 363 that, in a case of maintenance, a stay should not be ordered, remained good law (see further below), there was no doubt that the court was free, in the case of a champertous agreement, to grant a stay on the basis that it constituted a continuing abuse of process which the court, as well as the defendants, had an interest in bringing to an end.

In *Condliffe v Hislop* [1996] 1 All ER 431 at 439, [1996] 1 WLR 753 at 761 upon which Lloyd J relied, Kennedy LJ, in obiter dicta with which the remainder of the court agreed, appeared to put the matter on a wider basis than 'abuse of process'.

In that case, the plaintiff, who was a bankrupt, was pursuing libel proceedings in which he was being financed by his mother who had limited resources. She gave an undertaking that she would pay any court order in respect of the defendants' costs, but the master ordered a stay under the inherent jurisdiction of

the court to prevent abuse of process unless the plaintiff provided security. The plaintiff appealed and the mother withdrew her undertaking. The judge reversed the order, holding that, even if there were jurisdiction, he would have exercised it in the plaintiff's favour. The court disposed of the case shortly on the facts on the basis that the mother's position was one long since recognised as a lawful justification to maintain, sharing as she did a common interest with the plaintiff on the grounds of kinship. However, in deference to the arguments of counsel, Kennedy LJ dealt with the question of the court's discretion.

He considered the decision in the *Bowring* case and expressly proceeded on the basis that Ord 23 constituted an exclusive code in relation to orders for security.

In the section of his judgment headed 'Is this maintenance?', Kennedy LJ referred to a number of modern cases starting with *Hill v Archbold* [1967] 3 All ER 110, [1968] 1 QB 686 and finishing with *McFarlane v E E Caledonia Ltd (No 2)* [1995] 1 WLR 366. In the former case, heard prior to the abolition of criminal and tortious liability for maintenance by ss 13(1) and 14(1) of the Criminal Law Act 1967, Lord Denning MR said ([1967] 3 All ER 110 at 112, [1968] 1 QB 686 at 694–695):

> 'Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Very few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side.'

After abolition, Lord Denning MR developed this theme in *Trendtex Trading Corp v Crédit Suisse* [1980] 3 All ER 721, [1980] QB 629. That was a case in which a stay was sought against a bank which had financed a contract and was supporting litigation arising out of it. Lord Denning MR observed that, although the liability in crime and tort had been abolished, s 14(2) of the 1967 Act preserved the law 'as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'. In that connection he observed:

> 'It is perfectly legitimate today for one person to support another in bringing or resisting an action (as by paying the costs of it), provided that he has a legitimate and genuine interest in the result of it and the circumstances are such as reasonably to warrant his giving his support.' (See [1980] 3 All ER 721 at 741, [1980] QB 629 at 653.)

In that respect he repeated the quotation from his judgment in *Hill v Archbold* above.

In *McFarlane*'s case [1995] 1 WLR 366 at 373 Longmore J said:

> 'It may well be that it is not necessary to every case of lawful maintenance that the maintainer should accept a liability for a successful adverse party's costs; for example, a member of a family or a religious fraternity may well have a sufficient interest in maintaining an action to save such maintenance from contractual illegality, even without any acceptance of liability for such costs. But in what one may call a business context (e g insurance, trade union

activity, or commercial litigation support for remuneration) the acceptance of such liability will always, in my view, be a highly relevant consideration.'

In *Condliffe v Hislop* [1996] 1 All ER 431 at 439–440, [1996] 1 WLR 753 at 761–762 Kennedy LJ said of that passage of Longmore J's judgment:

> 'That seems to me to be the correct approach. The existence of a business relationship will not always lead the court to expect acceptance for liability for costs (eg if the financial backer is a bank lending money to a plaintiff, or in some cases an insurer (see *Tharros Shipping Co Ltd v Bias Shipping Ltd (No 3)* [1995] 1 Lloyd's Rep 541)) but it will be a highly relevant consideration.'

In the section of his judgment headed 'Security for costs, or what?' Kennedy LJ went on to put the power of the court to grant a stay thus:

> '... I am satisfied that there is at present no power to require a party who is maintained but who does not satisfy the requirements of Ord 23, r 1 to give security for costs. That is something which it might be appropriate for the Rules Committee to consider, but until it does so it seems to me that whatever may have been the position 90 years ago ... an order for security for costs is not a weapon which the court can now invoke outside the ambit of Ord 23. Nevertheless, the court is entitled to protect its own procedures, and as Sir Thomas Bingham MR said in *Roache v News Group Newspapers Ltd* (1992) Times, 23 November, [1992] CA Transcript 1120 the principle that in the ordinary way costs follow the event "is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose". If that principle is threatened, as for example if an insurer or trade union were known to be giving financial support to a party without accepting liability for the costs of the other side if the supported party were to lose, then, as it seems to me, the court might, at least in some cases, be prepared to order that the action be stayed ... Normally the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under s 51 of the Supreme Court Act 1981 ... but if the circumstances suggest that the litigating party or the maintainer may not be bona fide, or if that party were to lose, an order for costs would be difficult to enforce against the maintainer then, as it seems to me, a stay could be imposed.' (See [1996] 1 All ER 431 at 440, [1996] 1 WLR 753 at 762.)

Turning to the argument of the defendants in this case, it is pertinent to observe that the defendants' application was originally made on the basis that, if disclosure were ordered which revealed that there had been third party funding the defendants would be entitled to apply for an order for security for costs *against the third party*. That contention has not been persisted in. The judge rightly held that he was bound by the observations of this court in the *Bowring* case. However, as I have already indicated, the defendants cannot and do not seek to justify the order for disclosure which the judge made simply as one preliminary or ancillary to any proposed application for security. Nor do they put the case on the traditional basis of the inherent jurisdiction of the court to prevent abuse of process. That is because Mr Bloch accepted that no such abuse can be demonstrated in the conventional sense anticipated by Millett LJ in the *Bowring* case [1994] 2 Lloyd's Rep 567 at 580 when he observed:

> 'It is an abuse of the process of the Court to bring a claim with no genuine belief in its merits but in bad faith and for an ulterior purpose ... A party who makes an exorbitant claim with no genuine belief in its merits, rejecting all reasonable offers of settlement, and exploiting his own inability to satisfy an order for costs in order to bring pressure on the other party to settle for an excessive sum, is abusing the process of the Court.'

See also Lightman J in the *Grovewood Holdings* case [1994] 4 All ER 417, [1995] Ch 80, when he referred to 'a collateral (improper) purpose'. It has not been suggested, nor did the judge hold, that the plaintiffs' claims against the defendants are not bona fide or that they are brought for any collateral or improper purpose. As stated by Millett LJ in the recent case of *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 All ER 418 at 424 (in which a non-party costs order was sought against the liquidator of an insolvent company):

> 'It is not an abuse of the process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid. If the plaintiff is an individual, the defendant's only recourse is to threaten the plaintiff with bankruptcy. If the plaintiff is a limited company, the defendant may apply for security for costs ...'

Finally in that connection, it is not suggested that the plaintiff's limited assets or financial difficulties are the result of arrangements deliberately made with the litigation in mind or in order to put his assets beyond the reach of his creditors. All that is suggested is that it is likely that he will continue to be advanced sums to assist him in respect of his own costs of the action from a trust or trusts prepared to assist him in relation to his own costs, but which may be unready to make money available to meet a costs order in favour of the defendants if they are eventually successful. The stay sought is put firmly on the basis of the final words of the dicta of Kennedy LJ last quoted, namely that, if the defendants were to lose, an order for costs would be difficult to enforce against the maintainer.

When invited by this court to elaborate the aspect of the inherent jurisdiction relied on, the defendants put it in this way, namely:

> 'The court has jurisdiction to order a stay where the plaintiff's affairs are so arranged as to threaten to defeat or frustrate the procedures of the court or the fundamental principles on which litigation is conducted before the courts.'

Mr Bloch identified the procedure concerned in this case as the procedure under s 51(1) by which the court may make an order against a maintainer once the other party's right to costs has been established, and that the fundamental principle concerned is the principle that, ordinarily, costs follow the event and that a plaintiff pursues his action under the sanction of his risk as to costs.

In terms of fundamental principles, as a matter of approach it is of some assistance to refer to an authority on maintenance which bears upon the question of jurisdiction. In *Martell v Consett Iron Co Ltd* [1954] 3 All ER 339, [1955] Ch 363 Danckwerts J at first instance, laid the foundation to what may be called the 'modern approach' to what was the offence of maintenance before its criminality was abolished (see the observations of Winn LJ in *Hill v Archbold* [1967] 3 All ER 110 at 115–116, [1968] 1 QB 686 at 700 and of Oliver LJ in the *Trendtex* case [1980]

3 All ER 721 at 749, [1980] QB 629 at 664). In that case it was held that members of a fishing association with a common interest in the subject matter of the plaintiffs' action in respect of the pollution of their fishery were not guilty of unlawfully maintaining the plaintiffs by supporting them in the form of indemnities for their costs in the action. In stating that it was not necessary to deal with the question of whether an application for the stay of the proceedings was an appropriate remedy on the assumption that it was a case of unlawful maintenance, Danckwerts J said ([1954] 3 All ER 339 at 351, [1955] Ch 363 at 388–389):

> 'I will observe, however, that, if it is a proper procedure, it is strange that no previous exercise of the jurisdiction of the court to stay proceedings in such a case can be produced ... I am not satisfied, however, either that such jurisdiction exists in this kind of case or that it would be proper to stop proceedings at an early stage when, in the result, the applicant may turn out, by reason of the absence of damage, to have no cause of action for maintenance.'

In the Court of Appeal, on the same assumption, Jenkins LJ observed:

> 'We have been referred to many cases in which actions have been held to have been illegally maintained, but to no case in which an order has been made for a stay of proceedings in a maintained action on the ground that it was being illegally maintained. The question whether it might not be proper to order a stay on this ground was touched on, but left entirely open, by Atkin LJ, in *Wild v Simpson* [1919] 2 KB 544 at 564, [1918–19] All ER Rep 682 at 692 where he said: "To set the procedure of the court in motion for a particular object may be unlawful; but the proceedings themselves remain valid ... though I reserve my opinion as to whether the court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the court, and to continue such stay until the court is satisfied that the proceedings are purged of the taint of illegality". It is well settled that the illegal maintenance of the plaintiff in an action is no defence to the action ... I find difficulty in reconciling this with the theory that it affords proper ground for a stay of proceedings. It is not, to my mind, a satisfactory answer to this difficulty to say that the stay would be of a temporary character only, operating until such time as the proceedings are purged of the taint of illegality. Once there has been illegal maintenance, the crime by which the proceedings are said to be tainted has been irretrievably committed, and I do not see how the taint could be purged otherwise than by discontinuing these proceedings and starting a fresh action. That would in effect make maintenance a defence to the action which it clearly is not ... Moreover, it seems to me undesirable that the question whether an action is being illegally maintained should be adjudicated upon on an application to stay proceedings in that action, for this procedure involves, in effect, a trial of the question whether the alleged maintainer is guilty of what is still, theoretically at all events, a crime, in the absence of the person accused.' (See [1955] 1 All ER 481 at 502, [1955] Ch 363 at 421–422.)

The weight of that expression of opinion was discounted by Lightman J in the *Grovewood Holdings* case on the ground that it was squarely based on the then criminality of maintenance and— a

> 'This ground ceases to have any force with the abolition of the crime of maintenance, and the recognition of so many grounds for a stay which do not constitute defences, eg absence of authority of the plaintiff's solicitors, forum non conveniens or the fact that the action is brought for a collateral (improper) purpose.' (See [1994] 4 All ER 417 at 425, [1995] Ch 80 at 88.) b

However, it seems to me that the logic of the reasoning of Jenkins LJ retains its force in this general sense. It assumes and recognises the general principle that a plaintiff is entitled to proceed to trial without a stay in a case where the action is brought bona fide and the ground on which the stay is sought is one which would involve a pre-trial investigation of facts which, even if established, would afford no defence to the persons sued. While plainly such principle requires qualification where the action is not bona fide or otherwise amounts to an abuse of process, it does not seem to me that further qualification is necessary; nor, indeed, is it desirable in this context in a time when 'satellite litigation' is to be discouraged. The reference by Lightman J to the development of the remedy of stay in the field of forum non conveniens and absence of the plaintiff's solicitors' authority do not seem to me to carry the matter further on this aspect of the court's inherent jurisdiction. c d

In my view, the starting point in any case where a stay is sought in circumstances which are not provided for by statute or rules of court, should be the fundamental principle that in this country an individual (who is not under a disability, a bankrupt or a vexatious litigant) is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, in respect of which the opposing party may resort to the usual remedies of execution and/or bankruptcy if such order is not complied with. This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the specific provisions of the rules of court or the inherent jurisdiction of the court. e f g

Imposition of a requirement that security for costs be provided subject to the sanction of a stay is a plain fetter on the exercise of such right of access. That is a principle underlying and recognised by Ord 23 which excludes from its regime as to the provision of security any individual who does not fall within the categories specifically provided for. h

In those circumstances, it seems to me that, when, in the course of an action which is properly constituted and pleaded and which is conceded to be brought bona fide, the defendant applies for a stay unless security is provided in respect of his costs, for the court to grant a stay on the grounds of its inherent jurisdiction is in principle to act in opposition, rather than as a supplement, to the provisions and underlying policy of the rules of court. j

There are two conflicting considerations involved in such a case. One is the *right* of an individual plaintiff freely to pursue a bona fide action lawfully brought. The other is the *interest* which the defendant has in being protected as to his costs

in the event he is successful. In my view, the former has hitherto been recognised, and rightly recognised, as paramount, subject to such protection from its consequences as (a) the legislature or rule-making authority has seen fit to provide to the defendant by way of enforcement or provision for security and (b) the court has provided under its inherent jurisdiction to prevent abuse of its process. In this case, the defendant seeks to achieve under (b) a wider basis of protection than it has hitherto been prepared to grant.

I consider that, if such extension is to be effected, it should be by way of an addition to the rules of court and not in the guise of a condition attached to an application for a stay in circumstances where no abuse of process is alleged or has been demonstrated.

So far as the order apparently made for security for costs in *Broxton v McClelland* (6 November 1992, unreported) is concerned, it is not apparent on what grounds the order was made: see the report of a later stage in the proceedings ([1995] EMLR 485) in which the making of the earlier order for security is mentioned. While it appears that it may have been made on the grounds that the plaintiff's action was being maintained by a third party, it is not clear what points were taken in the course of those proceedings, in particular in relation to abuse of process. What is clear is that Drake J, at a later stage, struck out the action as an abuse of process on the grounds of the ulterior motive of the maintainer, only to be reversed by the Court of Appeal in the decision reported under the reference above.

It seems to me likely that, when Kennedy LJ referred in *Condliffe*'s case [1996] 1 All ER 431, [1996] 1 WLR 753 to the entitlement (by which he plainly meant inherent jurisdiction) of the court 'to protect its own procedures', the principle on which Lloyd J also founded his judgment, he was intending to refer to the inherent powers of the court to prevent abuse of its process, ie those powers which a 'court must enjoy ... in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process' (see *Connelly v DPP* [1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301 per Lord Morris).

Certainly the foundation of the submissions of Mr Eady QC, as counsel for the defendants in *Condliffe*'s case, was his assertion that maintenance is still an abuse of process (see [1996] 1 All ER 431 at 436, [1996] 1 WLR 753 at 758).

The 'procedures' to which Kennedy LJ referred as requiring protection, were not in fact provisions of the rules of court said to be ignored or abused by misuse or circumvention. They were, as he went on to make clear, a reference to the principle that in the ordinary way costs follow the event, which, quoting Bingham MR in *Roache v News Group Newspapers Ltd* (1992) Times, 23 November, [1992] CA Transcript 1120, 'is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose'.

However, the context in which that observation was made in *Roache*'s case was quite unrelated to the problem in this case. It was quoted by way of introduction to a discussion of the court's discretion to award costs, in the context of a payment-in. It was equated in 'fundamental importance' to a second principle namely that, where a plaintiff claimed a financial remedy in debt or damages and the defendant paid into court a sum not accepted by the plaintiff which was equal to or greater than the sum recovered by the plaintiff, the plaintiff ordinarily is ordered to pay the defendant's costs from the date of payment in. The case was

concerned with entitlement to an order for costs and not with questions of security or enforcement. Whilst accepting entirely the observations of Kennedy LJ that the court should be willing to exercise its inherent jurisdiction 'if the circumstances suggest that the litigating party or the maintainer may not be bona fide', I venture to disagree with his observation (in the disjunctive rather than the conjunctive) that it should be prepared to intervene simply on the ground 'that if that party were to lose, an order for costs would be difficult to enforce against the maintainer' ([1996] 1 All ER 431 at 440, [1996] 1 WLR 753 at 762).

Presumably that ground was intended to reflect the observations of Lord Denning MR concerning the need for the maintainer who lacks a familial connection or other common or 'legitimate' interest to accept liability for the successful adverse party's costs. However, two reservations need to be stated in that respect. Since those observations were made, the court by subsequent enactment of s 51(1) of the 1981 Act has been provided with the power in appropriate cases to order maintainers to pay the costs of a maintained action. To that extent any argument that the court should grant a stay in respect of maintained proceedings has been much weakened. Further, to put the power of the court to grant a stay simply upon the possible difficulties of enforcement against a maintainer, seems to me to go further than anything which Lord Denning MR was contemplating when making his observations. The test of 'legitimate' interest according to which the acceptability of the maintenance has hitherto fallen to be judged has depended on examination of the interest and motives of the maintainer rather than on mere questions of enforceability.

Conclusion

I would limit the jurisdiction to grant a stay in advance of a determination under s 51(1) to cases where it can clearly be demonstrated that there exists a situation amounting to abuse of process.

Whether or not that is correct, as a matter of procedure I have no doubt, that, as stated by Kennedy LJ (in *Condliffe v Hislop* [1996] 1 All ER 431 at 440, [1996] 1 WLR 753 at 762):

> 'Normally the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under s 51 of the Supreme Court Act 1981 (as in *McFarlane*'s case) ...'

That, as it seems to me, would have been the appropriate course in this case. I say that for the following reasons.

There was a lack of evidence placed before the judge to demonstrate (i) that, if (as suggested) the plaintiff was receiving assistance from family or other trusts interested in his welfare they were unwilling or unable to support him in respect of any costs order made against him and (ii) that in any event, the interest of such trust or trusts to assist was not of a 'legitimate' kind, given the whole basis of defendants' case that the trusts were closely connected with the plaintiff and able and willing to act in his interests.

Thus the application of the defendants was not an application for information to confirm what appeared to be a strong prima facie case of abuse. It was rather a fishing expedition to see if a case of abuse could be made out when, even if the defendants could establish their suspicion as to the facts, it would remain highly arguable whether the position of the plaintiff or his putative maintainer was one of abuse at all. Further, the granting of the application was plainly likely to give

rise to issues of fact and arguments of law which would have to be tried before the action in a position where (a) trial of the action was imminent and might well have to be adjourned if trial of the issues raised was to be accommodated; (b) the application was in support of no more than a speculative right of the defendants to an order for costs following trial; and (c) restoration of the application would in any event not be determinative of whether or not, following a trial in which the defendants were successful, an order would necessarily be made against the maintainer.

Finally, in relation to questions of possible oppression, this was not a case where the defendants making the application would themselves suffer financial hardship if for any reason they obtained an order for costs which could not be enforced, because they enjoyed the benefit of an indemnity from Planal. It seems to me that all those considerations militated in favour of the judge declining to make the order sought and leaving the matter to be dealt with, by means of an application under s 51(1) of the 1981 Act, if and when the defendants' right to costs was determined following the hearing of the action.

For these reasons, I would allow the appeal.

MILLETT LJ. I agree.

It is not an abuse of the process of the court for an impecunious plaintiff to bring proceedings for a proper purpose and in good faith while being unable to pay the defendant's costs if the proceedings fail. If the plaintiff is an individual the court has no jurisdiction to order him to provide security for the defendant's costs and to stay the proceedings if he does not do so. It may be unjust to a successful defendant to be left with unrecovered costs, but the plaintiff's freedom of access to the courts has priority. The risk of an adverse order for costs and consequent bankruptcy has always been regarded as a sufficient deterrent to the bringing of proceedings which are likely to fail. Where there is no risk of personal bankruptcy, as in the case of a plaintiff which is a limited company, the court has a statutory jurisdiction to award security for costs; but even in this case it will frequently not do so if this will have the effect of stifling bona fide proceedings. It is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it.

Before 1967 maintenance was not only contrary to public policy but also both tortious and criminal. Even so, it was not an abuse of the process of the court for a plaintiff without the means to pay his own costs let alone to meet those of the defendant to bring proceedings with financial assistance provided by a third party, and the court would not stay such proceedings on this ground (see *Martell v Consett Iron Co Ltd* [1955] 1 All ER 481, [1955] Ch 363).

In that case Jenkins LJ gave three reasons for this. First, it was well settled that the fact that an action was being illegally maintained was no defence to the action, and it was impossible to reconcile this with the proposition that it afforded a proper ground for a stay of the proceedings. Secondly, once there had been illegal maintenance the proceedings were irretrievably tainted; the taint could not be purged except by discontinuing the proceedings and bringing a fresh action. But this would effectively make maintenance a defence to the action, which it was not. Thirdly, it was undesirable that the question whether the action was being illegally maintained should be adjudicated upon in interlocutory proceedings in the action, for this procedure involved the trial of what was, at

least theoretically, still a crime in the absence of the accused. At first instance Danckwerts J gave a further reason. Damage was the gist of the tort of maintenance, and it was undesirable to stay proceedings at a stage when it was uncertain that any damage would be suffered.

In *Grovewood Holdings plc v James Capel & Co Ltd* [1994] 4 All ER 417, [1995] Ch 80 Lightman J expressed the view that the decision in *Martell v Consett Iron Co Ltd* had ceased to have any force now that the crime of maintenance has been abolished and other grounds for a stay are recognised which do not constitute defences. I do not find this reasoning persuasive. The examples which he gave of cases where the court grants a stay on grounds which do not constitute defences were: absence of authority of the plaintiff's solicitors, forum non conveniens, and the fact that the action is brought for a collateral purpose. The first and third can be dismissed at once, since they are both examples of an abuse of the process of the court. The second is a special case; for the plaintiff is not denied his right to bring proceedings, but rather told to bring them elsewhere, either before a foreign court or an arbitrator. The stay is merely the procedural mechanism by which the court declines jurisdiction. But in any case the examples are hardly new; all of them existed in 1955; none of them weakens the force of the reasoning in *Martell v Consett Iron Co Ltd*. Moreover, I find it difficult to see how the decriminalisation of maintenance can form any rational basis for distinguishing the decision. It is, to say the least, counterintuitive to reason that conduct which was not regarded as an abuse of the process of the court even when it constituted a crime and a tort should be regarded as an abuse of its process when it is neither.

Unlike the defendants in *Martell v Consett Iron Co Ltd*, however, the defendants in the present case do not seek a permanent stay of the proceedings. They seek disclosure of the identity of the party providing the finance with a view to obtaining an undertaking from him to pay their costs if the proceedings are unsuccessful, and ultimately security for those costs, with a stay of the proceedings if these are not provided.

In a number of cases starting with *Hill v Archbold* [1967] 3 All ER 110, [1968] 1 QB 686 Lord Denning MR suggested that a stranger who funded litigation should be required to undertake to pay the costs of the other side, and that the proceedings could be struck out if such an undertaking was not forthcoming. Lord Denning did not, however, suggest that the court should require the undertaking to be fortified or order the third party to provide security for costs. Thus the mischief which he identified was not the risk that the successful party might be left with unrecovered costs, but that proceedings might be financed by a party who was immune from personal liability for an adverse order for costs. This mischief has now been remedied by s 51 of the Supreme Court Act 1981.

The jurisdiction conferred by s 51, however, is normally exercised after trial, and then with caution and only after proper consideration of all the circumstances. It is inappropriate to pre-empt the decision by exacting an undertaking from the third party at an interlocutory hearing before the outcome of the proceedings is known. It was submitted that the undertaking could be expressed as an undertaking to pay the costs of the successful defendant if ordered to do so, and that this would facilitate recovery from a party who was resident outside the jurisdiction. But such an undertaking would add nothing unless it was accompanied by security, and the judge recognised that the court could not order security in these circumstances. No provision for such a case is made by

RSC Ord 23, which the court has no jurisdiction to supplement (see *C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567). Even if it were thought desirable to make security available in such circumstances, it would not be open to Parliament or the Rules Committee to distinguish between the case where the finance was provided by a party resident within the jurisdiction (where there would be no need to facilitate enforcement) and one where it was provided by a resident of the European Union.

In making the order for disclosure in the present case the judge was adopting the approach foreshadowed by Kennedy LJ in *Condliffe v Hislop* [1996] 1 All ER 431 at 439, [1996] 1 WLR 753 at 761. In my judgment such an approach would not be justified unless there was clear evidence of an abuse of the process of the court and, for the reasons I have given, the presence of unlawful maintenance is not by itself such an abuse.

Appeal allowed.

Kate O'Hanlon Barrister.

The Indian Endurance (No 2)
Republic of India and another v India Steamship Co Ltd

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD STEYN, LORD HOFFMANN, LORD COOKE OF THORNDON AND LORD HOPE OF CRAIGHEAD

9–12 JUNE, 16 OCTOBER 1997

Admiralty – Jurisdiction – Claim for loss of or damage done to goods carried in ship – Cargo owners bringing action in rem in English court – Judgment obtained in action in personam in India – Whether English proceedings in rem barred – Whether statutory provision preventing same cause of action being tried twice – Civil Jurisdiction and Judgments Act 1982, s 34.

The plaintiffs, the Republic of India and the Indian Ministry of Defence, were the owners of a cargo of munitions carried on board the defendants' vessel in September 1987 pursuant to bills of lading for a voyage from Sweden to India. During the voyage, part of the cargo was jettisoned and part of the remaining cargo was damaged by a fire on board the vessel. Following the discharge of the cargo in India, the plaintiffs issued proceedings in India seeking damages in respect of the jettisoned cargo. In 1989 the plaintiffs issued a writ in rem out of the Admiralty Court in England, which was served on a second vessel owned by the defendants, claiming total loss of the cargo, including the jettisoned part. Thereafter judgment was given in the Indian proceedings against the defendants, who then applied for an order striking out the claim in rem. The judge held that since the cause of action in the proceedings in England was the same as that on which the plaintiffs had relied when they obtained judgment in India, the English proceedings were barred by s 34[a] of the Civil Jurisdiction and Judgments Act 1982. The Court of Appeal affirmed the judge's decision, but the House of Lords allowed the plaintiffs' appeal and remitted the case back to the judge to determine the issue on the evidence. On a preliminary issue, the judge held that while the two actions involved the same cause of action they were not between the same parties, since the action in rem was an action brought against the ship rather than the owners, and that therefore the proceedings were not barred by s 34 of the 1982 Act. That decision was reversed by the Court of Appeal and the plaintiffs appealed.

Held – Since the object of s 34 of the 1982 Act was to prevent the same issue being litigated afresh between the same parties, it would be unfair to permit an action in rem to proceed where a foreign judgment in personam had been obtained against the owners of the vessel on the same cause of action. For the purposes of s 34, therefore, an action in rem was an action against the owners of the vessel from the moment that the Admiralty Court was seised with jurisdiction either by service of a writ, or where a writ was deemed to be served, by acknowledgment of the issue of writ by the defendant before service.

a Section 34, so far as material, is set out at p 383 *f g*, post

From that moment, the owners were parties to the proceedings in rem. It followed, in the instant case, that the action in rem issued by the plaintiffs was an action 'between the same parties, or their privies' within the meaning of s 34 as the Indian action in personam in which the plaintiffs had obtained judgment. Since no estoppel had arisen to preclude the defendants from relying on s 34, that section was a bar to the action in rem. The appeal would accordingly be dismissed (see p 382 *g h*, p 389 *c* to *e*, p 391 *e* to *g*, p 393 *j* and p 394 *b c d* to *g*, post).

Cia Naviera Vascongada v Cristina, The Cristina [1938] 1 All ER 719, *The Arantzazu Mendi* [1939] 1 All ER 719, *The August 8* [1983] 2 AC 450 and *The Deichland* [1989] 2 All ER 1066 applied.

The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj (owners) Case C-406/92 [1995] All ER (EC) 229 considered.

The Nordglimt [1988] 2 All ER 531 overruled.

Decision of the Court of Appeal [1996] 3 All ER 641 affirmed.

Notes

For nature of actions in rem and in personam and the application of the Civil Jurisdiction and Judgments Act 1982, see 1(1) *Halsbury's Laws* (4th edn reissue) paras 310, 358–361.

For the Civil Jurisdiction and Judgments Act 1982, s 34, see 22 *Halsbury's Statutes* (4th edn) (1995 reissue) 533.

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Arantzazu Mendi, The [1939] 1 All ER 719, [1939] AC 256, HL.

August 8, The [1983] 2 AC 450, [1983] 2 WLR 419, PC.

Banco, The, Owners of the motor vessel Monte Ulia v Owners of the ship Banco [1971] 1 All ER 524, [1971] P 137, [1970] 3 WLR 842, CA.

Burns, The [1907] P 137, CA.

Cella, The (1888) 13 PD 82, CA.

Cia Naviera Vascongada v Cristina, The Cristina [1938] 1 All ER 719, [1938] AC 485, HL.

Deichland, The [1989] 2 All ER 1066, [1990] 1 QB 361, [1989] 3 WLR 478, CA.

Dictator, The [1892] P 304, [1891–4] All ER Rep 360.

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Henderson v Henderson (1843) 3 Hare 100, [1843–60] All ER Rep 378, 67 ER 313, V-C.

Indian Endurance, The, Republic of India v India Steamship Co Ltd [1993] 1 All ER 998, [1993] AC 410, [1993] 2 WLR 461, HL; *rvsg* [1992] Lloyd's Rep, 124, CA.

James v South Western Rly Co (1872) LR 7 Ex 287.

Joannis Vatis, The (No 2) [1922] P 213.

John and Mary, The (1859) Sw 471, 166 ER 1221.

Jupiter, The [1924] P 236, [1924] All ER Rep 405, CA.

Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28, CA.

Maciej Rataj, The, Tatry (cargo owners) v Maciej Rataj (owners) Case C-406/92 [1995] All ER (EC) 229, ECJ.

Milor Srl v British Airways plc [1996] 3 All ER 537, [1996] QB 702, [1996] 3 WLR 642, CA.

Moorgate Mercantile Co Ltd v Twitchings [1976] 2 All ER 641, [1977] AC 890, [1976] 3 WLR 66, HL.

Nelson v Couch (1863) 15 CBNS 99, [1861–73] All ER Rep 160, 143 ER 721.

Nordglimt, The [1988] 2 All ER 531, [1988] QB 183, [1988] 2 WLR 338.

Northcote v Henrich Björn (owners), The Henrich Björn (1886) 11 App Cas 270.

Norwegian American Cruises A/S (formerly Norwegian American Airlines A/S) v Paul Mundy Ltd, The Vistafjord [1988] 2 Lloyd's Rep 343, CA.

Parlement Belge, The (1880) 5 PD 197, [1874–80] All ER Rep 104, CA.

Rena K, The [1979] 1 All ER 397, [1979] QB 377, [1978] 3 WLR 431.

Tervaete, The [1922] P 259, [1922] All ER Rep 387, CA.

Appeal

The plaintiffs, the Republic of India and the Ministry of Defence of the government of India (the government), appealed from the decision of the Court of Appeal (Staughton, Simon Brown and Auld LJJ) ([1996] 3 All ER 641, [1997] 2 WLR 538) on 23 April 1996 allowing the appeal by the defendant shipowners, India Steamship Co Ltd, from the decision of Clarke J [1994] 2 Lloyd's Rep 331) in the Admiralty Court on 25 May 1994 whereby he held (i) that the defendants were estopped from relying on s 34 of the Civil Jurisdiction and Judgments 1982, (ii) that the parties to an action in personam were not the same as the parties to an action in rem, and (iii) that the government's claim was not barred by the principle of res judicata. The writ was served at Middlesborough on the defendants' vessel, The Indian Endurance. The case had been remitted back to the Admiralty Court by the House of Lords ([1993] 1 All ER 998, [1993] AC 410). The facts are set out in the opinion of Lord Steyn.

Timothy Charlton QC and *Alan Roxburgh* (instructed by *Clyde & Co*) for the plaintiffs.

Kenneth Rokison QC, Jeffrey Gruder QC and *Daniel Jowell* (instructed by *Ince & Co*) for the defendants.

Their Lordships took time for consideration.

16 October 1997. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, for the reasons given by my noble and learned friend Lord Steyn, in his speech, a copy of which I have seen in draft, I would dismiss the appeal.

LORD STEYN. My Lords, in June 1987 the respondent defendants' vessel, Indian Grace, loaded a cargo of munitions in Sweden for carriage to Cochin in India and delivery to the appellant plaintiffs, the Indian government. The vessel sailed. A few days later a fire occurred in the no 3 hold of the vessel. The master and crew extinguished the fire with water. They also jettisoned 51 artillery shells and 10 charges. The vessel put into Cherbourg for survey and to repack and restow the cargo in no 3 hold. On completion of the necessary work the vessel resumed her voyage to Cochin. She arrived at Cochin in early September, and the cargo was cleared by 4 September 1987.

In the next few months the Indian government notified two separate claims to the defendants. The first was a claim for the total loss of the cargo of

munitions. The second was a small claim for short delivery based on the loss of the cargo jettisoned after the fire. On 1 September 1988 the Indian government issued a plaint in the subordinate judge's court in Cochin, seeking damages for the 51 shells and 10 charges which had not been delivered. The owners served a defence. This action came on for final hearing in December 1989. After a contested trial the judge gave judgment for the Indian government for the amount of its claim in rupees. At that time the sterling equivalent was £7,200. An appeal against this judgment is still pending.

On 25 August 1989 (ie before judgment in the action in Cochin) the Indian government caused a writ in rem to be issued in the Admiralty Court in England. On 4 May 1990 the writ was served on the Indian Endurance, a sister ship of the Indian Grace, at Tees Dock, Middlesbrough. In due course, the parties agreed to the application of English law and the owners submitted to the jurisdiction of the Admiralty Court. The plaintiffs threatened to arrest the vessel in order to obtain security for their claim against the defendants. On the provision of a letter of undertaking by Steamship Mutual Underwriting Association Ltd to pay the claim, if proved, the Indian Endurance was allowed to sail. The statement of claim, as subsequently amended, was in respect of damage to all the cargo in no 3 hold. The plaintiffs' case was that the munitions were subjected to radiant heat by the fire, and were consequently unreliable and worthless. The claim was largely made in Swedish kronor. The sterling equivalent was £2·6m.

Initially, the defendants pleaded issue estoppel as a defence to the claim: they said that the plaintiffs could and should have brought their whole claim before the court in Cochin. The defendants applied to strike out the claim. The summons came before the Admiralty judge, who was then Sheen J. The judge allowed the defendants to amend their defence to rely on s 34 of the Civil Jurisdiction and Judgments Act 1982. Section 34 provides:

> 'No proceedings may be brought by a person in England and Wales ... on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies ... in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales ...'

Sheen J held that the cause of action was the same as that on which the plaintiffs had relied when they obtained judgment in India. He held that s 34 of the 1982 Act was an absolute bar to the English proceedings. He struck out the proceedings. The plaintiffs appealed. The Court of Appeal dismissed the appeal ([1992] Lloyd's Rep 124). The Court of Appeal ruled that the causes of action were the same and that s 34 applied. The plaintiffs sought to argue that the defendants were debarred by agreement, waiver or estoppel from relying on s 34. The Court of Appeal held that s 34 defined the jurisdiction of the court and that parties cannot by agreement, waiver or estoppel confer a jurisdiction on the court which it did not have. The plaintiffs appealed to the House of Lords ([1993] 1 All ER 998, [1993] AC 410). Counsel for the plaintiffs argued that the causes of action in the foreign and English proceedings were distinct. The House ruled that there was an identity between causes of action in the two sets of proceedings. But Lord Goff of Chieveley, speaking for a unanimous House, held that s 34 operated as a bar against proceedings rather than as an exclusion of jurisdiction. Accordingly, the operation of s 34 could in principle

be defeated by agreement, waiver or estoppel. Lord Goff concluded that the matter ought to be remitted to the Admiralty Court to consider the issue of estoppel or waiver. Lord Goff further observed that the plaintiffs sought to raise for the first time in the House of Lords the argument that the judgment of the Cochin court was not a judgment between the same parties as the plaintiffs asserted in the Admiralty action, because it was a judgment in personam, whereas the action was an Admiralty action in rem ([1993] 1 All ER 998 at 1010, [1993] AC 410 at 424). This matter, too, was remitted for consideration of the Admiralty judge.

The present Admiralty judge, Clarke J, ordered preliminary issues to be tried. After a six-day trial he gave a detailed and careful judgment ([1994] 2 Lloyd's Rep 331). He ruled: (i) that the defendants were estopped from relying on s 34 by an estoppel by convention and an estoppel by acquiescence; (ii) that in any event, the English action being an Admiralty action in rem, although an action brought on the same cause of action as the Cochin action, was an action brought against a different party, viz the ship rather than the defendants; and (iii) that the principle laid down in *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378 did not prevent the plaintiffs from bringing in rem proceedings in the Admiralty Court. The defendants appealed. The Court of Appeal ([1996] 3 All ER 641, [1997] 2 WLR 538) came to a contrary conclusion on all three issues and allowed the appeal.

Reversing the order in which the issues were considered in the courts below, I propose to examine first whether the English action in rem is 'between the same parties, or their privies' within the meaning of s 34 as the action in which the plaintiffs obtained judgment in Cochin. If the answer to that question is Yes, the question arises whether the defendants are estopped from relying on s 34. If the defendants fail on both the principal issues, the further question arises whether the defendants can rely on the principle in *Henderson v Henderson*, viz abuse of process, to defeat the action in rem.

The nature of an admiralty action in rem

Clarke J concluded that the authorities show that, although an action in personam and an action in rem may involve the same cause of action, historically they have been regarded as being between different parties ([1994] 2 Lloyd's Rep 331 at 350). Recognising that an action in rem affects the defendants, the judge cited the dictum of Fletcher Moulton LJ in *The Burns* [1907] P 137 at 149 that 'the action in rem is an action against the ship itself'. He also relied on the judgment of Hobhouse J in *The Nordglimt* [1988] 2 All ER 531, [1988] QB 183 along the same lines. Accordingly, the judge held that s 34 is inapplicable because the parties in the two sets of proceedings were different. Counsel for the plaintiffs supported this reasoning and amplified it in a helpful argument. It is necessary to understand the nature of the pending action in rem.

The pending action

The claims endorsed on the writ do not involve maritime liens. Instead the claims of the plaintiffs invoked the enlarged Admiralty jurisdiction of the High Court. The grounds of jurisdiction relied on by the plaintiffs are two paragraphs in s 20(2) of the Supreme Court Act 1981, namely:

'(g) any claim for loss of or damage to goods carried in a ship; (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;'

The indispensable conditions on which in such cases, among others, the jurisdiction of the Admiralty Court is predicated is defined in s 21(4) of the 1981 Act. Section 21(4) provides that, in the case of claims of the type under consideration (i e falling within s 20(2)(g) and (h)), an action in rem may be brought where—

'(a) the claim arises in connection with a ship; and (b) the person *who would be liable on the claim in an action in personam* ... was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship.' (My emphasis.)

This is the statutory basis on which the Indian government invoked the jurisdiction of the Admiralty Court.

The manner in which the Indian government invoked the jurisdiction of the Admiralty Court was by the issue and service of a writ in the form prescribed by RSC Ord 75, r 3(1), read with Form No 1 in App B. The writ is expressed to be directed to the defendants of the ship as defendants and other persons interested in her.

The historical perspective

The historical context of the problem before the House of Lords is noteworthy. Before the Judicature Acts 1873 to 1875, the courts of King's Bench regarded the High Court of Admiralty as in a sense a superior court but being of limited jurisdiction, amenable to restraint by prohibition (*James v South Western Rly Co* (1872) LR 7 Ex 287). The common law courts effectively blocked the assumption by the High Court of Admiralty of in personam jurisdiction. This was done by writs of prohibition to restrain the expansion of the jurisdiction of the High Court of Admiralty. The writ of prohibition did not extend to the Admiralty jurisdiction over the ship. Maritime liens over the ship were immune from the writ of prohibition (see the valuable discussion in Thomas *Maritime Liens* (1980) p 40). Admiralty practitioners and judges used the concept that the ship is a defendant in an action in rem, as a means of defending and extending the jurisdiction of the High Court of Admiralty. An enlarged view was taken of what constitutes a maritime lien. The personification theory flourished. But this struggle for power was ended by the Judicature Acts.

In the nineteenth century it was believed that an admiralty action could only be brought in respect of a maritime lien (*Harmer v Bell, The Bold Buccleugh* (1850) 7 MooPCC 267, 13 ER 884). By statute, actions in rem were subsequently permitted in new categories. But only after the Judicature Acts was it established that the new categories did not involve maritime liens (*Northcote v Henrich Björn (owners), The Henrich Björn* (1886) 11 App Cas 270). While the action in rem was still confined to maritime liens, courts sometimes ascribed personality to a ship. The ship was regarded as both the source and limit of liability. The ship, herself, was the 'wrongdoer'. After the Judicature Acts the personification theory fell into decline.

The interaction, and cumulative effect, of a number of factors contributed to the decline of this theory. First, there is the factor, already noted, that actions

in rem were permitted in new categories which did not involve maritime liens. It became less easy to personify the ship as the real defendant. Secondly, before 1873 actions in rem were commenced by a form of writ which did not name the owners of the ship as defendants. By 1883 the modern form of process, which named the defendants as defendants, had evolved. This development made it easier to regard an action in rem as an action against the defendants of the vessel. An argument that the procedural changes brought about no change in substance was expressly rejected by Jeune J in *The Dictator* [1892] P 304, [1891–4] All ER Rep 360. The procedural change influenced the reasoning of judges in subsequent important decisions: *The Tervaete* [1922] P 259 at 274, [1922] All ER Rep 387 at 394 per Atkin LJ; *The Jupiter* [1924] P 236 at 245, [1924] All ER Rep 405 at 408 per Atkin LJ; *Cia Naviera Vascongada v Cristina, The Cristina* [1938] 1 All ER 719 at 721–722, 730–731, [1938] AC 485 at 492, 505 per Lord Atkin and Lord Wright. In *The Arantzazu Mendi* [1939] 1 All ER 719, [1939] AC 256 the plaintiffs sought to avoid a plea of sovereign immunity by issuing a writ naming the ship as a defendant. Lord Atkin observed that the writ was wholly irregular since it 'purported to make a chattel (the ship) a defendant, and to order the chattel to enter an appearance' ([1939] 1 All ER 719 at 721, [1939] AC 256 at 262–263). The other Law Lords agreed. Thirdly, until the Judicature Acts, it was not possible to combine an action in rem with an action in personam in the Admiralty. Since *The Dictator* was decided in 1892 the law has been that once the defendants enter an appearance (or, in modern phraseology, when they acknowledge issue of the writ) there are two parallel actions: an action in personam and an action in rem. From that moment, the defendants are defendants in the action in personam. This development militated against the personification theory. It became implausible to say that the defendants are the defendants in the action in personam but the ship is the defendant in the action in rem or, alternatively, as counsel for the Indian government suggested, there is no defendant in the action in rem. Fourthly, judges, steeped in Admiralty history with its civilian roots, tended to be more sympathetic to the personification theory than judges trained in the common law. At appellate level common law judges tended to take the robust view that a ship is an inanimate thing, incapable of making contracts and committing torts, and devoid of legal personality. In authoritative judgments common law judges eschewed the mystique of the personification theory.

The personification theory gave way to a more realistic view of the nature of actions in rem. This development took place in the context of the changes which I have sketched. The breakthrough came in *The Dictator*. In one of his first sittings as President of the new Probate, Divorce and Admiralty Division, Jeune J, a common lawyer, undertook a comprehensive review of the development of actions in rem. He concluded ([1892] P 304 at 320, [1891–4] All ER Rep 360 at 368) that when the defendants do appear the action in rem—

> 'not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it.'

This was the procedural theory which subsequently became dominant. The historical analysis in *The Dictator* has been criticised (see Wiswall *The*

Development of Admiralty Jurisdiction and Practice since 1800 (1970) ch 6). On the other hand, the foremost historian of Admiralty history has supported it (see R E Marsden (ed) for the Selden Society *Select Pleas in the Court of Admiralty* (1894) pp lxxi–lxxii). *The Dictator* was followed and endorsed by the Court of Appeal in *The Gemma* [1899] P 285, [1895–9] All ER Rep 596. It is true that a few years later, in *The Burns* [1907] P 137 at 149, Fletcher Moulton LJ appeared in effect to be repudiating the procedural theory by saying that 'the action in rem is an action against the ship' and by acknowledging only that 'the action indirectly affects them' (the defendants). That observation was made on a point of statutory construction and did not reflect the reasoning of the majority. The reasoning in *The Dictator* prevailed. In *The Tervaete* [1922] P 259 at 270, [1922] All ER Rep 387 at 392 Scrutton LJ said that it was established that an action in rem was not based on the wrongdoing of the ship personified as an offender but was a means of bringing the owner of the ship to meet this personal liability by seizing his property. Atkin LJ expressed a similar view ([1922] P 259 at 274, [1922] All ER Rep 387 at 394). See also *The Jupiter* [1924] P 236, [1924] All ER Rep 405. In *Cia Naviera Vascongada v Cristina, The Cristina* [1938] 1 All ER 719, [1938] AC 485 the House of Lords unambiguously rejected the personification theory, and adopted the realist view that in an action in rem the owners were the defendants.

This historical account of the evolution of the procedural theory must be qualified. Thomas *Maritime Liens* (1980) pp 40–44 has pointed out that the procedural theory does not explain why a maritime lien may be enforced against a bona fide purchaser and that it is not entirely consistent with the fact that certain maritime liens accrue independently of personal liability of the shipowner. These may be regarded as distant echoes of the personification theory. But this case is not concerned with maritime liens. That is a separate and complex subject which I put to one side.

Given this general historical perspective, counsel for the plaintiffs acknowledged that the procedural theory became dominant but argued that it tells us nothing about the answer to the question before the House. He said that the procedural theory is a neutral fact. That is unrealistic. The procedural theory stripped away the form and revealed that in substance the owners were parties to the action in rem.

The sovereign immunity cases

The reality that an action in rem is an action against the owner of the ship is supported by the line of sovereign immunity cases. I will refer only to the most significant cases. In *The Parlement Belge* (1880) 5 PD 197, [1874–80] All ER Rep 104 the Court of Appeal held that an action in rem *indirectly* impleaded a sovereign who was the owner of the vessel served because his property was affected by the judgment of the court. In this century, the courts have gone further and held that a sovereign whose ship is served in an action in rem is in fact *directly* impleaded as a defendant. This appears clearly from the judgments in *Cia Naviera Vascongada v Cristina, The Cristina* [1938] 1 All ER 719 at 721, 723, 725, 730, [1938] AC 485 at 491, 493, 498, 505 of Lord Atkin, Lord Thankerton, Lord Macmillan, and Lord Wright. A perusal of those judgments shows clearly that the reasoning of the House of Lords depended in the first place not on principles of international law but on an analysis of the development of the action in rem in English law. Because the sovereign was held to be directly

impleaded the principle of sovereign immunity was then applied. The decision of the House of Lords in *The Arantzazu Mendi* [1939] 1 All ER 719, [1939] AC 256 was to the same effect. The proposition that the foreign sovereign is directly impleaded as a defendant by service on his vessel is therefore conclusively established. That proposition must carry with it the legal consequence that the sovereign is a party to the action in rem.

Further developments

Confining myself to the more important decisions only, there are other decisions of high authority for the proposition that the true defendant in a duly constituted action rem are the defendants of the ship. In *The August 8* [1983] 2 AC 450 at 456, [1983] 2 WLR 419 at 424 Lord Brandon of Oakbrook, a former Admiralty judge, explained:

> 'By the law of England, once a defendant in an Admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues *against him* not only as an action in rem but also as an action in personam ...' (My emphasis.)

More importantly, in *The Deichland* [1989] 2 All ER 1066, [1990] 1 QB 361 the Court of Appeal held that the owner of a vessel which is served with proceedings in rem is 'sued' for the purpose of art 2 of Sch 1 to the 1982 Act. The essential basis of the decision is to be found in the observation of Sir Denys Buckley ([1989] 2 All ER 1066 at 1086, [1990] 1 QB 361 at 389) that: 'In reality, distinguished from formal aspects, the instant action is, in my judgment, as much a suit against Deich as would be an action in personam ...' This reasoning was based on a perception of the true nature of an action in rem in English law. It is a view that I share.

The decision of the European Court of Justice in The Maciej Rataj

In *The Maciej Rataj* Case C-406/92 [1995] All ER (EC) 229 the European Court of Justice had to consider the applicability of art 21 of the Convention on Jurisdiction and the Enforcement of the Judgments in Civil and Commercial Matters 1968 (as set out in Sch 1 to the 1982 Act) to actions in rem and in personam. Article 21 provides:

> 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court ...'

The European Court held that an action in rem and an action in personam involve the same cause of action, the same object and the same parties (at p 255, paras 47 and 48). The Advocate General observed (at p 242, para 19):

> 'No importance must therefore be attached to the fact that the proceedings in question may possibly be of a different nature under the civil procedural law of one or other of the states concerned—what is important is whether or not the substantive issues which the court is called upon to examine are the same.'

Counsel for the plaintiffs has emphasized that, unlike art 21, s 34 of the 1982 Act is a provision of domestic origin designed to address a problem of domestic law. That is true. On the other hand, a comparison of art 21 and s 34 reveals a striking similarity in language. In drafting s 34 the draftsman must have taken art 21 as a model. In these circumstances, it would be curious if one were to arrive at a decision on 'the same parties' in respect of s 34 which diverges from that which applies to art 21. This consideration reinforces the view that I take on a consideration of the nature of an action in rem judged from the perspective of domestic English law.

The purpose of s 34

The function of s 34 was to overcome the anomaly created by the fact that the doctrine of merger did not apply in the case of foreign, ie non-English, judgments. The rationale of the bar against proceedings caught by s 34 is that it is unjust to permit the same issue to be litigated afresh between the same parties. (See *The Indian Endurance, Republic of India v India Steamship Co Ltd* [1993] 1 All ER 998 at 1009, 1008, [1993] AC 410 at 423, 422 per Lord Goff of Chieveley.) Given this legislative objective, it would in my view be wrong to permit an action in rem to proceed despite a foreign judgment in personam obtained on the same cause of action. The purpose of s 34 militates in favour of the bar created by it applying to the action in rem. That seems to me to be a factor weighing strongly against the arguments of the plaintiffs.

The Nordglimt

Clarke J relied on the judgment of Hobhouse J in *The Nordglimt* [1988] 2 All ER 531, [1988] QB 183. Hobhouse J had to consider whether, in the context of art 21, a Belgian action in personam against defendants was between 'the same parties' as an Admiralty action in rem. Hobhouse J held that at the date of its commencement an action in rem was not between the same parties as an action in personam. That was always a very narrow view. Given the decision of the European Court of Justice in *The Maciej Rataj* Case C-406/92 [1995] All ER (EC) 229 the decision in *The Nordglimt* is no longer good law. But Clarke J relied on *The Nordglimt* for its exposition of the nature of an action in rem. Hobhouse J in turn founded his decision on the observations of Fletcher Moulton LJ in *The Burns* [1907] P 137 at 149 encapsulated by the statement that 'the action in rem is an action against the ship itself'. In the light of the development of the action in rem after the Judicature Acts, that proposition can no longer be accepted. It has been overtaken by the developments which I have described in this century, notably the analysis in the sovereign immunity cases. Those decisions were apparently not cited to Hobhouse J and he did not mention them. His analysis can no longer be supported.

The anomaly

Counsel for the plaintiffs relied on a suggested anomaly which may arise if s 34 is held to bar the present action. That anomaly was identified by Staughton LJ. He observed ([1996] 3 All ER 641 at 656–657, [1997] 2 WLR 538 at 553–554):

> 'It is well established since the time of Dr Lushington that a plaintiff who has an unsatisfied judgment in personam can proceed by an action in rem. (Presumably there would be no advantage in doing so unless there had

> been a change in ownership of the vessel, otherwise the plaintiff could employ ordinary methods of execution ...) Similarly, a plaintiff who has proceeded in rem, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action in personam. Those two propositions emerge from *The John and Mary* (1859) Sw 471, 166 ER 1221, *Nelson v Couch* (1863) 15 CBNS 99, [1861–73] All ER Rep 160, *The Cella* (1888) 13 PD 82, *The Joannis Vatis (No 2)* [1922] P 213 and *The Rena K* [1979] 1 All ER 397, [1979] QB 377 ... Can it be that by s 34 of the 1982 Act Parliament has, in a case where the first of two actions is brought in a foreign court (but not if it was brought in England and Wales or Northern Ireland), abolished the well-established rule that a judgment in personam is no bar to an action in rem and vice versa? If so, it is hard to see the rhyme or reason of it.'

Nevertheless, Staughton LJ held that s 34 must have been intended to prevent the same cause of action being tried twice over between those who are, in reality, the same parties.

Counsel were agreed that the rule to which Staughton LJ referred was established in cases involving maritime liens. The House was not referred to authority extending the rule beyond maritime liens. It is an ancient and strange rule which I would not wish to extend beyond the limits laid down by authority. To that extent the scope of any anomaly is less than may have been apparent in the Court of Appeal. But counsel for the defendants argued that the anomaly disappears on a proper construction of s 21(4) of the 1981 Act. The argument runs as follows: in cases of maritime liens the Admiralty Court's jurisdiction does not necessarily depend on the personal liability of the owner (see s 21(3) of the 1981 Act). On the other hand, in cases falling within s 21(4), such as the present case, proof of personal liability of the owner is essential. In order to succeed in the Admiralty action in rem, the plaintiffs must prove the personal liability of the defendants (see *Republic of India v India Steamship Co Ltd, The Indian Grace* [1994] 2 Lloyd's Rep 331 at 355 per Clarke J). In the case of an unsatisfied foreign or domestic judgment in personam, further action in personam between the same parties is barred. That leaves the possibility of a foreign or domestic judgment in personam and a subsequent action in rem in the Admiralty Court. But in a subsequent action in rem the plaintiffs would be unable to establish the personal liability of the defendants. For these reasons, counsel for the defendants argued that the anomaly disappears in fact. It is, however, not merely a defensive point. If it is correct, it affords an independent reason why the plaintiffs cannot succeed in the pending action in rem. This point was not remitted by the House to be decided by Clarke J. He did not do so. It was not put before the Court of Appeal. In these circumstances, I propose to express no view on it. Finally, I must point out that there is an argument that the old rule has simply been abolished by s 34 (see Briggs and Rees *Norton Rose on Civil Jurisdiction and Judgments* (2nd edn, 1993) p 359). Since this point has not been explored in argument, I will express no final view on it. If any anomaly exists, it is quite insufficient to displace the compelling arguments in favour of the applicability of s 34 in the present case.

Was the pending action 'brought' within the meaning of s 34?

That brings me to a discrete point. When the English action in rem was launched no judgment in personam in Cochin had yet been obtained. In these

circumstances, Clarke J held that the bar in s 34 is, in any event, inapplicable (at 356). This is a short point. Counsel for the plaintiffs argued that the action in rem in the Admiralty Court was merely continued, and not 'brought' within the meaning of s 34 after the judgment in Cochin. This issue turns on the meaning of the word 'brought' in s 34. I consider that where proceedings are continued one can quite naturally describe those proceedings as brought. That construction also gives a sensible and purposive meaning to s 34. I am reinforced in this view by the fact that in an analogous context, viz art 28 of the Warsaw Convention 1929 (as set out, unamended, in Pt B of Sch 2 to the Carriage by Air Acts (Application of Provisions) Ord 1967, SI 1967/480), the Court of Appeal interpreted the word 'brought' as embracing the initiation and pursuit of the proceedings (*Milor Srl v British Airways plc* [1996] 3 All ER 537, [1996] QB 702). I would therefore reject the argument of plaintiffs on this point.

Conclusion on the action in rem point

The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building. Fortunately, the scaffolding can usually be removed with ease (see Fuller *Legal Fictions* (1967) p 70). The idea that a ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts this fiction helped to defend and enlarge Admiralty jurisdiction in the form of an action in rem. With the passing of the Judicature Acts that purpose was effectively spent. That made possible the procedural changes which I have described. The fiction was discarded.

It is now possible to say that for the purposes of s 34 an action in rem is an action against the defendants from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service (*The Banco, Owners of the motor vessel Monte Ulia v Owners of the ship Banco* [1971] 1 All ER 524, [1971] P 137). From that moment, the defendants are parties to the proceedings in rem. Subject to the plea of estoppel, s 34 is therefore a bar to the action in rem.

Estoppel: the law

The plaintiffs rely in the alternative on estoppel by convention and estoppel by acquiescence to defeat the applicability of the bar created by s 34. A general review of the requirement of these estoppels is not necessary. It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption (see *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28; *Norwegian American Cruises A/S (formerly Norwegian American Airlines A/S) v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343 and Treitel *Outline of the Law of Contract* (9th edn, 1995) pp 112–113). It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

So far there was no disagreement about the law. But it was argued for the plaintiffs that Staughton LJ had held in the Court of Appeal that a concluded agreement was a requirement of an estoppel by convention. That argument was based on the observation by Staughton LJ ([1996] 3 All ER 641 at 652, [1997] 2 WLR 538 at 549) that: '... it is essential that the assumption be agreed for there to be an estoppel ...' At first glance that observation seems to bear out the argument entirely. But earlier Staughton LJ had referred to an 'agreement or something very close to it'. Reading the observations in context, I do not accept that the Court of Appeal misdirected itself on this point.

That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 2 All ER 641 at 646, [1977] AC 890 at 903. Lord Wilberforce said that the question is—

> 'whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property would expect the "owner" acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known ...'

Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence.

The question was debated whether estoppel by convention and estoppel by acquiescence are but aspects of one overarching principle. I do not underestimate the importance in the continuing development of the law of the search for simplicity. I, also, accept that at a high level of abstraction such an overarching principle could be formulated. But Mr Rokison QC, for the defendants, persuaded me that to restate the law in terms of an overarching principle might tend to blur the necessarily separate requirements, and distinct terrain of application, of the two kinds of estoppel. (In passing I would pay tribute to the argument of Mr Rokison, presented with his customary flair in his last case in the House of Lords.)

Estoppel by convention: the facts

Clarke J ([1994] 2 Lloyd's Rep 331) set out the primary facts and his inferences in detail. Staughton LJ summarised the facts and the findings of the judge in his judgment. It is unnecessary for me to cover the same ground. Instead, I deal with the matter quite shortly. Clarke J (at 346) found established a manifestation of consent to the basis on which the proceedings in Cochin were proceeding, namely that it was limited to the shortage claim and the larger claim could proceed elsewhere. It is, however, not enough to show that the defendants by their conduct manifested that they knew that the larger claim would be put forward in other proceedings. It is true that the common assumption does not have to extend specifically to the bar under s 34. But in order to establish an estoppel by convention the plaintiffs had to prove that the defendants evinced by their conduct that they were content that the taking of a judgment in Cochin would not prejudice the resolution of other proceedings on their merits, that is, that in future proceedings no plea or defence on the

basis of a judgment in Cochin would be raised, whatever the outcome of the proceedings in Cochin.

Once this distinction is kept in mind, it is clear that there was insufficient evidence to warrant a finding that an estoppel by convention was established. Ultimately, on appeal to the House of Lords, counsel for the plaintiffs relied on two aspects of the evidence. The first was a telephone conversation on 14 August 1989 between Captain Singh of Steamship Mutual Underwriting Association Ltd (representing the defendants) and Mr Wilson of Clyde & Co. (the plaintiffs' solicitors). Mr Wilson was unaware of any Indian proceedings. Captain Singh mentioned that there were two sets of proceedings pending in India, viz proceedings for particular average loss in Cochin and proceedings in Calcutta for general average loss. Mr Wilson asked for an extension of time to serve a writ in England. Captain Singh refused this request. Captain Singh was left with the impression that Clyde & Co would issue a writ in the Admiralty Court. Contrary to the defendants' case the judge found that Captain Singh did not mention that English jurisdiction would be contested, or, if he did so, that it was done in a way not calculated to impress itself on Mr Wilson. This evidence shows merely that the plaintiffs' solicitors informed the defendants that there would be English proceedings. It falls markedly short of establishing a common assumption, manifested by the exchanges between the parties, that no plea arising from the fact of a judgment would be taken in the English proceedings.

In the second place, the plaintiffs relied on the way in which the proceedings in Cochin were conducted. The plaintiffs made clear in the plaint that the claim was confined to the short delivery of a small quantity of cargo. The plaint recited that the plaintiffs had notified the defendants of a large claim in respect of an 'alleged total loss of entire consignment'. In his judgment the judge pointed out that the claim before him was only in respect of the small claim in respect of short delivery. He noted that the plaintiffs appeared to have a further and much larger claim. That is the extent of the relevant evidence. The statements by the advocates admitted in evidence do not reveal that anything more of significance was said by either side about the basis on which the claim was being conducted. All that can be inferred from the conduct of the proceedings in Cochin is that there was a larger claim which would be pursued elsewhere. The evidence does not begin to show that the defendants evinced an attitude that they were content that judgment should be given in Cochin, and that whatever the outcome of the proceedings in Cochin they would not raise a plea or defence elsewhere on the basis of the fact of a judgment in Cochin. There was no evidence to warrant such a finding.

The distinction that I have drawn about the facta probanda of an estoppel by convention in the present case may not have been squarely placed in argument before the judge. It was crucial. The judge did not therefore approach his findings of fact in the way which I have outlined. In any event, there was insufficient evidence before him to justify findings of estoppel by convention of the type which I have described. In these circumstances, the Court of Appeal were entitled to conclude that no estoppel by convention was established.

Estoppel by acquiescence: the facts

It is overwhelmingly probable, as both sides accepted, that until after the judgment in Cochin was handed down neither side gave any thought to the implications of that judgment on any further proceedings. Both sides were in

ignorance of the potential consequences of a judgment in Cochin. There were no special circumstances which could even arguably have required the defendants to put the plaintiffs on their guard as to the risk flowing from the taking of a judgment in Cochin. The defendants also did nothing by conduct or silence which could have led the plaintiffs to think that the plaintiffs could safely take a judgment in Cochin without any risk of a plea or defence in any further proceedings.

Clarke J, [1994] 2 Lloyd's Rep 331 at 346 said that the defendants are 'estopped either by convention or by acquiescence (if that is different)': So far as the judge rested his judgment on estoppel by acquiescence, I am satisfied that the separate requirements of this kind of estoppel were not satisfied. In my judgment, the Court of Appeal was entitled to reverse Clarke J on this point.

Henderson v Henderson

In view of my conclusion that s 34 is applicable, and not defeated by estoppel, it is unnecessary to express any view on the separate issue whether the principle in *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378 applies.

The disposal of the appeal

Acknowledging my indebtedness to the judgment of Staughton LJ, I conclude that for the reasons I have given the appeal ought to be dismissed.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons which he gives, I agree that the appeal should be dismissed.

LORD COOKE OF THORNDON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn and for the reasons given by him I, too, would dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Steyn. I agree with it, and for the reasons which he has given I, also, would dismiss the appeal.

Appeal dismissed.

Celia Fox Barrister.

Ingram and another (executors of the estate of Lady Ingram (deceased)) v Inland Revenue Commissioners

COURT OF APPEAL, CIVIL DIVISION
NOURSE, EVANS AND MILLETT LJJ
6, 7, 8 MAY, 28 JULY 1997

Lease – Grant of lease by nominee to principal – Validity – Whether principle that no person can contract with himself breached.

Inheritance tax – Lifetime transfer – Gift of property subject to a reservation – Transfer of freehold interest subject to leases in favour of donor – Whether property enjoyed to exclusion of donor – Whether property subject to a reservation of benefit – Finance Act 1986, s 102.

In March 1987 J carried out various transactions with the object of avoiding or reducing the inheritance tax payable on her death in respect of the family home, while allowing her to remain in residence in the property for the rest of her life. The transactions effected were as follows. On 29 March J transferred the property and another parcel of land which she owned to her solicitor outright. Later that day the solicitor declared that he held the property as nominee for J and agreed to transfer it back to her or otherwise deal with it as she might direct. On 30 March, acting on J's directions, the solicitor granted J two leases which together extended to the whole of the property for a term of 20 years free of rent. The leases contained covenants by the tenant against assignment and underletting and as to repairs, and a covenant for quiet enjoyment by the landlord. On 31 March, again acting on J's instructions, the solicitor transferred the freeholds of the property, subject to the leases in favour of J, to her two sons and her grandson (the trustees). On the same day the trustees executed two declarations of trust, the effect of which was to constitute themselves trustees of a settlement under which the property was to be held for the benefit of certain beneficiaries, subject to the leases in favour of J. J died on 3 February 1989. The executors of her estate claimed that because she had died within seven years of the disposition in favour of the beneficiaries, the disposition was chargeable at the lifetime rate. The Revenue however did not accept that contention and issued a notice determining that inheritance tax was payable in respect of the property at the death rate on the basis that it was 'property subject to a reservation' within s 102(2) of the Finance Act 1986 and was therefore to be treated as property to which J was beneficially entitled immediately before her death. The judge allowed the executors' appeal, holding that although the leases were a nullity, having been granted by a nominee to a principal, the freehold interest in the property was, after 31 March 1987, enjoyed to the entire exclusion of J and of any benefit to her by contract or otherwise for the purpose of s 102(1)(b) of the 1986 Act. The Revenue appealed.

Held – (Millett LJ dissenting) The appeal would be allowed for the following reasons—

(1) A nominee could not grant a lease to his principal since he could not contract with his principal so as to create rights and obligations in relation to the

subject of the nomineeship. Moreover, a person could not assume the burden of an obligation to someone whose only function was to hold the benefit for him. It followed, in the instant case, that the covenants in the lease were a nonsense and as it was not was not possible to split up the transactions so as to hold the tenancy good and the covenants bad, the tenancy fell with the covenants and therefore the leases were a nullity (see p 401 *c* to *h*, p 410 *c* and p 416 *b c e f*, post); *Rye v Rye* [1962] 1 All ER 146 applied; *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657 adopted.

(2) It followed that the trustees took the freehold free from any lease at law, but since they were volunteers with notice of J's intention, they took subject to an obligation in equity to give effect to that intention, namely to treat her in all respects as if the leases had been valid, and therefore to afford her possession of the property when the freehold interest was vested in them. Moreover, because the interests of a beneficiary under a trust could only take effect subject to those obligations to which his trustee was subject, the beneficiaries were no less volunteers with notice of J's intention than the trustees and equally subject to an obligation in equity to give effect to that intention. Accordingly, J's rights were smaller rights comprised in the disposition to the trustees and in the gift to the beneficiaries. It followed that although the property given to the beneficiaries was the freehold interest, the nature of J's rights against the trustees and beneficiaries was such that that interest was not enjoyed to her entire exclusion for the purpose of s 102(1)(b) (see p 402 *e* to *j*, p 407 *j* to p 408 *g*, p 410 *b c*, p 414 *f* to p 415 *a* and p 416 *e f* post); *Nichols v IRC* [1975] 2 All ER 120 followed; *Lang v Webb* (1912) 13 CLR 503 considered.

(3) A covenant for quiet enjoyment was in reality no more than a contractual backing for the landlord's obligation not to derogate from his grant. Accordingly the covenants for quiet enjoyment had not given J a benefit by contract or otherwise within the meaning of s 102(1)(b) (see p 409 *h*, p 410 *c* and p 416 *f*, post).

Decision of Ferris J [1995] 4 All ER 334 reversed.

Notes

For gifts subject to a reservation of benefit, see 24 *Halsbury's* Laws (4th edn reissue) paras 446–453.

For the Finance Act 1986, s 102, see 42 *Halsbury's Statutes* (4th edn) (1996 reissue) 935.

Cases referred to in judgments

A-G v Worrall [1895] 1 QB 99, [1891–4] All ER Rep 861, CA.

Belaney v Belaney (1867) LR 2 Ch App 138, LC.

Brockbank (decd), Re, Ward v Bates [1948] 1 All ER 287, [1948] Ch 206.

Cochrane, Re [1906] 2 IR 200, Ir CA; *affg* [1905] 2 IR 626, Ir KBD.

Comr of Stamp Duties of New South Wales v Perpetual Trustee Co Ltd [1943] 1 All ER 525, [1943] AC 425, PC.

Farrar v Farrars Ltd (1888) 40 Ch D 395, CA.

Faulkner v Lowe (1848) 2 Exch 595, 154 ER 628, Ex Ch.

Furniss (Inspector of Taxes) v Dawson [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL.

Gilbert v Comr of Internal Revenue (1957) 248 F 2d 399, US Ct of Apps (2nd Cir).

Grey v Ellison (1856) 1 Giff 438, 65 ER 990.
Grey (Earl) v A-G [1900] AC 124, [1900–3] All ER Rep 268, HL; *affg* [1898] 2 QB 534, CA; *affg* [1898] 1 QB 318, DC.
Helvering (Comr of Internal Revenue) v Gregory (1934) 69 F 2d 809, US Ct of Apps (2nd Cir); *affd* (1935) 293 US 465, US SC.
Henderson v Astwood, Astwood v Cobbold [1894] AC 150, PC.
Hirachand Punamchand v Temple [1911] 2 KB 330, CA.
Ingle v Richards (1860) 28 Beav 361, 54 ER 405.
IRC v McGuckian [1997] 3 All ER 817, [1997] 1 WLR 991, HL.
Kildrummy (Jersey) Ltd v IRC [1990] STC 657, Ct of Sess.
Knetsch v US (1960) 364 US 361, US SC.
Lang v Webb (1912) 13 CLR 503, Aust HC.
Lewis v Hillman (1852) 3 HL Cas 607, 10 ER 239.
Lord Advocate v Stewart (1906) 8 F 579, Ct of Sess.
Munro v Comr of Stamp Duties [1934] AC 61, [1933] All ER Rep 185, PC.
Nichols v IRC [1975] 2 All ER 120, [1975] 1 WLR 534, CA; *affg* [1973] 3 All ER 632, [1974] 1 WLR 296.
Oakes v Comr of Stamp Duties of New South Wales [1953] 2 All ER 1563, [1954] AC 57, [1953] 3 WLR 1127, PC.
Ramsay (W T) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.
Regent Oil Co Ltd v J A Gregory (Hatch End) Ltd [1965] 3 All ER 673, [1966] Ch 402, [1965] 3 WLR 1206, CA.
Rye v Rye [1962] 1 All ER 146, [1962] AC 496, [1962] 2 WLR 361, HL.
St Aubyn (L M) v A-G (No 2) [1951] 2 All ER 473, [1952] AC 15, HL.
St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2) [1975] 1 All ER 772, [1975] 1 WLR 468, CA.
Walsh v Lonsdale (1882) 21 Ch D 9, CA.
Whichelow (decd), Re, Bradshaw v Orpen [1953] 2 All ER 1558, [1954] 1 WLR 5.
Williams v Scott [1900] AC 499, PC.

Cases also cited or referred to in skeleton arguments

Boyce v Edbrooke [1903] 1 Ch 836.
Craven (Inspector of Taxes) v White, IRC v Bowater Property Developments Ltd, Baylis v Gregory [1988] 3 All ER 495, [1989] AC 398, HL.
IRC v Duke of Westminster [1936] AC 1, [1935] All ER Rep 259, HL.
Kenny v Preen [1962] 3 All ER 814, [1963] 1 QB 499, CA.
Memec plc v IRC [1996] STC 1336.
R v Special Comrs, ex p Inspector of Taxes Simon's Weekly Tax Intelligence 1995 p 1101.
United Scientific Holdings Ltd v Burnley BC [1977] 2 All ER 62, [1978] AC 904, HL.

Appeal

The Commissioners of Inland Revenue appealed from the decision of Ferris J ([1995] 4 All ER 334) on 17 May 1995 allowing an appeal by Michael Warren Ingram and Christopher David Palmer-Tomkinson, the executors of Lady Jane Lindsay Ingram, deceased, pursuant to s 222(3) of the Inheritance Tax Act 1984 against a determination dated 10 October 1994 made by the Commissioners of Inland Revenue in respect of the inheritance tax payable on certain assets on the death of Lady Ingram, which occurred on 3 February 1989. The facts are set out in the judgment of Nourse LJ.

Edward Nugee QC and *Michael Furness* (instructed by the *Solicitor of Inland Revenue*) for the Crown. a

Robert Venables QC and *Robert Grierson* (instructed by *Norton Rose*) for the executors.

Cur adv vult

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28 July 1977. The following judgments were delivered.

NOURSE LJ.

Introduction

On the last three days of March 1987 Jane Lindsay Ingram, the widow of Sir Herbert Ingram Bt, carried into effect a series of voluntary transactions whose object was to avoid or reduce the inheritance tax prospectively payable on her death in respect of her family home, Hurst Lodge, near Twyford in Berkshire, while enabling her to continue to live there free of rent under a term of years which was likely to exceed her lifetime. Lady Ingram died on 3 February 1989. Shortly stated, the question for decision is whether the disposition of the freehold subject to the term of years was a gift with reservation, having the effect of cancelling the reduction in inheritance tax which would have been achieved had there been no such reservation. Ferris J has answered that question in the negative and in favour of Lady Ingram's executors (see [1995] 4 All ER 334). The Crown appeals to this court. The outcome of the appeal depends largely on estate duty authorities decided between 1898 and 1974 which it must have been generally expected would cease to have any application after the replacement of that duty by capital transfer tax in 1975.

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Since it is essential to a decision of the appeal that the nature and effect of the transactions should be carefully analysed, I will describe them in my own words. In order to do that I must start with the background facts, most of which are deposed to in an affidavit of Lady Ingram's solicitor, Mr Michael Macfadyen of the firm of Norton Rose, who had advised her and her family in relation to their tax affairs since about 1980 and now acts for her executors, Michael Warren Ingram and Christopher David Palmer-Tomkinson.

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The background

At the end of March 1987 Lady Ingram was 73 years of age. By a deed of gift made in 1946 her father, James Edward Palmer-Tomkinson, had conveyed to her the freehold of Hurst Lodge, together with some adjoining and adjacent land, all of which was unregistered and amounted in the aggregate to 61 acres or thereabouts. In 1986 Lady Ingram sought Mr Macfadyen's advice as to making lifetime gifts of this property and a further area of land of about 46 acres in the neighbouring parish of Whistley Green, the title to which was registered, in favour of her three daughters and the children of her deceased son. She was aware that, with the introduction by the Finance Act 1986 of transfers which were potentially exempt from inheritance tax, it could well be advantageous to the donees for her to make lifetime gifts in their favour. At the same time, she wished to retain actual occupation of the land or, in the case of let property, the right to receive the rents. After taking advice from counsel specialising in revenue matters instructed by Mr Macfadyen on her behalf, Lady Ingram decided that she would make a gift of her freehold

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interest in the property, subject to a leasehold interest for the next 20 years at no rent which she would retain for herself. Acting on her instructions, Mr Macfadyen prepared the necessary documentation.

The transactions

The first step was the execution by Lady Ingram, on 29 March, of a conveyance of the unregistered land and a transfer of the registered land in favour of Mr Macfadyen. Each of those instruments was, in form, an out and out voluntary disposition of the property comprised therein. However, also on 29 March, Mr Macfadyen executed two deed polls, described as declarations of nomineeship, each of which recited that the property had been conveyed or transferred to him upon trust as thereinafter mentioned. By the operative part of each deed Mr Macfadyen declared that he held the property as nominee for Lady Ingram and agreed that he would transfer it to her at such time and in such manner or otherwise deal with it as she should direct or appoint. In the result Mr Macfadyen held the unencumbered freehold interest in the property in trust for Lady Ingram absolutely. There being for present purposes no material difference between the relationships of trustee and beneficiary on the one hand and nominee and principal on the other, I will adopt the terminology used by the parties and refer to Mr Macfadyen and Lady Ingram as nominee and principal respectively.

On the following day, 30 March, Mr Macfadyen, at Lady Ingram's direction, executed two leases, together comprising the whole of the property, in favour of Lady Ingram as tenant for a term of 20 years from 30 March 1987 free of rent. One of them comprised Hurst Lodge, its surrounding land and some neighbouring cottages and the other a separate piece of agricultural land at Hurst and the agricultural land at Whistley Green. Each of them contained covenants by Lady Ingram in a form appropriate to the property comprised in it which it is not suggested did not impose real obligations on her. Each contained an absolute covenant against assignment, underletting, charging, or parting with or sharing the possession of the occupation of the whole or any part or parts of the property. There were also covenants to permit the landlord to enter to do repairs himself and, in the lease of the agricultural land, to deliver up the property at the end of the term in good and substantial repair and condition. In the lease of Hurst Lodge there was a covenant to deliver up the property in such good and substantial repair and condition as was evidenced by the schedule of condition of the property attached thereto. By neither lease was any greater obligation imposed on Lady Ingram to do repairs herself. The only covenant on the part of the landlord was for quiet enjoyment. There was a proviso for forfeiture for breach of covenant.

On the following day, 31 March, again at Lady Ingram's direction, Mr Macfadyen executed two conveyances and a transfer conveying and transferring the freeholds in the various parts of the property to Michael Warren Ingram, Christopher David Palmer-Tomkinson and David Michael Ingram (the trustees). Each of those instruments stated that the property to which it related was conveyed or transferred to the trustees 'to hold ... on trusts declared concerning the same'. Each of them was expressed to take effect subject to and with the benefit of the relevant lease in favour of Lady Ingram. Also on 31 March the trustees executed two declarations of trust, again expressed to be subject to the relevant lease or leases, under each of

which the property was declared to be held on trust for sale and immediate absolute interests in the proceeds of sale were declared in favour of Lady Ingram's three daughters and the trustees of a settlement made on 29 March 1987 for the benefit of the children of her deceased son and known as Robin Ingram's children's 1987 settlement. She herself could not in any circumstances have benefited under or by virtue of the declarations of trust, although in each case the property comprised therein could not be sold during her lifetime without her written consent.

The judge thought that there was an instant of time between the execution of the conveyances and transfer and the execution of the declarations of trust, during which the trustees held the property in trust for Lady Ingram. I do not think that that can be a correct view of the matter. It is true that in his affidavit Mr Macfadyen, having referred first to the execution of the conveyances and transfer on 31 March, then states that on the same day the trustees executed the declarations of trust. That may well indicate that the conveyances and transfer were executed first. However, I think that the correct inference, especially in view of the words in the declarations of trust 'on trusts ... declared' (not 'on trusts to be declared'), is that the conveyances and transfer and the declarations of trust were all intended to take effect, and did take effect, at one and the same time.

The decision of the judge

The intended fiscal consequences of the transactions, the best result they could achieve as a result of Lady Ingram's death within two years (consequence (e)), the nature of the Crown's claim, the route by which it contended that the claim was made good and the issues to which the case gives rise are stated in the judgment of Ferris J and need not be repeated (see [1995] 4 All ER 334 at 338). In a full and clear judgment the judge decided, first, that the leases in favour of Lady Ingram, having been granted by a nominee to his principal, were a nullity; secondly, that the freehold interests in the property were, after 31 March 1987 and subject to an equitable interest in Lady Ingram equivalent to that which she would have taken had the leases been valid, enjoyed to the entire exclusion of Lady Ingram and of any benefit to her by contract or otherwise. In view of his decision that the leases were a nullity it was unnecessary for him to decide, thirdly, whether, had they been valid, the *Ramsay* principle (see *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300) would have applied with the same result as if they had been a nullity. The same issues having been raised in this court, I will deal with them in the same order as the judge.

Were the leases to Lady Ingram a nullity?

This question was considered by Ferris J ([1995] 4 All ER 334 at 339–345). Since I am in complete agreement with his reasoning and conclusion, I can deal with it relatively briefly. Mr Nugee QC, for the Crown, submitted that the question was, as a matter of principle, concluded in favour of the Crown by the decision of the House of Lords in *Rye v Rye* [1962] 1 All ER 146, [1962] AC 496, the decision of the Inner House of the Court of Session in *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657 being effectively a working out of the consequences of the earlier decision. In Mr Nugee's submission the key

passage in *Rye v Rye* [1962] 1 All ER 146 at 155, [1962] AC 496 at 514 appears in the speech of Lord Denning:

> '... I have come to the clear opinion that even under the [Law of Property Act 1925] a person cannot grant a tenancy to himself: for the simple reason that every tenancy is based on an agreement between two persons and contains covenants expressed or implied by the one person with the other. Now if a man cannot agree with himself and cannot covenant with himself, I do not see how he can grant a tenancy to himself. Is the tenancy to be good and the covenants bad? I do not think so. The one transaction cannot be split up in that way. The tenancy must stand or fall with the agreement on which it is founded and with the covenants contained in it: and as they fall, so does the tenancy.'

In that case it was held that two individuals cannot grant a lease to themselves. Mr Nugee submitted that, since it is clear that a nominee cannot contract with his principal so as to create rights and obligations in relation to the subject of the nomineeship, it follows that a nominee cannot grant a lease to his principal, at any rate one which is not a bare term containing no covenants by either party. The specific authority for that proposition is the *Kildrummy* case. Mr Nugee submitted that the facts of that case are for all relevant purposes indistinguishable from those of this case and, further, that there is no material difference between the laws of Scotland and England on this point.

In my judgment Mr Nugee's submissions are correct. The logic of the passages quoted by Ferris J (at 343–345) from the judgments of the Lord President (Lord Hope), Lord Sutherland and Lord Clyde in the *Kildrummy* case, is unanswerable, and I agree with him that their reasoning is based on principles which are part of English law just as much as they are part of Scots law. Indeed, I would think that no system of law could sensibly allow you to assume the burden of an obligation to someone whose only function was to hold the benefit of it for yourself. That is no less whimsical a transaction than the grant of a lease to yourself. Although neither lease in the present case contained a covenant to pay rent, each of them contained covenants by Lady Ingram creating real obligations to Mr Macfadyen which could only have been held by him for her benefit. So the covenants were a nonsense and bad from the start. Just as Lord Denning said of a lease to yourself, you cannot split up the transaction so as to hold the tenancy good and the covenants bad; as the covenants fall, so does the tenancy. Therefore the leases were a nullity. As to the consequences of that, two alternative views have been put forward, one preferred by the Crown and the other by the executors, although each side maintained that whichever view was correct the result would be the same.

The consequences of the leases having been a nullity

The Crown's preferred view is that the conveyances and transfer by Mr Macfadyen to the trustees on 31 March operated as a grant by the trustees of legal leases to Lady Ingram in the form of those which were purported to be granted to her by Mr Macfadyen on 30 March. Their operation in that manner is said to have been the result of s 65 of the Law of Property Act 1925, which, so far as material, provides:

'(1) A reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.

(2) A conveyance of a legal estate expressed to be made subject to another legal estate not in existence immediately before the date of the conveyance, shall operate as a reservation, unless a contrary intention appears ...'

What is said by the Crown is that the conveyances and transfer by Mr Macfadyen to the trustees, having been expressed to be made subject to the leases by Mr Macfadyen to Lady Ingram (each of which was a 'legal estate not in existence' immediately beforehand), operated as a reservation by virtue of sub-s (2), the reservation operating for the benefit of Lady Ingram by virtue of sub-s (1). Although this may, on a literal reading, be a tenable view of s 65, I cannot believe that it was intended to have that effect. Ferris J (at 346) rejected it because he thought that there was an instant of time between the execution of the conveyances and transfer and the execution of the declarations of trust, during which the trustees held the property in trust for Lady Ingram; that s 65 must have operated, if it operated at all, during that instant; but that if it did, then it operated to create in favour of Lady Ingram the very interests which he had held had created a legal impossibility.

Being of the opinion that the conveyances and transfer and the declarations of trust took effect at one and the same time, I do not base my own rejection of the Crown's preferred view quite on that ground. There is, I think, an anterior and more fundamental ground, which is that s 65(2), in referring to 'another legal estate not in existence' can only have been intended to refer to a legal estate which was capable of existence. The leases purportedly granted by Mr Macfadyen to Lady Ingram were incapable of existence and thus outside the ambit of s 65(2).

In my judgment the correct view is that preferred by the executors. I will state it in my own words. The immediate consequence of the leases having been a nullity was that on 30 March Mr Macfadyen continued to hold the unencumbered freehold interest in the property in trust for Lady Ingram absolutely. When, on 31 March and at her direction, he conveyed and transferred the freehold interest to the trustees, they likewise took it free from any lease at law. However, being volunteers, moreover volunteers with notice, through the terms of the conveyances and transfer and the declarations of trust, of Lady Ingram's intention, they took subject to an obligation in equity to give effect to that intention, in other words to treat her in all respects as if the leases had been valid. To the further consequences of that I will return in due course.

Was the property disposed of, after 31 March 1987, enjoyed to the entire exclusion of Lady Ingram and of any benefit to her by contract or otherwise?

The broad effect of s 102 of the 1986 Act, to which the sidenote is 'Gifts with reservation', is that, subject to familiar exemptions under sub-s (5), the property comprised in such a gift is treated for the purposes of inheritance tax

as property to which the donor was beneficially entitled immediately before his death, being taxable accordingly. So far as material, s 102(1) provides:

> '... this section applies where, on or after 18th March 1986, an individual disposes of any property by way of gift and either—(a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or (b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise ...'

There is then a definition, under which 'the relevant period' in this case was between 31 March 1987 and 3 February 1989, the date of Lady Ingram's death.

With the exception of the words 'or virtually to the entire exclusion', on which nothing turns here, s 102(1) is agreed to have an effect identical to that of the corresponding, although somewhat differently worded, provisions of the estate duty legislation; see in particular s 11(1) of the Customs and Inland Revenue Act 1889, which described the dutiable property thus—

> 'property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, and of any benefit to him by contract or otherwise ...'

There were comparable provisions in the Victorian and New South Wales death duties legislation considered in the Australian cases hereafter referred to.

Although it is usual, and no doubt convenient, to speak of a gift with or subject to a reservation, or of the reservation of a benefit, such expressions are no substitute for the wording of the provision itself, which must be meticulously applied to the facts of the particular case. It was only rarely that an estate duty claim was squarely based on what is now para (a) of s 102(1), the example usually cited being *Lord Advocate v Stewart* (1906) 8 F 579. Here it is agreed that the outcome depends on para (b). In other words, s 102 will apply unless, between 31 March 1987 and 3 February 1989, the property disposed of by Lady Ingram was continuously enjoyed to the entire exclusion (1) of Lady Ingram and (2) of any benefit to her by contract or otherwise, to which I will refer as the first and second limbs of s 102(1)(b). The Crown's case is based mainly on the first limb.

We were referred to the following estate duty authorities bearing on the first limb of s 102(1)(b), which I list in chronological sequence: *Earl Grey v A-G* [1900] AC 124, [1900–3] All ER Rep 268; *affg* [1898] 2 QB 534; *affg* [1898] 1 QB 318, *Re Cochrane* [1906] 2 IR 200; *affg* [1905] 2 IR 626, *Lang v Webb* (1912) 13 CLR 503, *Munro v Comr of Stamp Duties* [1934] AC 61, [1933] All ER Rep 185, *Comr of Stamp Duties of New South Wales v Perpetual Trustee Co Ltd* [1943] 1 All ER 525, [1943] AC 425, *St Aubyn (L M) v A-G (No 2)* [1951] 2 All ER 473, [1952] AC 15, *Oakes v Comr of Stamp Duties of New South Wales* [1953] 2 All ER 1563, [1954] AC 57 and *Nichols v IRC* [1975] 2 All ER 120, [1975] 1 WLR 534; *affg* [1973] 3 All ER 632, [1974] 1 WLR 296. Of these authorities the only two which deal with a simultaneous gift of the freehold and the grant of a lease back are *Lang v Webb* and *Nichols v IRC*.

The estate duty authorities demonstrate that the application of the first limb of s 102(1)(b) to any particular case essentially depends on the identification of the property disposed of. That is because, as Lord Russell of Killowen, when delivering the judgment of the Privy Council in the *Perpetual Trustee* case [1943] 1 All ER 525 at 533–534, [1943] AC 425 at 446, observed:

> '... the entire exclusion of the donor from ... enjoyment which is contemplated ... is entire exclusion from ... enjoyment of the beneficial interest in property which has been given by the gift, and ... enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from ... enjoyment which the subsection requires.'

That statement of the principle has since been consistently approved, for example by Lord Radcliffe in *St Aubyn (L M) v A-G (No 2)* [1951] 2 All ER 473 at 496, [1952] AC 15 at 50.

An example of the distinction made by Lord Russell which provides a helpful introduction to the present case is *Munro's* case. There, in 1909, the deceased orally agreed with his six children that he and they would carry on the business of graziers on land owned by him as partners under a partnership at will. In 1913 the deceased transferred by way of gift the freehold interest in portions of the land to each of his four sons and to trustees for each of his two daughters and their children. The transfers were taken subject to the partnership agreement. In 1919 the deceased and his children entered into a formal partnership agreement, which provided that during his lifetime no partner should withdraw from the partnership. On the deceased's death in 1929 a claim for death duties was made in respect of the land transferred to his children in 1913. In delivering the judgment of the Privy Council rejecting the claim, Lord Tomlin said ([1934] AC 61 at 67, [1933] All ER Rep 185 at 188):

> 'It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the term of the partnership or a licence coupled with an interest. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and upon this footing it is in their Lordships' opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor.'

In *Munro's* case so far from there being a simultaneous gift of the freehold and the grant of a lease back, the grant of the lease or licence preceded the gift of the freehold by some four years. Of the two authorities where the two transactions were simultaneous it is convenient to deal first with *Nichols'* case. In that case a father, in 1954, had decided to make a gift of his family home and the surrounding estate to his son, then aged 22. It was arranged that the father would transfer the whole estate to the son, who would immediately lease the bulk of the property back to the father, the lease to contain a full repairing covenant on the part of the son. The gift of the freehold took effect on 24 June 1955, but the lease did not take effect until 16 July of that year, when it was not in its original form but contained, in addition, a covenant by the son to pay the tithe redemption annuity charged on the property. The father continued to

live in the family home and to enjoy the property comprised in the lease, paying less than a rack rent, until his death in 1962.

The Crown claimed estate duty on the father's death in respect of the freehold, primarily on the ground that the lease back had prevented it from being enjoyed to his entire exclusion. The son argued that the father had given him the freehold subject to an equitable obligation to grant a lease back, and that the property disposed of accordingly consisted of the reversion expectant on the determination of the lease. Walton J at first instance accepted that, if the son had indeed been under an equitable obligation to grant the lease back, the property disposed of would have been the reversion. However, he held that there was no such obligation, so that the property disposed of was the freehold, which, not having been enjoyed to the entire exclusion of the father, was dutiable accordingly. On the son's appeal to this court, it was held that he had been under an equitable obligation to grant the lease back but that, even if the reversion had been possessed and enjoyed to the entire exclusion of the father, the son's full repairing covenant and, it would appear, his covenant to pay tithe redemption annuity were benefits to the father by contract or otherwise within what is now the second limb of s 102(1)(b), so that the freehold was dutiable accordingly.

The judgment of this court (Russell, Cairns LJJ and Goff J) was delivered by Goff J. Having referred to the gift of the freehold and the material estate duty provisions, they stated the three problems thereby posed, which, for the sake of convenience, I have numbered:

> '... [1] whether all that was given was the beneficial interest in the estate shorn of the benefit of the rights and interests of the donor under the lease back, in which case prima facie the gift must fall outside the statutory provision, or [2] whether the gift was of the whole beneficial interest in the property, in which case it is not disputed that the lease back must have prevented the son from assuming bona fide possession and enjoyment immediately on the gift to the entire exclusion of the father, and also [3] whether the covenants in the lease are such that in any case the son cannot be said to have assumed such possession and enjoyment to the entire exclusion of any benefit to the father by contract or otherwise within the meaning of the section.' (See [1975] 2 All ER 120 at 122, [1975] 1 WLR 534 at 538.)

Problems (1) and (2) arose in the application of what is now the first limb of s 102(1)(b) and problem (3) in the application of the second limb.

The judgment contains a thorough review of *Earl Grey v A-G*, *Re Cochrane*, *Munro's* case, the *Perpetual Trustee* case and *Oakes'* case. It does not refer to *St Aubyn v A-G (No 2)*, nor to *Lang v Webb*. There then appears this important passage (see [1975] 2 All ER 120 at 126–127, [1975] 1 WLR 534 at 543):

> 'Having thus reviewed the authorities, we return to the question what was given, and we think that a grant of the fee simple, subject to and with the benefit of a lease back, where such grant is made by a person who owns the whole freehold free from any lease, is a grant of the whole fee simple with something reserved out of it, and not a gift of a partial interest leaving something in the hands of the grantor which he has not given. It is not like a reversion or remainder expectant on a prior interest. It gives an immediate right to the rent, together with a right to distrain for it, and,

> if there be a proviso for re-entry, a right to forfeit the lease. Of course, where, as in the *Munro* case, the lease, or, as it then may have been, a licence coupled with an interest, arises under a prior independent transaction, no question can arise because the donor then gives all that he has, but where it is a condition of the gift that a lease back shall be created, we think that must, on a true analysis, be a reservation of a benefit out of the gift and not something not given at all.' *a* *b*

The court then said that it was unnecessary to reach a final conclusion on the point, since there were two unanswerable reasons why the case was caught by the statutory provision, ie the full repairing covenant on the part of the son and his covenant to pay tithe redemption annuity.

The observations in that important passage were directed to what is now *c* the first limb of s 102(1)(b). What was being said, in the words of the provision itself, was that where there is a gift of the freehold conditional on the grant of a lease back the freehold is not enjoyed to the entire exclusion of the donor. Although *Lang v Webb* was not referred to in the judgment, it was cited in argument and is recorded by Walton J as having been strongly relied on by counsel for the Crown before him, especially the judgment of Isaacs J (see *Nichols v IRC* [1973] 3 All ER 632 at 635, [1974] 1 WLR 296 at 299). It is *d* therefore natural to assume that it was strongly relied on by the Crown in this court and that their observations were, at least to some extent, influenced by it.

In *Lang v Webb* the case stated recorded that in 1908 the deceased had *e* transferred and conveyed a piece of land to each of her three sons; that on the same date as, but subsequently to, the execution of the transfers and conveyances there had been executed by the deceased and each of her sons a lease back for a term of five years of the land which had been transferred and conveyed to him; and that the transfers and conveyances and leases had been *f* executed after discussion and arrangement between the deceased and her three sons and after she had explained to them that she desired to make fixed and permanent provision for them and at the same time to take from them leases at whatever might be a reasonable rental for grazing purposes having regard to the conditions of the leases, those conditions and the amounts of the rents having been discussed and agreed before the execution of any of the *g* documents. There were further findings to the effect that the rents reserved were in each case fair and reasonable and that after the execution of the documents the whole of the land continued to be occupied by the deceased and was used by her for grazing purposes. On the deceased's death in 1910, before the expiration of the leases, a claim for death duties was made in respect *h* of the freehold, that claim being upheld by the High Court of Australia (Griffith CJ, Barton and Isaacs JJ) (see (1912) 13 CLR 503).

It is not possible to reconcile all the observations made by the three members of the court. Certainly, the clearest reasoning appears in the judgment of Isaacs J. He agreed (at 514) that in order to find out what is given, it is the real transaction which must be looked at and not merely the form *j* which it takes. He said (at 515):

> 'But there must be no misunderstanding as to what is meant by the transaction ... in the relevant sense it means that you regard the substantial effect of the "conveyance, assignment, gift, delivery or

transfer," by which the gift was made. If by an instrument, as in this case, you look at the instrument by which the property passes from the donor to the donee, and, disregarding mere form, ascertain its real effect. What does it give, not how does it give it? In this case the gift is made by the indenture executed by Henrietta Lang, and by that the whole of her estate in the lands was given without any exception or reservation whatever. That was the transaction of gift—complete in itself and unqualified. No other construction is possible. It had to be complete before the donee could execute to her the lease of the property. A lease is a conveyance; and it is more than form, it is substance, when the donor's interest has to be vested in the donee before the donee can convey a smaller interest. That smaller interest was comprised in the gift itself, it was part of it, and is quite different from the case of *In re Cochrane*, where the trust of surplus income and the ultimate contingent trust of corpus were expressly retained by the donor for himself on the face of the instrument, and never in any shape or form included in what he gave.'

Those observations can be summarised by saying that the property disposed of was the freehold interest in the land because the disposition of that interest had to be complete before the lease back could be granted; that that was a matter of substance and not of form; and that the leasehold interest, having been an interest smaller than the freehold, was comprised in the gift itself and was part of it. This analysis explains and is entirely consistent with the observations of this court in *Nichols v IRC*.

Mr Venables QC, for the executors, submitted, correctly, that those observations, having been unnecessary to this court's decision of the case, were obiter. He further submitted that they were wrong and was even disposed, initially, to suggest that there were good reasons for our not attaching to them the weight we would instinctively attach to any observations of a division of this court thus constituted. I cannot accept that submission. Being in complete agreement with the analysis of Isaacs J, I am satisfied that the observations of this court were correct, although I would not myself attach weight to the rights of the landlord to the rent, to distrain for it and to forfeit the lease. The question then is whether those observations apply to the transactions in the present case.

Adapting the language of problem (1) as posed by this court in *Nichols v IRC* [1975] 2 All ER 120 at 122, [1975] 1 WLR 534 at 538), I state the executors' case to be that 'all that was given was the beneficial interest in the [property conveyed and transferred by Mr Macfadyen to the trustees on 31st March] shorn of the benefit of the rights and interests of [Lady Ingram] under the [trustees' equitable obligation to treat her in all respects as if the leases had been valid]'. If that is the correct view, the property disposed of was undoubtedly enjoyed to the entire exclusion of Lady Ingram within the first limb of s 102(1)(b). In order to decide whether it is correct or not, it is necessary to start with a consideration of Lady Ingram's rights and interests under the trustees' equitable obligation towards her.

Both sides proceeded in argument on the footing that Lady Ingram was entitled to a lease in equity. There was, I think, no examination of what that really meant. There having been no agreement by the trustees to grant leases to Lady Ingram, it seems improbable that she could have obtained a specific decree to that effect against them. It would appear to follow that she was not

entitled to an equitable lease in the full sense, it being made clear in the judgment of Jessel MR in *Walsh v Lonsdale* (1882) 21 Ch D 9 at 14, that the existence of a lease in equity under an agreement for a lease depends upon the agreement being specifically enforceable. So it appears that Lady Ingram's rights and interests may have been limited to those which were available to her by way of injunctive relief to compel the trustees to treat her in all respects as if the leases had been valid. I will proceed on that footing, being the one which is, if anything, the more favourable to the executors.

The principal right and interest which Lady Ingram would have had against the trustees was a right to possession of the property. That right mirrored the trustees' obligation to afford her possession. That obligation, just like an obligation to grant her a lease had there been one, was one to which the trustees only became subject when the freehold interest was vested in them. Thus the correlative right or interest in Lady Ingram, just like her interest under a lease had there been one, was, in the language of Isaacs J, a smaller right or interest comprised in the gift itself and part of it. For these reasons, unless there is any other objection, I would hold that the property disposed of was the freehold interest in the property and that the nature of Lady Ingram's rights and interests against the trustees was such that the freehold interest was not enjoyed to her entire exclusion.

The objection suggested, as I understand it, is that the equitable obligation, having been imposed on the trustees, did not impinge on the interests of the beneficiaries under the declarations of trust, which can therefore be regarded as having been shorn of the benefit of the rights and interests of Lady Ingram. That is a proposition to which I am quite unable to assent. The interest of a beneficiary under a trust can only take effect subject to those obligations to which his trustee is subject. Here the beneficiaries were no less volunteers with notice, through the terms of the declarations of trust, of Lady Ingram's intention than the trustees. They were equally subject to an obligation in equity to give effect to that intention which could, if necessary, have been enforced against them. Accordingly, Lady Ingram's rights and interests were just as much smaller rights and interests comprised in the gift to the beneficiaries as they were in the disposition to the trustees. That was not a matter of conveyancing or of form. It was, as Isaacs J said, a matter of substance.

The reality of this state of affairs can be illustrated by supposed events which could theoretically have occurred. Immediately after 31 March 1987 Lady Ingram's daughters and the trustees of Robin Ingram's children's 1987 settlement, being together absolutely entitled to the beneficial interest in the property as against the trustees, could have joined together and directed them to turn Lady Ingram out of the property. The direction would have been ineffective, not because the trustees could have refused to comply with a direction given to them by all their beneficiaries, being adult and sui juris, but because their interests in the property were as much subject to Lady Ingram's rights and interests as the trustees'. More generally, it must be clearly said that it would run quite contrary to the principle of the estate duty authorities, indeed it might be said to the principle of any known impost on property, for the mere interposition of trustees, especially between a donor and beneficiaries with absolute interests, to be the decisive factor in avoiding a liability for inheritance tax.

It has also been suggested that the Crown's claim is inconsistent with the view which has been taken of the case where A gives freehold land to B absolutely, subject to a rentcharge in favour of A (cf *Earl Grey v A-G*). In *St Aubyn v A-G (No 2)* [1951] 2 All ER 473 at 496, [1952] AC 15 at 49–50 Lord Radcliffe said:

> 'In substance the position of Lord St. Levan was the position of a man who creates a rentcharge in his own favour on property which is in his absolute disposition and then makes a gift of that property subject to that charge. Nothing is then given except the interest so charged. Is possession and enjoyment of what is given exclusive of the donor or of any benefit to him, despite his continued receipt of the amounts secured by his charge? I conclude that it is, for I cannot imagine that, had the law been otherwise, the case of *Grey* v. *A.-G.* would have taken the course that it did. In that case Earl Grey had at least created a rentcharge for himself on parting with his estates.'

The short answer to this suggestion is that a rentcharge, unlike a lease, can be created by way of reservation. It is unnecessary to dispose of the freehold and take a grant back. This is made clear in Megarry and Wade *The Law of Real Property* (5th edn, 1984) p 822, where it is said:

> 'Apart from statute, a legal rentcharge can be created *inter vivos* only by a deed, although it has always been possible for a person disposing of land to reserve a rentcharge to himself, without the grantee of the land executing the deed.'

A footnote refers to 1 Co Litt 143a, which I take to be a reference to the following:

> '"*Reserving.*" *Reserve* commeth of the *Latine* word *reservo*, that is, to provide for store; as when a man departeth with his land, he reserveth or provideth for himselfe a rent for his owne livelihood. And sometime it hath the force of *saving* or *excepting*. So as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing in *esse* that is granted ...' (Coke's emphasis.)

Alternatively to its claim under the first limb of s 102(1)(b), the Crown relies on the second limb. Here the claim is effectively based only on the covenants for quiet enjoyment, which, it is said, gave Lady Ingram a benefit by contract or otherwise. I disagree. A covenant for quiet enjoyment is in reality no more than a contractual backing for the landlord's obligation not to derogate from his grant. If that be an over-simplification, I cannot see that the covenant can give a benefit of sufficient significance to fall within the second limb. It is of a wholly different order from the covenants on the part of the son in *Nichols'* case.

The Ramsay principle

My conclusion that the leases were a nullity makes it unnecessary for me to decide whether, had they been valid, the *Ramsay* principle would have applied with the same result as if they had been a nullity. Moreover, the scope of that principle is now a matter of such uncertainty that it is unprofitable to express any view as to its application in a case where it is unnecessary to do so. I

should add that since, at the conclusion of Mr Venables' argument, two members of the court were of a clear opinion that the leases were a nullity, we did not ask Mr Nugee to deal with this point.

Conclusion

My conclusions that the leases were a nullity and that the transactions fell within the first limb of s 102(1)(b) are a sufficient basis for the Crown to succeed on this appeal. I desire to emphasise that had the leases been valid then, subject to the application of the *Ramsay* principle, the outcome of this case would have been governed by *Munro's* case and the Crown's claim would have failed. It was unfortunate for the promoters of the scheme that in March 1987 the consequences of *Rye v Rye* had not been elucidated by the decision in the *Kildrummy* case.

I would allow this appeal.

EVANS LJ. In March 1987 Lady Ingram, then aged 73, lived at Hurst Lodge near Twyford in Berkshire. The property was given to her by her father in 1946 and she had lived there ever since. On 29 March she conveyed it for no consideration to her solicitor, Mr Michael Macfadyen. She took this dramatic step on legal advice and with the legitimate object of reducing the inheritance tax which would become payable on her death. The effect of the conveyance was minimal, because by a separate deed signed on the same day Mr Macfadyen declared that he held the property as nominee for Lady Ingram and that he would comply with her directions in relation to it in all respects.

On the following day, acting therefore on her instructions and as her nominee, Mr Macfadyen granted Lady Ingram a lease of the property for the period of 20 years, non-assignable and rent-free and with the minimum of covenants on the part of the landlord.

Next, on 31 March, Mr Macfadyen conveyed the property to trustees 'on trusts declared [concerning] the same' and subject to Lady Ingram's lease. By a supplemental deed also dated 31 March the trusts were declared by the trustees in favour of the next generation of Lady Ingram's family, her three children and the two children of a fourth child, who had died.

Lady Ingram's occupation and enjoyment of Hurst Lodge was uninterrupted by these transactions, and she continued to live there until she died two years later in February 1989.

Upon her death, inheritance tax became payable on her estate under the Finance Act 1986. This included, it is accepted, the value of the remaining period of her 20-year lease, but not, her executors contend, the value of the freehold which became vested in the trustees for her children and grandchildren in consequence of the March 1987 transactions described above.

The Revenue, who are the appellants, claim that inheritance tax nevertheless is payable on the value of the freehold under s 102 of the 1986 Act. Section 102(3) provides that property which immediately before her death was 'property subject to a reservation', as defined in s 102(2), shall be treated for the relevant tax purposes as if it was her property at that time. The relevant words of definition are found in s 102(1):

> '*Gifts with reservation.*—(1) ... this section applies where ... an individual disposes of any property by way of gift and either—(a) possession and enjoyment of the property is not bona fide assumed by the donee at or

a before the beginning of the relevant period; or (b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise ...'

The relevant period is seven years ending on the date of death.

b This statutory provision can be traced back through the capital transfer tax and estate duty legislation to s 38 of the Customs and Inland Revenue Act 1881. Initially concerned with property taken as a donatio mortis causa within a three-month period before the death, the period was successively extended to 12 months in 1889 and to seven years in 1968.

c At first sight, nothing could be clearer than that the statutory definition applies when freehold property is given to or in trust for a person's children but subject to an arrangement which permits the donor to remain in occupation and to have full enjoyment of the property until he or she dies. In the first of the cases to which we have been referred, *Earl Grey v A-G* [1900] AC 124 at 126, [1900–3] All ER Rep 268 at 269, the Earl of Halsbury LC began his speech as follows:

d

> 'My Lords, there are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides.'

e Four of the five other members of the House of Lords concurred, without giving reasons of their own.

Subsequent authorities, however, have demonstrated that the interpretation of the statutory words in this taxation context requires a close and careful analysis, even or perhaps especially in what might otherwise seem to be an equally clear case. The contention of the executors, ably presented

f by Mr Venables QC on their behalf, is that the 'property' which was given to trustees for the family beneficiaries was the freehold subject to Lady Ingram's 20-year lease, or in other words the freehold without that leasehold interest, and that neither (a) or (b) of the requirements of s 102(1) applies. The trustees did assume possession and enjoyment of the property, so defined, though they had no right to occupy the land until the lease expired, and they enjoyed that

g property to the entire exclusion of Lady Ingram, who had no further interest in or enjoyment of it. She received no 'benefit by contract or otherwise' from the transaction because the right to occupy the property was one which already, as freehold owner, she enjoyed.

It is accepted that if she had retained a life interest in the property then her

h taxable estate would nevertheless have included the full value of the property, under separate provisions of the inheritance tax legislation, which do not operate when she remained in occupation under the lease. The issue raised, therefore, is whether her retention of a leasehold interest takes the case outside s 102(1), notwithstanding that the terms and period of the lease were designed to enable her to occupy the property rent free for the rest of her life.

j As will be apparent, the executors' interpretation of s 102 (1) centres upon the meaning of 'property', which clearly refers to the subject matter of the gift. If only the freehold reversion was given, then they rely upon the judgment of the House of Lords in *St Aubyn v A-G (No 2)* [1951] 2 All ER 473, [1952] AC 15, where both Lord Simonds and Lord Radcliffe in their speeches restated the importance of identifying the property that was given. If the donor gives only

part of his property to the donee, then the operation of s 102(1) is limited to the part which he gives. Lord Simonds illustrated this by reference to the simple case where the donor owns two separate properties, estates in Yorkshire and Wiltshire respectively, and makes a gift of one but retains the other. He continued ([1951] 2 All ER 473 at 479, [1952] AC 15 at 22):

> '... equally so, if, his interest being not in two geographically separate estates but in land and capital moneys ... he surrenders his interest in the one form of property and retains it in the other.'

In that case, the relevant facts of which are lucidly explained by Ferris J in his judgment under appeal, the donor exercised powers of appointment 'to make some part of the settled property his own', and it was 'wholly irrelevant that by a contemporaneous or later transaction he surrenders his life interest in other parts of it' (see [1995] 4 All ER 334). The different parts of the property were distinct personal assets, none being real property or an interest in realty, and the part which he gave by releasing his life interest was not 'property subject to a reservation' for the purposes of s 102. The donor did not receive a 'benefit by contract or otherwise' merely because by a separate transaction he enlarged his life interest into an absolute interest in other property.

That decision may now have to be read subject to the principle stated by the House of Lords in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, but there can be no doubt that as regards the application of what is now s 102 of the 1986 Act the judgment remains good law.

Lords Simonds and Radcliffe considered the earlier authorities in some detail, including *Earl Grey v A-G*, judgments of the Privy Council in two Australian cases, *Munro v Comr of Stamp Duties* [1934] AC 61, [1933] All ER Rep 185 and *Comr of Stamp Duties of New South Wales v Perpetual Trustee Co Ltd* [1943] 1 All ER 525, [1943] AC 425, *Re Cochrane* [1906] 2 IR 200, a decision of the Court of Appeal of Ireland, and *A-G v Worrall* [1895] 1 QB 99, [1891–4] All ER Rep 861. The last is a judgment of the Court of Appeal which was approved both by Lord Simonds and Lord Radcliffe, though with considerable reservations by the former (see [1951] 2 All ER 473 at 481 and 495, [1952] AC 15 at 25 and 47 respectively). It establishes that 'a benefit ... by contract or otherwise' may be reserved by the donor notwithstanding that it 'does not arise by way of reservation out of that which is given' (see [1951] 2 All ER 473 at 481, [1952] AC 15 at 25–26 per Lord Simonds). The donor gave his son the benefit of a debt of about £24,000 which was owing to him, in return for which the son covenanted to pay the father an annuity of £735 pa during his life. Lord Radcliffe said ([1951] 2 All ER 473 at 495, [1952] AC 15 at 47):

> 'It seems to me reasonable enough for a court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which encumbered the enjoyment of the very thing that was given.'

Although the debt was secured by a mortgage on land which was acquired by the son from the debtor who was its owner, the annuity was not secured on the land and it could not be said to 'arise out of that which was given', namely the right to receive the debt. On the other hand, the case was not authority for the converse proposition that 'all benefits are within the mischief

of the section, whether they are by way of reservation out of the subject matter of the gift or not'.

Lord Radcliffe summarised the authorities as follows ([1951] 2 All ER 473 at 496, [1952] AC 15 at 49):

> 'A man may have an arrangement which gives him contractual benefits that affect an estate and may subsequently make a gift of his interest in that estate. If he does, the donee has possession and enjoyment of what is given to the entire exclusion of the donor or of any benefit to him. That is the *Munro* case. Shares may be made the subject of a trust for another person, the maker of the trust having the right under it to be one of the trustees, to retain in his control the voting power in respect of the shares and to take an ultimate resulting interest, yet that benefit does not bring the property within the mischief of a similar provision. That is the *Perpetual Trust Co.* case. No more is possession and enjoyment of a gift compromised if a man vests property in trustees on trust to provide out of it certain limited benefits for a donee, but subject thereto on trust for himself. That is the *Cochrane* case. All these decisions proceed on a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift.'

These statements of principle were followed by Lord Reid giving the judgment of the Privy Council in a further Australian case, *Oakes v Comr of Stamp Duties of New South Wales* [1953] 2 All ER 1563, [1954] AC 57. After referring to *St Aubyn (L M) v A-G (No 2)*, Lord Reid said:

> '... it is now clear that it is not sufficient, to bring a case within the scope of these sections, to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property: it is necessary to consider the nature and source of each of these advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.' (See [1953] 2 All ER 1563 at 1567, [1954] AC 57 at 72.)

One potential benefit to the donor, as the settlor of property in trust for his children, was the advantage which was assumed to accrue to him from the fact that income from the settled property was available to be spent on the maintenance of the children, and therefore was expenditure the burden of which might have fallen on him. This advantage or benefit to him did not bring the case within the scope of the section, because it 'did not impair or diminish the value of the gift to them or their enjoyment of it' (see [1953] 2 All ER 1563 at 1568, [1954] AC 57 at 73–74). But the settlor also retained a right to take remuneration for managing the property. That could not be regarded as a beneficial interest in the property which he had reserved when making the deed of trust, and therefore was regarded as a reservation from the gift which was within the section. If it had been such a beneficial interest, then the

section would not have applied (see [1953] 2 All ER 1563 at 1569, [1954] AC 57 at 76). a

So the ground is laid for Mr Venables' submission. A person is entitled to segregate and give away part of his property. The fact that he continues to receive the benefits of owning or enjoying other property which he retains does not mean that there is a reservation for the purposes of s 102. 'The property' in question is the property which he gives, and it is in relation to that b property that the question must be asked, whether its possession and enjoyment were bona fide assumed by the donee at the time of the gift (strictly, 'at or before the beginning of the relevant period'), and enjoyed thereafter to the exclusion of the donor. Moreover, the segregation can be made at the same time as and as part of the same transaction as the gift, and the same principle applies when the donor subdivides his legal interest in the c property into different equitable parts (e g the resulting trust for the balance of income in *Re Cochrane*).

Therefore, it is submitted, a person is entitled to create a leasehold interest in land which he owns, in favour of himself or another, and thereby to segregate the freehold reversion in the property. If he then gives the freehold d interest to a donee who takes possession and enjoyment of it for himself, and provided the donor has no further enjoyment of that property and receives no collateral benefit by contract or otherwise within para (b), then the freehold interest does not become liable to tax under s 102.

I would be prepared to hold in any other context that this produces a result e which is so clearly at variance with the apparent object of s 102 that it cannot be regarded as a proper interpretation of the section. However, I appreciate that in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision, so that the taxpayer shall not become liable to tax unless that is clearly and unequivocally the effect of the statutory provisions.

Approaching the matter in this way, in my judgment the section does apply f in the circumstances of the present case, and the taxpayer's submission fails. The essential reason is that the leasehold interest which the donor retains cannot come into existence until the freehold passes to the donee. I use the present tense deliberately, because Mr Venables stresses that the transactions can and should be regarded as having taken place simultaneously, and Mr g Nugee QC for the Crown does not contend otherwise. The inescapable fact is that the leasehold is a derivative interest which, being in favour of the donor, could not take effect in law or, I would add, in equity until the donee becomes a party to the transaction. This does not mean that the freehold reversion can never be 'the property' for the purposes of s 102(1), because there might be a h lease in favour of a third party, either pre-existing or granted by the donor as part of the same transaction as the gift, and in such circumstances the donee would acquire only the freehold subject to that lease (or, as it may be, encumbered by an equitable obligation to grant that lease). But the situation is different when the donor purports to grant the lease to himself, for the simple reason that he cannot make such a contract or create the separate j interest, in the capacity of lessee, unless there is an owner of the freehold (or superior lessee) who can contract as lessor. The donee, or when the property is conveyed to trustees by way of gift, the beneficiaries as donees may receive the property subject to an equitable obligation to grant a lease to the donor, but until they do so they cannot make that grant. It follows that the lease

cannot become effective either in law or equity unless the freehold interest is transferred at least momentarily to them. Thereafter, they possess and enjoy the property by virtue of their right to receive rent and other benefits as lessors and of their rights as owners of the freehold reversion.

If this view is correct, then the result is entirely consistent with what I regard as the apparent object of the section. Mr Venables accepts, as I understood his submission, that if the donor was to remain in occupation as licensee or by virtue of some permission given by the donee, then the section would apply. He distinguishes the case of a lease because, he submits, that is a legal or equitable interest which the donor 'carves out' of the property before or at the time of the gift. But he cannot do that unilaterally, and by parity of reasoning the donor is in the same position as lessee as he would be if he was granted a licence. Moreover, the submission leads to the strange conclusion that a collateral payment or other benefit by contract or otherwise, as well as the grant of a licence to occupy the land, would be within the scope of s 102, whereas the grant or reservation of a right to occupy the property on a more secure basis as lessee would not.

I have reached this conclusion in the light of the authorities before *Nichols v IRC* [1975] 2 All ER 120, [1975] 1 WLR 534, where the Court of Appeal formed a clear view on this very issue, although they stated expressly that they did not base their decision upon it. The relevant passages are quoted by Nourse LJ and I need not repeat them here (see [1975] 2 All ER 120 at 126–127, [1975] 1 WLR 534 at 543). The final sentence which contrasts 'a reservation of a benefit out of the gift' with 'something not given at all' has to be read bearing in mind the words of the statute and of the earlier authorities. The contrast is between a benefit which is retained by the donor out of the property gifted, and on the other hand the retention of other property which is not gifted at all.

It is said that land may be gifted subject to a rentcharge in favour of the donor and that in such a case the section does not apply. In *Earl Grey v A-G* [1898] 2 QB 534 at 535 in the Court of Appeal the term of the conveyance to the defendant (donee) were these:

> '... the said Earl Grey did convey to the defendant ... all his real estate other than the mansion-house and the appurtenances, to the use that the said Earl Grey should thenceforth during his life receive an annual rent-charge of 4000*l.* to be issuing out of the said hereditaments, and subject thereto to the use of the defendant in fee simple.'

This was expressly referred to by the Earl of Halsbury LC as something which was reserved to the settlor and within the express language of the statute (see [1900] AC 124 at 126, [1900–3] All ER Rep 268 at 269). The later authorities, in my judgment, do not cast doubt upon this being a ground of decision in *Earl Grey*'s case and correct as a matter of principle. Lord Radcliffe in *St Aubyn (L M) v A-G (No 2)* [1951] 2 All ER 473 at 496, [1952] AC 15 at 50 envisaged that Lord St Levan, the donor in that case who was held not liable for tax, was in the same position as 'a man who creates a rentcharge in his own favour on property which is in his absolute disposition and then makes a gift of that property subject to that charge'. Lord Radcliffe did not refer in terms to the owner of the freehold and moreover he referred to a situation where a rentcharge could validly be created in favour of the donor before the gift was made. If that could not be done, unless the property was first vested in the

donee, then the situation envisaged by Lord Radcliffe would not arise, and in my respectful view his dictum does not prevent the application of principle in the interpretation of s 102 which I have tried to describe.

Lease to principal by nominee

I have assumed above that the lease which Mr Macfadyen purported to grant to Lady Ingram as her nominee was equivalent in law to a lease granted by Lady Ingram to herself, and therefore was of no effect. The judge's conclusion on this issue in my view was correct. I would not dissent from any of Millett LJ's analysis of the relationship between trustee and beneficiary, or between principal and agent, but with due diffidence I do consider that the transaction offends what conveniently he calls the two-party rule. Lady Ingram must be taken to have directed Mr Macfadyen to make the lease contract with herself. I do not see how that can be described as the meeting of minds which is essential for the creation of consensual obligations. The law which permits a valid leasehold interest to be kept separate from the freehold reversion notwithstanding that the same person acquires the beneficial interests in both seems to me to be concerned with a different issue.

Conclusion

I therefore would hold that there was no effective lease by Mr Macfadyen to Lady Ingram and that the gift to trustees which he made on her behalf was subject to a reservation in her favour, within the scope of s 102(1) of the 1986 Act. This would be clear, in my judgment, if the gift was made direct to the beneficiaries, and I do not consider that the interposition of trustees changes the nature of the gift. I express no view on the possible application of the *Ramsay* principle, on which no argument was addressed to us.

I agree with the judgment of Nourse LJ and I would allow the appeal.

MILLETT LJ. In the course of his submissions Mr Nugee QC for the Crown cited a passage from Potter and Monroe *Tax Planning* (1st edn, 1954) p vii (Preface) in which the authors warned, in words which remain as true today as when they were first written:

> 'A man cannot eat his cake and have it. Moreover, it is not the function of his lawyer to devise a scheme whereby this fact of life is falsified. If a man disposes of his property for another's benefit, certain tax results may follow; but the results cannot be achieved unless the disposition is in the first place effected not as a fiction but as a fact.'

A man may, however, genuinely dispose of his property by way of gift while retaining an interest in the property given or obtaining some other benefit from the donee in return. Such a transaction has traditionally been described as 'a gift subject to a reservation' and it is still so described in the legislation which is in force today. From the inception of estate duty in 1894, Parliament denied to such gifts the tax advantages which it was willing to accord to gifts made without reservation. It did so by making it a condition of relief (a) that possession and enjoyment of the property should be immediately assumed by the donee, and (b) that thenceforward the property should be 'enjoyed to the entire exclusion ... of the donor and of any benefit to him by contract or otherwise'.

The grammatical structure of these provisions indicated that the property in question was the property given; and accordingly, adopting a somewhat literal construction of the statute to the possible detriment of its evident legislative purpose, the courts laid down a settled rule that it was only the possession and enjoyment of the actual property given from which the donor must be excluded. It was, therefore, necessary in every case to identify with precision the interest which formed the subject matter of the gift. If the donor was not excluded from possession and enjoyment of the very interest which he had given, then relief from estate duty was denied. But relief from estate duty was not denied merely because the donor continued in possession and enjoyment of some other interest in the same property which he had not given. As Lord Radcliffe expressed it in *St Aubyn (L M) v A-G (No 2)* [1951] 2 All ER 473 at 496, [1952] AC 15 at 49:

> '... if [the interest given] is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift.'

The distinction between a gift of the whole property with a gift back of a limited interest in the property on the one hand and a gift of a limited interest only in the property, the donor retaining what he has not given on the other, is not always easy to draw. The distinction is an artificial one which depends on form rather than substance. It was trenchantly criticised by Lord Radcliffe in *St Aubyn*'s case [1951] 2 All ER 473 at 493, [1952] AC 15 at 44–45, where he deplored the fact that, when Parliament had found the time in 1940 to repeal and re-enact the legislation concerning gifts with reservation of benefit, it had not taken the opportunity to make it intelligible.

The replacement of estate duty by capital transfer tax made it unnecessary to retain the provisions which dealt with gifts with reservation of benefit, and they were duly repealed. The replacement of capital transfer tax in turn by inheritance tax in 1986, however, made it necessary once more to deal with the problems caused by such gifts. Parliament did so by s 102 of the Finance Act 1986. Despite the criticisms which had been levelled at the earlier legislation, it re-enacted it almost verbatim. It thereby revived the artificial distinction between a gift where the donor remains in possession and enjoyment of the subject matter of the gift and a gift where he remains in possession and enjoyment of some other interest in the same property which is excluded from the gift. Given that in either case the donor's purpose is to obtain a tax advantage, and that in either case he may be with equal justification be said to want to eat his cake and have it, Parliament must be taken to have considered the one course of action but not the other to be what Lord Scarman described as the safe channel of acceptable tax avoidance (see *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 at 532, [1984] AC 474 at 513). The difference between acceptable and unacceptable tax avoidance is pre-eminently a matter for the legislature. If Parliament has drawn the line in a particular place, however incongruously, it is not for the courts to draw it elsewhere.

Lady Ingram's scheme

Lady Ingram wished to take appropriate steps to achieve an eventual saving of inheritance tax if she lived long enough. To this end she decided to make a potentially exempt transfer of her country estate to her children. She did not, however, wish to give up the right to continue to live there rent-free during the rest of her life. She could not achieve her object by retaining a life interest in the property, for this would constitute an interest in possession in settled property, and on the death of a person entitled to such an interest inheritance tax is charged on the capital value of the property in which the interest subsists (see Sch 5 to the Finance Act 1975 (see s 43 and ss 49 to 52 of the Inheritance Tax Act 1984)). Nor could she take a lease for life or for a period determinable by reference to her death, since such a lease is treated as an interest in possession in settled property. Accordingly, Lady Ingram was advised to retain for her own benefit a leasehold interest for a fixed period which was likely to be of sufficient duration to exceed the remainder of her lifetime and to make a gift of the freehold reversion to her children.

To this end (disregarding immaterial features) Lady Ingram took the following steps or procured them to be taken. (1) Lady Ingram conveyed the freehold interest in the property to her solicitor, Mr Macfadyen, for no consideration. This transaction, of course, did not pass any beneficial interest to Mr Macfadyen. (2) Immediately afterwards Mr Macfadyen executed a deed by which he declared that he held the property as nominee for Lady Ingram and agreed to transfer it back to her or otherwise deal with it as she might direct. This merely gave formal recognition to the effect of the conveyance to Mr Macfadyen. (3) On the following day, and at Lady Ingram's direction, Mr Macfadyen granted a lease of the property to Lady Ingram for a term of 20 years free of rent. The lease contained an absolute covenant against assignment, underletting or parting with possession, and appropriate but fairly minimal covenants on the part of each party. (4) On the following day, again at Lady Ingram's direction, Mr Macfadyen conveyed the freehold interest in the property subject to and with the benefit of the lease to named trustees. (5) Immediately afterwards the trustees executed a declaration of trust by which they declared that they held the property which had been conveyed to them (that is to say the freehold interest in the property subject to and with the benefit of the lease) in trust for Lady Ingram's intended beneficiaries.

The rival contentions

Lady Ingram set out to create and retain for her own benefit a 20-year lease of the property and to give only the freehold reversion subject to and with the benefit of the lease to her children. The Revenue acknowledge that, if that is what she did, then she succeeded in making a potentially exempt transfer of the freehold reversion in the property and not a gift of the property subject to a reservation. But the Revenue contend that that is not what she did, and (implicitly) that it is not possible to do it.

The judge held that it is not possible for a nominee to grant a lease to his principal, with the result that the purported lease was a nullity. (Although Mr Macfadyen is described in the documents as Lady Ingram's nominee, the judge of course fully recognised that the relationship between them was not that of principal and agent but that of bare trustee and beneficiary.) Accordingly, he held that Lady Ingram's leasehold interest did not come into existence until

the trustees executed the declaration of trust, which was when Lady Ingram for the first time ceased to be beneficially entitled to the freehold. The lease then vested in Lady Ingram and the freehold reversion vested in her intended beneficiaries simultaneously. On this analysis Lady Ingram's leasehold interest must have taken effect in equity only, although she undoubtedly intended to take a legal term of years.

On the judge's analysis, Lady Ingram and the beneficiaries acquired their respective beneficial interests in the property at one and the same moment, and it followed that there was no prior point of time at which the trustees or beneficiaries had a more extensive interest out of which Lady Ingram's interest was carved. It was clear that Lady Ingram never intended to give the property to the beneficiaries unencumbered by her leasehold interest. The judge held that the beneficial interests should be treated as vesting in such manner as would give effect to her intention, with the result that the subject matter of the gift which Lady Ingram made was the freehold shorn of the leasehold interest.

The Revenue appeal against the judge's conclusion that the subject matter of the gift was the freehold reversion shorn of the leasehold interest, and submit that, even if the two interests did vest simultaneously, they came into existence at the same time and were indissolubly bound together. The Revenue contend that in the circumstances Lady Ingram's leasehold interest was necessarily carved out of the subject matter of the gift. Lady Ingram's executors cross-appeal against the judge's ruling that the grant by Mr Macfadyen was ineffective to create and vest a legal term of years in Lady Ingram. If all else fails, the Revenue invoke the principles established by the House of Lords in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300 and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 to defeat Lady Ingram's scheme.

The first question is whether the judge was correct in ruling that the lease to Lady Ingram was ineffective to vest a legal term of years in her.

Can a nominee grant an effective lease to his principal?

There is no direct English or, so far as I know, Commonwealth authority on this question, which therefore falls to be decided as a matter of principle.

In *Rye v Rye* [1962] 1 All ER 146, [1962] AC 496 the House of Lords held that it is not possible for a man to grant a lease to himself. The reasons are succinctly stated in the speech of Lord Denning ([1962] 1 All ER 146 at 155, [1962] AC 496 at 513):

> 'This makes it necessary to determine the point of law: Is it possible for a person to grant a tenancy to himself? or for two persons to grant a tenancy to themselves? At common law it was clearly impossible. Nemo potest esse tenens et dominus. A person cannot be, at the same time, both landlord and tenant of the same premises: for as soon as the tenancy and the reversion are in the same hands, the tenancy is merged, that is, sunk or drowned, in the reversion; see 2 BLACKSTONE'S COMMENTARIES 177. Neither could a person at common law covenant with himself, nor could two persons with themselves. Neither could one person covenant with himself *and* others jointly. Such a covenant, said POLLOCK, C.B., is "senseless", see *Faulkner* v. *Lowe* ((1848) 2 Exch 595 at 597, 154 ER 628 at 630)).' (Lord Denning's emphasis.)

These two reasons correspond to the dual character of a lease in English law as both contract and conveyance. A man cannot convey to himself; and he cannot contract with himself. But he can convey to a nominee for himself, and if he can contract with a nominee for himself there is no reason why he should not be able to grant a lease to a nominee for himself. Lord Radcliffe was of opinion that he could. In *Rye v Rye* [1962] 1 All ER 146 at 153, [1962] AC 496 at 511 he said:

> 'He could, of course, put land in trust for himself by conveying it to a nominee, and, I suppose, if there was any conceivable point in the operation, he could similarly demise land to a nominee.'

Lord Radcliffe's remark was obiter and expressed in tentative terms; but he clearly considered that such a transaction gave rise to no obvious conceptual difficulty. Since he agreed that a man cannot grant a lease to himself, he also recognised that the two transactions were distinguishable in this respect.

The judge relied on an observation of Lord Macnaghten in *Henderson v Astwood, Astwood v Cobbold* [1894] AC 150 which at first sight appears to support the contrary view. The case concerned a purported sale by a mortgagee to a nominee for himself. Giving the opinion of the Privy Council, Lord Macnaghten said (at 158):

> 'The so-called sale was of course inoperative. A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another.'

I shall have to return to this passage later.

The judge principally relied, however, on the Scottish case of *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657, in which the Inner House of the Court of Session held that it was not possible in Scottish law for a man to grant a lease to a nominee for himself. The Lord President (Hope) said (at 662):

> 'I have, as I have said, no difficulty in the concept by which the title to property and beneficial interest are separated, the title being held by a nominee. There is no reason to doubt the efficacy of this arrangement where the property in question has some independent existence of its own ... But I know of no case, and none was cited to us, where it has been held that a nominee may contract with his principal so as to create new rights and obligations involving no third party whatever which are to be held only on his principal's behalf. That seems to me to conflict with the principle that a man cannot contract with himself.'

After quoting the observation of Lord Macmillan in *Henderson v Astwood*, to which I have referred, Lord Hope continued (at 662–663):

> 'The whole basis of a contractual obligation is the agreement of two or more parties as to the act or thing to be done. This is as true of a lease as it is of any other kind of contract. It is impossible to conceive of a lease by a man in his own favour. The essence of a lease lies in the tenant's right to exclusive possession of the subject let, and the landlord's obligation to put and maintain him in that possession ... I do not see how a man can contract with his own nominee to the effect that his own nominee is to be entitled to that exclusive possession against himself, this to be held for his

a own behoof. The truth of the matter is that the separate interests of landlord and tenant are incapable of creation by such an arrangement.'

The Lord President (Hope) then cited *Grey v Ellison* (1856) 1 Giff 438, 65 ER 990 in addition to Scottish authorities before continuing ([1990] STC 657 at 663):

b 'The position would have been different if [the nominee] had been contracting with [the principals] for its own benefit, but since it was acting from the outset as their trustee or agent and as their nominee [the principals] were in effect seeking to enter into a contract with themselves for their own benefit.

c Lord Sutherland said (at 669):

'A contract of lease ... involves the creation of mutual rights and obligations which can only be given any meaning if the contract is between two independent parties. [The nominee] had no interest of [its] own to enter into such a contract, any rights and obligations accruing d thereunder being exercisable only as [nominee] for [the principals]. Under a normal lease the landlords cede occupation of the property to the tenants in return for certain obligations, but if the tenants are in fact mere nominees of the landlords the whole lease becomes a pure fiction. Accordingly, in the special circumstances of this case I am of the opinion that the purported lease is not a contract to which the law can give effect e and must be treated as a nullity.'

Lord Clyde, the third member of the court, said (at 670):

'But where the same person is both debtor and creditor in the same matter there can be no obligation created. It is in my view ineffective to f enter into a contract with continuing mutual rights and obligations with oneself and it is whimsical to grant a lease of one's own property to oneself (see *Grey v Ellison* (1856) 1 Giff 438, 65 ER 990). To attempt to grant a lease to a nominee for oneself seems to me to be a similarly barren exercise.'

g I have some difficulty in accepting this reasoning as accurately representing the position in English law. It appears to my mind to treat a lease as exclusively contractual in nature and the relationship between a bare trustee and his beneficiary as analogous to that between an agent and his principal. This may be so in Scottish law or in a civilian system, but it would be an unsafe h foundation upon which to base a proposition of English law which is not supported by clear English authority. As will appear later, I am of opinion that neither the passage in Lord Macnaghten's speech in *Henderson v Astwood* nor the decision of the House of Lords in *Grey v Ellison* provide such support.

I propose to examine the Revenue's contention that a man cannot grant a lease to a nominee for himself (for it is common ground that the proposition j and its converse must yield the same answer) as a matter of principle. In doing so I shall take the lease first as property and secondly as contract.

There is no doubt that a lease is property. It is a legal estate in land. It may be created by grant or attornment as well as by contract and need not contain any covenants at all. The mortgage term and the portions term are examples of leases which contain no covenants and which consist of nothing more than

the vesting of a term of years. It was formerly the practice for a mortgagor to attorn tenant to his mortgagee. The tenancy contained no covenants and was merely a device to give the mortgagee a right to obtain summary judgment for possession under the Small Tenements Recovery Act 1838 (which was repealed in 1972). But it was effective to create the relationship of landlord and tenant (see *Regent Oil Co Ltd v J A Gregory (Hatch End) Ltd* [1965] 3 All ER 673, [1966] Ch 402).

The Revenue argue that, while a lease need not contain any covenants, it is consensual and must be capable of existing as a contract. While this is usually the case, I doubt that there is any absolute rule to this effect. The relationship of landlord and tenant has its source in medieval law, and was originally exclusively contractual. But it has long since outgrown its origins, and the term of years to which the relationship gives rise one of the two interests in land which can exist as a legal estate. It normally arises by agreement, but it can be created by statute, and the obligations to which it gives rise are enforceable by privity of estate alone.

It is easy to make too much of the contractual nature of the relationship. The feature of a tenancy which distinguishes it from a licence or merely contractual right of occupation is the lessee's right to exclusive possession. But this right is a consequence of the ownership of the legal estate; it is not merely a contractual right, or it could not be the feature which distinguishes a lease from a licence. It would not, therefore, in my opinion be an accurate description of the position in English law to say that the landlord was under a contractual obligation to put and maintain his tenant in exclusive possession; still less to imply that the right to exclusive possession depended on the existence of any such contract. That would equate a lease with a mere licence.

In so far as a lease is a conveyance, that is to say in so far as it lies in grant, there is no difficulty in the proposition that a man can vest a term of years in a nominee for himself. There is no question of the same person being at the same time both landlord and tenant at law, for the two legal estates are vested in different persons; while the rule that a man cannot be both landlord and tenant does not apply in equity, which allows the question of merger to be governed by intention.

In this connection *Belaney v Belaney* (1867) LR 2 Ch App 138 is instructive. The testator purchased the residue of a 99-year lease and took an assignment of the term. In the following year he bought the freehold reversion and, by a deed which recited that he was desirous that the term should not merge in the freehold, the reversion was conveyed to a trustee for him. He afterwards made a will bequeathing his personal estate. Lord Chelmsford LC held that the reversion did not pass, but that the term did. He said (at 142):

> 'It is most important to observe, that in the conveyance of the reversion, taken by the testator within a year after the assignment of the term to him, it is stated that the conveyance is taken to a trustee for the express purpose of preventing merger. *The term, therefore, remained in the testator as personal estate.*' (My emphasis.)

This result could not have been achieved if the freehold had been conveyed to the testator himself, for before the Judicature Act merger took effect without regard to the intention of the parties. But the device of taking the freehold in the name of a nominee was sufficient to prevent merger and to keep the term

of years alive as a separate interest even though it was in the same beneficial ownership as the reversion. If the result is legally possible, Lady Ingram's deliberate attempt to achieve it cannot be dismissed as a nullity or a barren exercise.

The Revenue argue that the grant of the lease to Lady Ingram by her nominee was devoid of any legal effect. But that is not correct. Had Mr Macfadyen fraudulently and in breach of trust conveyed the fee simple in the land free from encumbrances to a bone fide purchaser for value without notice before granting any lease to Lady Ingram, the purchaser would have taken free from her equitable interest. Had Mr Macfadyen done so after granting her the lease the purchaser would have taken subject to her lease (though not her equitable interest in the reversion) even if he had no notice of it because it was a legal estate. Of course on the facts of this case the example is somewhat fanciful, since Lady Ingram's occupation of the land would have given the purchaser notice of her interest. But the Revenue's argument must be tested generally; the validity of a lease by a nominee to his principal cannot be made to depend on whether the lessee is in possession. In my judgment the grant of such a lease is not without legal effect. The Revenue object that this reasoning is circular, since it presupposes that Lady Ingram's lease is valid. But I think that it is the Revenue's argument which is circular, since it contends that the lease is a nullity because it is incapable of having legal effect, when it is incapable of having legal effect only if it is a nullity.

I turn next to consider the lease as contract. The proposition that a man cannot contract with a nominee for himself requires close examination. Several different objections may be made to such a transaction, and it is necessary to distinguish between them. One, with which alone we are concerned, is that there cannot be a contract unless there are at least two parties to it. This is the objection made in *Kildrummy (Jersey) Ltd v IRC*. It is directed to the intrinsic validity of the contract, and applies whether the principal is a beneficial owner or a trustee. It is based on what may conveniently be called the two-party rule. A quite different objection is that the equitable interests of beneficiaries under a trust are not capable of being overreached by a transaction between the trustee and his nominee. For this purpose there must be not merely two parties to the transaction but two independent parties who are capable of dealing with each other at arm's length. In my opinion this is the context in which Lord Macnaghten's words in *Henderson v Astwood* must be understood. The doctrine applies only where the principal is himself a trustee and is part of the rule against self-dealing. We are not concerned with it.

An agent can of course contract with his principal, provided that he is contracting on his own behalf, that is to say as principal. The agency contract itself is just such a contract. What an agent cannot do is contract with his principal as agent for and on behalf of his principal so as to make his principal and not himself liable to sue and be sued on the contract. Such a contract is obviously impossible, since the agent drops out leaving only the principal liable to himself. It infringes the two-party rule. For the same reason two agents of the same principal cannot contract with each other. This is the ratio of *Grey v Ellison*. That case was concerned with a policy of insurance which one department of an insurance company purported to effect with another department of the same company. Although different individuals were parties

to the contract, they all contracted as agents for the company with the intention that it alone should be able to sue and be sued on the policy. The policy was held to be a nullity. It infringed the two-party rule. But a trustee who contracts with his beneficiary contracts as principal, even when he enters into the contract for the benefit of the trust estate and not on his own behalf. He contracts so as to make himself personally liable to sue and be sued on the contract, though he will usually have a right of indemnity out of the trust fund. The fact that he may hold the benefit of the contract and any damages which he recovers in trust for the covenantor does not make the contract nonsensical, still less void. To put the same point another way, it is conceptually impossible for an agent to contract with his principal as agent for and on behalf of his principal so as to make the principal the only person liable to sue and be sued on the contract. But it is not conceptually impossible for a trustee to contract with his beneficiary and hold the benefit of the contract in trust for the beneficiary. It is no doubt an economic absurdity, unless it is intended to be a step in some other transaction having an economic effect. But it is not a legal absurdity. It does not infringe the two-party rule.

It is important not to understate Mr Macfadyen's position. He was not independent of Lady Ingram, but neither was he a mere cypher. His duty was 'to deal with the land as Lady Ingram might direct'. He was bound to convey the land to her or to whom she might direct. But he was not bound to comply with other directions which she might give (see *Re Brockbank (decd), Ward v Bates* [1948] 1 All ER 287, [1948] Ch 206 and *Re Whichelow (decd), Bradshaw v Orpen* [1953] 2 All ER 1558 at 1560–1561, [1954] 1 WLR 5 at 8). He could not have been compelled to grant the lease, though if he had refused to do so Lady Ingram could simply have found someone willing to do her bidding and require Mr Macfadyen to convey the land to him. It is not, in my opinion, correct to identify Mr Macfadyen's mind with Lady Ingram's for the purposes of the two-party rule.

I reject the idea that no rational system of law could sensibly allow a party to assume an obligation to a party whose only function was to hold the benefit of the obligation for the benefit of the person subject to it. This might be so in a unified system like Scottish law, but in a divided system like ours it is possible for the parties to create obligations which are enforceable at law while being subject to equitable defences. Such obligations will not be enforced, but they are not nullities. Where the only objection is one of circuity of action they are capable of ripening into enforceable obligations when third parties become interested.

A covenant by a trustee with his beneficiary the benefit of which the trustee holds in trust for the beneficiary cannot in my judgment be dismissed as a mere whimsy. The covenant is good at law, but subject to equitable defences. Before 1873 it would have been enforced by the common law courts. It would not be enforced today, but only because enforcement would involve circuity of action (see *Hirachand Punamchand v Temple* [1911] 2 KB 330). This is a procedural bar, not a substantive one. Once the circuity disappears, so does all objection to enforcement. If the covenant were a nullity from the start, it could not be resuscitated.

The other objection is based on the rule which precludes a trustee from purchasing the trust property. The rule is discussed in *Snell's Equity* (29th edn, 1990) p 249. The purchase is not a nullity, though it is voidable at the instance

of any beneficiary however honest and fair the transaction may be and even if it is at a price higher than that which could be obtained on the open market. It does not matter whether the trustee is a sole trustee who purchases from himself or only one of several trustees who purchases from his co-trustees. The vice of the transaction is not that it is unfair or that it is not the product of negotiations between independent parties dealing with each other at arm's length, but that it infringes the principle that a man may not put himself in a situation where his interest conflicts with his duty. It is obvious that a trustee cannot circumvent the self-dealing rule by using a nominee to buy the trust property on his behalf.

The rule has been thought in modern times to operate harshly where one of several trustees purchases the trust property at a fair price properly negotiated with his co-trustees. Where the trustee is a sole trustee, however, and purports to exercise his power of sale by selling the trust property to a nominee for himself masquerading as an independent third party, the transaction is objectionable on more than one ground. Both purchase and sale are bad. The purchase is bad because it contravenes the self-dealing rule; it is a purchase of trust property by a trustee. The sale is bad because it purports to be that which it is not, viz an arm's length sale of the trust property to an independent third party. A trustee's power of sale does not authorise the trustee to sell the trust property except to someone with whom he can deal at arm's length. A sale to his nominee, being unauthorised, is incapable of overreaching the interests of the beneficiaries.

The leading cases are *Lewis v Hillman* (1852) 3 HL Cas 607, 10 ER 239, *Ingle v Richards* (1860) 28 Beav 361, 54 ER 405, *Farrar v Farrars Ltd* (1888) 40 Ch D 395, *Henderson v Astwood* and *Williams v Scott* [1900] AC 499. In *Lewis v Hillman* a sale by a sole trustee to his nominee posing as a bona fide purchaser was held to be incapable of overreaching the interests of the beneficiaries. It was, as Lord St Leonards expressed it, powerless for that purpose. Similarly, in *Farrar v Farrars Ltd* Lindley LJ observed that a power of sale does not authorise the donee of the power to take the property at a price fixed by himself. If the sale is unauthorised, it cannot affect the beneficial interests.

The reasons for this conclusion are variously stated in the cases. They are: (i) that a general power of sale given to a trustee does not authorise a sale in contravention of the self-dealing rule; (ii) that the very word sale connotes a transaction between independent parties dealing with each other at arm's length, so that whatever else a transaction between a principal and his nominee may be it is not a sale; and (iii) that the beneficial interests under a trust are not affected by any transaction by the trustees which is not entered into between independent parties dealing with each other at arm's length. None of these reasons are of any relevance in the present case: the first and third because Lady Ingram was an absolute owner; and the second because the word lease is not like the word sale and does not import any connotation of bargain. It is analogous to words like 'conveyance', 'transfer' or payment which denote merely the passing of property from one person to another whether preceded by a bargain between them or not.

In this connection *Farrar v Farrars Ltd* is instructive. A sale by a mortgagee to a company of which he was a director and shareholder was held to be effective to extinguish the equity of redemption, but only because the sale was negotiated between the mortgagee and the other directors at arm's length. It

is clear from Lindley LJ's judgment that a sale by a mortgagee to a company of which he was sole director and only shareholder would be ineffective. Yet an absolute owner can grant an effective lease of his land to his own company, just as he can effectively sell and transfer his business to his own company. The truth is that the effectiveness of a contract to extinguish beneficial interests depends on there being two independent minds to conduct negotiations; but the intrinsic validity of a contract merely depends on there being two parties, not two independent minds. In many of the cases reference is made to the two-party rule, usually by way of preface to a statement of the self-dealing rule and its consequences. But contravention of the two-party rule is not in my opinion the ground upon which any of the cases proceeded; nor could it be, seeing that in all of them the arrangements between the trustee and his nominee had been completed by conveyance.

Henderson v Astwood was merely one of these cases. It was concerned with a sale by a mortgagee, ostensibly to a third party but in reality to his nominee. The land was conveyed by the mortgagee to his nominee, who executed a declaration that he held the land in trust for the mortgagee, and who subsequently sold and conveyed the land to a bona fide purchaser for value without notice of the defect in the title. This last-mentioned sale was held to be valid, but the transaction between the mortgagee and his nominee was held to be ineffective to extinguish the equity of redemption. The result was that on the taking of the mortgage account the mortgagor was entitled to the benefit of the sale to the ultimate purchaser.

The observation of Lord Macnaghten to which I have already referred must be understood in this context. His statement that a man cannot contract with himself, while true, did not in my judgment form part of the reasoning which led to his conclusion. This did not depend on the intrinsic validity as a contract of the arrangements which the mortgagee had entered into with his nominee, for these had been carried out, but on whether they constituted an effective exercise of the mortgagee's power of sale. Moreover Lord Macnaghten did not say that a man cannot contract with his nominee and he should not be understood as having said so. In my opinion his words provide no support for the conclusion of the judge in the present case or that of the Court of Session in *Kildrummy (Jersey) Ltd v IRC*.

In my judgment a nominee may grant an effective lease to his principal, and accordingly the lease which Mr Macfadyen granted to Lady Ingram was effective to vest a legal term of years in her. The transaction did not contravene the two-party rule, for there were two parties to the contract. It is true that they were not independent parties dealing with each other at arm's length, and had Lady Ingram been a trustee the lease would not have bound the interests of her beneficiaries; but this does not render the lease a nullity whether as property or contract. In my judgment, once the lease was granted, Lady Ingram was in the same situation as the testator in *Belaney v Belaney*. Pending the execution of the declaration of trust, and while Lady Ingram remained solely and beneficially entitled to the freehold and leasehold interests, the covenants in the lease were in abeyance because of the circuity of action which would be involved in any attempt by either party to enforce them. But she had succeeded in separating the two legal estates, which were in different ownership, and was in a position to deal separately with her beneficial interest in the freehold reversion and her legal estate in the term of

years. Had she bequeathed one to one legatee and the other to another, the two interests would have devolved separately on her death. How, then, can it have been impossible for her during her life unilaterally to give one away and retain the other?

I reach this conclusion with satisfaction for two reasons. In the first place, a lease by a nominee to his principal is unobjectionable on any but the most technical grounds and should be upheld if not conceptually impossible. In the second place, a decision to the contrary effect would create new opportunities for fraud. Such a lease would normally contain nothing on its face to indicate any defect—the lease which Mr Macfadyen granted to Lady Ingram did not—and could be used as security to raise money or to enable the lessee to grant an underlease. This was not fully explored in argument, no doubt because the lease to Lady Ingram contained an absolute prohibition against assignment or subletting. But the Revenue's argument must be tested generally; the validity of a lease by a nominee to his principal cannot be made to depend on the presence or absence of such a covenant. If the Revenue are right and the lease is a nullity then the position of a mortgagee or underlessee must be considered. It seems that he can obtain no title; but there is no very obvious reason of legal policy why he should lose the estate. Moreover, it is contrary to principle that a purchaser should have to investigate the beneficial interests in order to satisfy himself as to the legal title.

Summary

I can summarise my reasons for upholding the transaction as follows. (1) A man can convey one of the two legal estates in land, i e the fee simple absolute in possession, to a nominee for himself. There is no rational basis for denying him the ability to vest the other, i e a term of years absolute, in a nominee for himself. (2) The right to exclusive possession is what distinguishes a lease from a contractual right of occupation. The right is a proprietary right, not a contractual right. (3) A trustee does not contract as agent for his beneficiary but as principal. A contract by a trustee with his beneficiary does not contravene the two-party rule, and is good at law. (4) Before 1873 such a contract would have been enforced by the common law courts, though the action might have been restrained by the Court of Chancery. Today proceedings to enforce such a contract would be stayed for circuity of action. But the contract would not be a nullity, and enforcement would be permitted once the circuity was eliminated by, for example, an assignment. (5) A lease can be validly created even though it achieves nothing beyond the vesting of the legal estate. It is difficult to see why it should be possible to grant a lease which contains no covenants at all but not a lease containing covenants which are temporarily unenforceable on procedural grounds. (6) The law permits a man who acquires the freehold and leasehold interests by different transactions to keep the interests separate by vesting one in himself and the other in a nominee for himself. Such a transaction is very common. Yet it produces the very result which Lady Ingram set out to achieve, and which is stigmatised as nonsensical or whimsical. (7) The lease in question is good on its face. If void, it is a potent instrument of fraud. It should not be necessary for a purchaser to investigate the equitable interests in order to satisfy himself as to the legal title. (8) The principle for which the Revenue contend rests on bare assertion. Neither principle nor authority compels its acceptance. The

English authorities relied on in the *Kildrummy* case, when properly analysed, provide no support.

Was the property given enjoyed to the entire exclusion of Lady Ingram?

This is the first limb of s 102(1)(b) of the 1986 Act, which stipulates that the property must be enjoyed by the donee to the entire exclusion (i) of the donor, and (ii) of any benefit to him by contract or otherwise. On the view which I have formed of the validity of the lease, no contravention can have occurred. Lady Ingram created two separate interests in the land and made a gift of only one of them. The property which formed the subject matter of the gift was not the unencumbered freehold but the freehold reversion subject to and with the benefit of the lease. But I proceed to consider the case on the footing that the lease was invalid.

In analysing the transaction on this footing it is necessary to begin by observing that inheritance tax is charged on the value transferred by a chargeable transfer, and like its predecessor estate duty is charged by reference to the beneficial interests in property and not the bare legal estate. Neither the conveyance by Lady Ingram to Mr Macfadyen nor the conveyance by him to the trustees was a transfer of value. Neither Mr Macfadyen nor the trustees took any beneficial interest in the land. Lady Ingram made no gift to them. The only gift which she made was to her intended beneficiaries. They are therefore the donees for the purposes of s 102. The gift to them took effect under and by virtue of the declaration of trust. Whether the conveyance by Mr Macfadyen to the trustees preceded the declaration of trust or not it did not affect the beneficial interests, but operated in effect as an appointment of new trustees in place of Mr Macfadyen. Its only effect was that the trusts fell to be declared by them and not by Mr Macfadyen.

The trustees were not, of course, intended to take any beneficial interest for themselves, and they knew from the form of the conveyance to them, which was expressed to be subject to and with the benefit of the lease to Lady Ingram, that the beneficiaries were intended to take only the freehold reversion to her lease. In those circumstances they took the conveyance subject to an equitable obligation to give effect to her intentions. They were bound in equity to recognise Lady Ingram's right to the lease and to hold the reversion, but only the reversion, in trust for the beneficiaries. The respective rights of Lady Ingram and the beneficiaries arose at the same time and under the same instrument, that is to say the declaration of trust, and they were enforceable against the same persons, that is to say the trustees. In my judgment the same result would have been achieved and in much the same manner if Lady Ingram had simply conveyed the land to the trustees upon trust to grant the lease to her and to stand possessed of the freehold reversion in trust for the beneficiaries.

With this preamble I turn to the question whether the subject matter of the gift to the beneficiaries under the declaration of trust was enjoyed to the entire exclusion of Lady Ingram. This depends on identifying the subject matter of the gift. In my opinion it consisted on the freehold reversion expectant on the lease and not the unencumbered freehold, with the result that Lady Ingram was entirely excluded therefrom. My reasons are as follows.

Where the gift does not exhaust the whole of the donor's beneficial interest in the property, as where he gives a life interest but not the ultimate interest

in the capital, the distinction between an interest which is reserved out of the property given and an interest which is not given is easy to draw. It is less easy where the donor retains a present interest in the property which did not exist as a separate interest before the gift.

In *Earl Grey v A-G* [1900] AC 124, [1900–3] All ER Rep 268 the donor conveyed land to his son by way of gift but reserved an annual rentcharge during his life which was charged on the land conveyed and which his son covenanted to pay (together with the other liabilities of the donor), and retained the right to occupy the mansion house which stood on the land conveyed together with other benefits. He also reserved a power of revocation. It is difficult to see how it could have been supposed for a moment that the gift was effective to save estate duty. The gift was revocable; the donor had reserved an interest for life; he had retained the right to occupy part of the land which formed the subject matter of the gift; and he had clearly reserved a benefit by contract or otherwise in the shape of the son's covenant to pay the rentcharge. This was a benefit which the donor did not possess before the gift. It was a security for the rentcharge which guaranteed payment even if the land produced insufficient income to support it. Not surprisingly the executors received short shrift from the Earl of Halsbury LC in the House of Lords (in a speech which Lord Russell of Killowen was later to describe as 'unreserved in more senses than one' (see *Comr of Stamp Duties of New South Wales v Perpetual Trustee Co Ltd* [1943] 1 All ER 525 at 533, [1943] AC 425 at 444)). For present purposes, however, what is important is the way in which the rentcharge was regarded by the Court of Appeal and has been regarded in other judgments of high authority since.

In the Court of Appeal A L Smith LJ relied exclusively on the son's covenant to pay the rentcharge and to bear the other liabilities of the donor. Rigby LJ thought that the reservation of the rentcharge and the son's covenant to pay it were 'so plain as to require no further notice' (see [1898] 2 QB 534 at 542). Vaughan Williams LJ agreed that the son's covenant to pay the donor's debts was a sufficient reservation of a benefit. But, he said, such a benefit was—

> 'totally different from the prior estate created by the use in respect of the rent-charge, and I mention this because I am inclined to agree with the appellant that the rent-charge must be treated as something entirely outside the gift.' (See [1898] 2 QB 534 at 546.)

In the House of Lords the Earl of Halsbury LC lumped the rentcharge with the other benefits and the case was dismissed as too plain for argument.

In *Re Cochrane* [1905] 2 IR 626 Palles CB distinguished *Earl Grey v A-G* on the specific ground that the rentcharge in that case was secured by the son's personal covenant. He said (at 638):

> 'The limitation of this annuity, although prior to the gift, was, as well as being charged on the land, secured by the personal covenant of the grantee, and this covenant, according to *The Attorney-General* v. *Worrall* ([1895] 1 QB 99, [1891–4] All ER Rep 861), made its subject-matter a reservation out of the gift within the meaning of [the statute]; and, therefore, even if Lord Halsbury's words, "The settlement itself has reserved £4000 a year," mean, as they probably do, "reserved *out of the gift*," they are in no sense contrary to our present decision. The law made

it a reservation *out of the gift* by reason of the existence of the personal covenant.' (Palles CB's emphasis.)

This is a neat explanation of the Earl of Halsbury LC's reasoning, even if it is one which is unlikely to have occurred to the Earl of Halsbury LC himself. Palles CB clearly shared the opinion of Vaughan Williams LJ, that without a covenant to pay it the reservation of a rentcharge is not in itself a benefit reserved out of the property given but is merely property not given.

The decision in *Re Cochrane* was affirmed by the Irish Court of Appeal ([1906] 2 IR 200), where Fitzgibbon LJ commented that if ever there was a case to which the statute applied it was *Earl Grey v A-G*. He referred to the various benefits which the donor had retained in that case, including the son's covenant to pay the rentcharge, but he did not mention the reservation of the rentcharge itself. Too much perhaps should not be made of this; but the same cannot be said of the speeches of Lord Russell in *Comr of Stamp Duties of New South Wales v Perpetual Trustee Co Ltd* and Lord Radcliffe in *St Aubyn v A-G (No 2)*. In the last-mentioned case Lord Radcliffe made it clear that in his opinion it was not the creation of the rentcharge but the existence of the son's covenants which caused liability for estate duty to attach in *Earl Grey v A-G*; that this was the explanation of that case given by the Court of Appeal in *Re Cochrane*; that Lord Russell's speech in the *Perpetual Trustee* case was directed to the same point; and that he (Lord Radcliffe) agreed with those views.

Any statement of law which has the concurrence of Vaughan Williams LJ, Palles CB, and Lord Radcliffe and which has been attributed to Lord Russell is deserving of the most profound respect. It is persuasive authority of the most compelling kind. I respectfully adopt it. It follows that it is in my opinion possible for a donor to create and retain for his own benefit a present interest in property, such as a rentcharge, which did not exist as a separate interest before the gift and to make a gift of property subject thereto without thereby reserving it out of the subject matter of the gift. Neither the fact that the interest retained by the donor is a present interest which did not exist before the gift nor the fact that the interests given and retained are brought into existence simultaneously compels the conclusion that the interest which the donor retains is reserved out of the subject matter of the gift. The question is whether this principle permits a donor to create and retain for his own benefit a legal term of years and to make a gift of the freehold reversion. This question was considered by this court in *Nichols v IRC* [1975] 2 All ER 120, [1975] 1 WLR 534. In that case a father conveyed land by way of gift to his son and took a lease back. Walton J held that the donee was under no more than a filial duty to grant the lease back, and that accordingly he had received by way of gift the whole unencumbered freehold interest from which the donor was not excluded thereafter. The Court of Appeal held that on the evidence the donee had been subject to an obligation binding in equity to grant the lease back. Superficially, therefore, the lease back was similar to the rentcharge which was reserved in *Earl Grey v A-G*. Giving the judgment of the court, Goff J said ([1975] 2 All ER 120 at 126–127, [1975] 1 WLR 534 at 543):

'Having thus reviewed the authorities, we return to the question what was given, and we think that a grant of the fee simple, subject to and with the benefit of a lease back, where such grant is made by a person who owns the whole freehold free from any lease, is a grant of the whole fee

simple with something reserved out of it, and not a gift of a partial interest leaving something in the hands of the grantor which he has not given. It is not like a reversion or remainder expectant on a prior interest. It gives an immediate right to the rent, together with a right to distrain for it, and, if there be a proviso for re-entry, a right to forfeit the lease. Of course, where, as in the *Munro* case, the lease, or, as it then may have been, a licence coupled with an interest, arises under a prior independent transaction, no question can arise because the donor then gives all that he has, but where it is a condition of the gift that a lease back shall be created, we think that must, on a true analysis, be a reservation of a benefit out of the gift and not something not given at all.'

The passage is obiter, since the court found it unnecessary to reach a final conclusion on the point. It is not strictly binding upon us; but it represents the considered view of the court and is of high persuasive authority. It is, however, worthy of remark that although *St Aubyn v A-G (No 2)* was cited it is not mentioned in the judgment; nor is any reference made to the view of Vaughan Williams LJ in *Earl Grey v A-G*, the explanation of that case given in *Re Cochrane*, or the approval of that explanation by Lord Radcliffe in the *Perpetual Trustee* case. While, therefore, I accept the conclusion stated in the passage in *Nichols v IRC*, I am unable fully to accept the reasons by which the court reached it.

In my judgment, the reason why a lease takes effect by way of regrant is not that it is a present interest which gives an immediate right to the rent, for this would apply equally to a rentcharge. The true reason is that a lease is not, like a rentcharge, merely an encumbrance charged upon the freehold which can be created by way of reservation without any regrant, and it is not, like a life interest, merely part of the freehold which can be retained without being disposed of. It is a derivative interest carved out of the freehold and must be granted by the freeholder. A man cannot grant a lease to himself, and he cannot reserve a lease to himself. Accordingly, the lease must take effect by way of regrant by the grantee of the freehold, and the grantee cannot grant it until the interest out of which it is to be carved has been vested in him. The point is made by Isaacs J in *Lang v Webb* (1912) 13 CLR 503 at 515:

'... you look at the instrument by which the property passes from the donor to the donee, and, disregarding mere form, ascertain its real effect. What does it give, not how does it give it? In this case the gift is made by the indenture executed by Henrietta Lang, and by that the whole of her estate in the lands was given without any exception or reservation whatever. That was the transaction of gift—complete in itself and unqualified. No other construction is possible. *It had to be complete before the donee could execute to her the lease of the property. A lease is a conveyance; and it is more than form, it is substance, when the donor's interest has to be vested in the donee before the donee can convey a smaller interest.*' (My emphasis.)

Accordingly, it is not possible for a donor to create and retain for his own benefit a lease on his own land and to give away only the reversion expectant on the lease by conveying the land to the donee and taking a lease back from the donee. Nor can the desired result be achieved by expressing the

conveyance to the donee to be subject to the leasehold interest retained by the donor. Section 65 of the Law of Property Act 1925 provides:

> '(1) A reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.
>
> (2) A conveyance of a legal estate expressed to be made subject to another legal estate not in existence immediately before the date of the conveyance, shall operate as a reservation, unless a contrary intention appears ...'

At first sight these provisions might appear to dispense with any requirement for an actual regrant. But in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772, [1975] 1 WLR 468 this court held that the words 'without ... any regrant' mean only 'without any words of regrant'. The lease back to the grantor is still created out of the absolute interest by way of regrant by the grantee.

It is for the same reason not possible to achieve the desired result by conveying the land to the donee subject to an equitable obligation to grant a lease back to the donor (as in *Nichols'* case) or (which comes to the same thing) subject to an equitable obligation to give effect to a lease which the donor has purported to reserve to himself. In either case the donee's conscience is not affected until he receives the freehold, and then his obligation is to grant (or give effect to) the lease out of the interest which he has received. The fact that the donee was never intended to have the freehold interest free from and unencumbered by the lease is in my opinion beside the point. What is determinative is that the donor can only obtain the lease from the donee and out of the interest which the donor has previously vested in him.

But these are conveyancing problems, not inheritance tax problems. It does not follow that it is impossible for a donor to create and retain for his own benefit a leasehold interest and give away the freehold reversion if appropriate conveyancing machinery is employed. In my opinion it is possible to do this, provided that the donor does not receive the lease by way of regrant from the donee. There are at least two methods by which the participation of the donee may be avoided: (i) by the use of a nominee (by which I mean a bare trustee) to grant or take the lease before making a gift of the reversion; or (ii) by conveying the land to a trustee upon trust to grant the lease to the settlor and subject thereto to hold the reversion in trust for the donee. In the present case Lady Ingram chose the first of these methods, and I have already concluded that she was successful. But even if the lease which Mr Macfadyen granted to Lady Ingram was a nullity, I am of opinion that Lady Ingram took her leasehold interest from the trustees without any participation by the donees, and accordingly was successful in excluding the leasehold interest from the subject matter of the gift.

If the lease actually granted to Lady Ingram was a nullity, then she never acquired a legal estate. But as I have already explained she did acquire a right to compel the trustees to grant the lease to her. Her right arose under and by virtue of the conveyance to the trustees. It was their conscience which was

affected by knowledge of Lady Ingram's intention to retain a leasehold interest, so that they could not take the legal estate under the conveyance to them and deny Lady Ingram her right to remain in exclusive possession. The consciences of the beneficiaries were not affected; the only property settled upon them was the freehold reversion subject to and with the benefit of the lease which the trustees were duty bound to grant to Lady Ingram; and they could take only that which was left after the trustees had discharged their equitable obligation to her. The difference between the present case and *Nichols'* case is that in *Nichols* the donee of the freehold reversion and the grantor of the lease were one and the same, whereas in the present case they were not.

In reaching this conclusion I have not overlooked the submission of counsel for the taxpayer in *Re Cochrane* [1905] 2 IR 626 at 631 which was approved by this court in *Nichols v IRC* [1975] 2 All ER 120 at 126, [1975] 1 WLR 534 at 542 that the interposition of trustees was not relevant. This could easily be misunderstood. It comes to no more than this, that it makes no difference whether the donor makes a gift direct to the donee or vests the property in trustees and directs them to make the gift. On either footing the gift is made by the donor not by the trustees, and the subject matter of the gift is the property which the donor directs the trustees to hold in trust for the donee. So in the present case the donor was Lady Ingram, not the trustees, and the subject matter of the gift was the property which the beneficiaries took beneficially under the declaration of trust, not the legal estate which the trustees took under the conveyance. The acts of the nominee are attributed to his principal.

But it does not follow that the interposition of trustees can be disregarded, or that the court is absolved from the necessity of analysing the transaction properly in order to identify the property taken by the donee. In the present case the interposition of the trustees did not affect the substance of the transaction, which was a gift by Lady Ingram (and not by the trustees) to the beneficiaries (and not to the trustees). But it enabled Lady Ingram to overcome the conveyancing problem to which her desire to create a leasehold interest and exclude it from the gift gave rise. That is precisely the kind of problem which has traditionally been solved by resort to a use or trust, as in *Belaney v Belaney*.

If donor and donee agree that the donor will convey freehold land to the donee and the donee will grant a lease back to the donor, then the lease takes effect by way of regrant and is an interest reserved out of the property given. It makes no difference that the donee takes the conveyance of the freehold in the name of a nominee and directs the nominee to grant the lease back to the donor. The regrant by the donee's nominee is a regrant by the donee, for it is made at his direction.

But that is not this case. The freehold interest in the land was taken by the trustees as Lady Ingram's nominees. It was their notice of her intentions which obliged them to grant or give effect to the lease in her favour; and which disentitled them from taking the freehold estate free from the lease either for their own benefit or as trustees for the beneficiaries. It was by her direction that they held the leasehold interest in trust for her and declared trusts of the freehold reversion for the beneficiaries. The beneficiaries were passive

recipients of Lady Ingram's bounty, which never extended beyond the reversion expectant on her lease.

Since writing the above I have had the advantage of reading the draft judgment of Nourse LJ. I accept, of course, that the beneficiaries could not have directed the trustees not to grant the lease, and that this is because the trustees could not have refused to grant it even if they had wanted to. Where I differ from him is that I regard the trustees and the beneficiaries as suffering from different disabilities. The trustees were entitled to the freehold estate, but their interest was subject to Lady Ingram's right to call for a lease. They could not decline to grant the lease without being in breach of an obligation which was binding on them. The beneficiaries were not subject to any such obligation. But they were given only what was left after the trustees had fulfilled their obligation to grant the lease. They could not prevent this because it did not affect the property in which their beneficial interests subsisted. Had Lady Ingram conveyed land to the trustees and directed them to stand possessed of an undivided one half-share for herself and the other half-share for the beneficiaries, the beneficiaries could not have prevented the trustees from giving effect to her interest. Their interest would not be subject to hers; it simply would not extend to hers. That, in my opinion, is the position in the present case.

Was the property given enjoyed to the entire exclusion of any benefit to Lady Ingram by contract or otherwise?

This is the second limb of s 102(1)(b) of the 1986 Act. This question can be easily disposed of. It is clearly established that to bring a case within this limb it is not necessary that the benefit to the donor should be by way of reservation out of the subject matter of the gift (see *A-G v Worrall* [1895] 1 QB 99, [1891–4] All ER Rep 861).

In *Earl Grey v A-G* the donor's right to continue to occupy the mansion house which stood on the land given to the son was a benefit reserved out of the property given and contravened the first limb of para (b), while the son's covenant to pay the rentcharge and to bear the donor's other expenses constituted a benefit to him by contract or otherwise which contravened the second limb. In *Oakes v Comr of Stamp Duties of New South Wales* [1953] 2 All ER 1563, [1954] AC 57 a father made a gift of land in favour of himself and his four children in equal shares but retained wide powers of management for which he reserved the right to charge remuneration. It was held that the donor was entirely excluded from the subject matter of the gift, which was the four-fifths interest given to the children, and that his retention of powers of management did not affect the matter. This was because the donor is entirely excluded if he only holds the property in a fiduciary capacity and deals with it in accordance with his fiduciary duty. But the right to charge remuneration was a different matter. This amounted to a benefit to the donor by contract or otherwise. Lord Reid said that if the right to take remuneration could be regarded as a beneficial interest in the property reserved by the donor when making the gift, then his remuneration would not be a benefit within the scope of this limb of para (b) (see [1953] 2 All ER 1563 at 1569, [1954] AC 57 at 76). (I interpose to say that it would be, like a rentcharge, an interest in the property not given.)

In *Nichols'* case the lease contained a full repairing covenant by the donee. The right to have his property repaired at the donee's expense was held to be a benefit which the donor did not enjoy before.

From these cases I conclude that to come within the scope of the second limb of s 102(1)(b) the benefit must consist of some advantage which the donor did not enjoy before he made the gift, and that it is not sufficient if it consists merely of the property which he owned before the gift and which was not included in it.

No such benefit has been identified in the present case. The lease itself was merely property not comprised in the gift. It contained no covenants which would have the effect of transferring to the trustees a liability which would otherwise be borne by Lady Ingram.

The Revenue relied on the landlord's covenant for quiet enjoyment, but in my judgment there is nothing in this point. Such a covenant was present in both *Nicholls'* case and *Munro v Comr of Stamp Duties* [1934] AC 61, [1933] All ER Rep 185. The court did not rely on the covenant in *Nicholls'* case and the decision in *Munro's* case would have gone the other way if the covenant were material. In my judgment it is not a benefit within the meaning of the second limb of para (b) because it cannot be separated from the lessee's right of exclusive possession under the lease. It reinforces that right by preventing the landlord and those claiming under him from interfering with the lessees right of exclusive possession. Thus it merely prevents the donee and his successors from interfering with the donor's continued enjoyment of property which was not included in the gift.

In my judgment Lady Ingram did not reserve a benefit by contract or otherwise within the meaning of the section.

The Ramsay doctrine

The *Ramsay* principle allows the court to disregard the artificial division of a single transaction into several steps or the insertion of steps which have no purpose except the avoidance of tax which would otherwise be chargeable. There is no room for the invocation of the *Ramsay* principle in the present case unless (i) (as I would hold) the lease was valid and (ii) (contrary to my opinion) the effectiveness of the gift as a potentially exempt transfer depended on the validity of the lease. If the lease was a nullity, it is not necessary to invoke the *Ramsay* principle in order to disregard it. If on the other hand the conveyance and declaration of trust would still constitute a potentially exempt transfer even if the lease were invalid, then disregarding the unnecessary creation of the lease would not affect the outcome. Since none of us was minded to reach a conclusion which could make the *Ramsay* principle relevant, we did not hear argument on it. Nevertheless, I shall express my own views on the subject, since it has some bearing on what might be regarded as the broader merits of the Revenue's case.

It is conceded by the executors that the several steps in the scheme were intended to be carried through as a whole and that they may properly be regarded as a preordained series of transactions or as a single composite transaction within the principle enunciated by the House of Lords in *W T Ramsay Ltd v IRC* and *Furniss v Dawson*. This is not, however, enough by itself to enable the Revenue to defeat the scheme.

Once it is found or admitted that the several steps were planned and carried through as a whole, thus forming a single composite transaction, the next question is whether the transaction as a whole or any steps artificially inserted into it have any purpose other than the avoidance of tax. These are then disregarded, not in the sense of being treated as if they did not take place, but in the sense that they cannot affect the application of the statute. As Learned Hand J put it in the seminal case of *Helvering (Comr of Internal Revenue) v Gregory* (1934) 69 F 2d 809 at 811:

> '... we cannot treat as inoperative the transfer of the Monitor shares by the United Mortgage Corporation, the Avril Corporation of its own shares to the taxpayer, and her acquisition of the Monitor shares by winding up that company. The Avril Corporation had a juristic personality ... All these steps were real, and their only defect was that they were not what the statute means ...'

The final question is whether the transaction so identified comes within a particular taxing or relieving statutory provision. As Lord Brightman said in *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 at 543, [1984] AC 474 at 527:

> 'The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.'

This is a matter of statutory construction. In *IRC v McGuckian* [1997] 3 All ER 817 at 823, [1997] 1 WLR 991 at 998 Lord Browne-Wilkinson said:

> 'The approach pioneered in the *Ramsay* case and subsequently developed in later decisions is an approach to construction, viz that in construing tax legislation, the statutory provisions are to be applied to the substance of the transaction, disregarding artificial steps in the composite transaction or series of transactions inserted only for the purpose of seeking to obtain a tax advantage. The question is not what was the effect of the insertion of the artificial steps but what was its purpose. Having identified the artificial steps inserted with that purpose and disregarded them, then what is left is to apply the statutory language of the taxing Act to the transaction carried through, stripped of its artificial steps.'

In my judgment the Revenue's attempt to invoke the *Ramsay* doctrine fails at each of the last two steps. It is, of course, beyond dispute that Lady Ingram was tax-motivated. If inheritance tax had not existed she would not have attempted to make a potentially exempt transfer of her property. But this is not sufficient to disregard the transaction or any steps in it, or it would not be possible to make a potentially exempt transfer at all. What is required to enable the court to disregard a transaction or step in a transaction is not the presence of a tax avoidance *motive*, but the absence of any other *purpose*. This is often described as the absence of any business purpose; but in this context business purpose does not mean commercial purpose but simply non-fiscal purpose. The circular and self-cancelling scheme in *Ramsay* and the artificial splitting of the disposal into two in *Furniss v Dawson* had no purpose at all except the avoidance of tax (see [1981] 1 All ER 865 at 873, [1982] AC 300 at 326 per Lord Wilberforce describing 'transactions designed only to avoid tax

and lacking otherwise in economic or commercial reality' and citing *Knetsch v United States* (1960) 364 US 361 at 366 and *Gilbert v Internal Revenue Comr* (1957) 248 F 2d 399 at 411).

In the present case Lady Ingram set out to make a genuine gift of a reversionary interest in her property to her children. Although motivated by a desire to save tax, this was a non-fiscal purpose. The transaction was not a mere paper transaction and cannot simply be disregarded for tax purposes like the scheme in *Ramsay*. Nor were any of the steps artificially inserted into the transaction for an exclusively fiscal purpose. The structure of the transaction, which is what makes the scheme appear artificial, was not, as in *Furniss v Dawson*, tax-motivated. The several steps by which the transaction was effected were an integral part of the proper and appropriate conveyancing method to achieve the gift of the freehold reversion which Lady Ingram intended to make. They were necessitated by the conveyancing problem inherent in the need to separate the two interests in land so that Lady Ingram could deal with only one of them. Had she been entitled to a fund of money, a single step would have been sufficient. In my judgment, there is no justification for disregarding any of the steps in the transaction.

The final step is to apply s 102, not to the individual steps in the transaction, but to the substance of the transaction or its end result. In my judgment that does not help the Revenue in the present case. As Lord Steyn put it in *IRC v McGuckian* [1997] 3 All ER 817 at 825, [1997] 1 WLR 991 at 1000, the *Ramsay* doctrine is based on a broad purposive construction of the statute and a rejection of formalism in fiscal matters. If Lady Ingram's scheme is analysed broadly and without formalism, its end result was a gift of the freehold reversion. A gift of the freehold reversion and a gift of the unencumbered freehold with a lease back to the donor are two quite different legal transactions, though with very similar economic effects. One might have expected Parliament to treat them in the same way for the purpose of inheritance tax, but by adopting the earlier legislation verbatim it has evinced a clear intention to treat them differently. It is not possible, in my opinion, to adopt a broad purposive approach to the interpretation of s 102 which disregards its legislative history and attributes to Parliament a purpose which it evidently did not have.

Conclusion

I return to the point which I made at the very beginning of this elaborate and, I fear, overlong judgment. Lady Ingram made no attempt to avoid tax by pretending to make a gift while retaining the subject matter of the gift. She attempted to retain a present interest in land and to make a gift of only that which she did not retain.

The distinction is highly artificial; but it is inherent in the legislation, as construed by the highest court over many generations, that liability or exemption from tax depends on this distinction. If this creates what is popularly described as a loophole, it is one which Parliament must be taken to have intended to revive when it re-enacted the earlier legislation verbatim in 1986.

It is beyond dispute that Lady Ingram could have made a potentially exempt transfer of her land while reserving a rentcharge equal to its current annual value. But she wished to retain exclusive possession of the land itself and not

merely its income. There is nothing in the nature of inheritance tax or in the detailed legislation by which it is enacted which makes this distinction material; and this is not surprising, for the two transactions have similar economic effect. The only obstacle which faced Lady Ingram was a conveyancing problem; and the only question which we have to decide is whether the conveyancing machinery which she employed to overcome it was successful. I think it was. I would dismiss the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Susan J Murphy Barrister.

R v Rasool and another

COURT OF APPEAL, CRIMINAL DIVISION

STUART-SMITH LJ, FORBES AND BRIAN SMEDLEY JJ

24 JANUARY, 5 FEBRUARY 1997

Criminal evidence – Interception of communications – Telephone intercepts – Telephone intercepts with consent of person to whom or by whom call made – Use of intercepted communication at trial – Whether evidence of telephone call obtained from telephone intercept admissible – Interception of Communications Act 1985, ss 1(2)(b), 9(1).

The first defendant, R, informed two brothers that a friend of his was able to offer them work which was well paid but could result in imprisonment. He introduced them to the second defendant, C, who offered them a car and money for delivering goods. Both brothers decided to inform the police and one agreed to act as an informant. The brother's assistance led to the surveillance of C. With his consent a telephone tap was placed on the brother's British Telecom line. An intercepted call showed that C was involved in the movement of large amounts of heroin. At his trial for conspiracy to supply a Class A drug, C contended that the combined effect of ss 1[a] and 9[b] of the Interception of Communications Act 1985 was such as to render the substance of the recorded telephone conversation inadmissible. The judge rejected that submission and C was convicted. He appealed against conviction.

Held – Section 9(1) of the 1985 Act did not, except in relation to intercepts pursuant to a warrant issued under s 2[c] of the Act, prevent the admission in evidence of the product of a telephone intercept to which the Act applied. Accordingly s 9(1)(a) was not sufficient by itself to prevent admissibility of the substance of a consensual intercept. Moreover, since on the question of admissibility, the fact that the evidence might have been obtained unlawfully was irrelevant, cross-examination to show that the intercept was not consensual could not be entertained, quite apart from the prohibition in s 9(1)(a). In the instant case, the evidence adduced by the prosecution had been provided by means of a consensual tap. It followed that the judge had been right in allowing the inclusion of the substance of the intercepted call as part of the prosecution's case. C's appeal would therefore be dismissed (see p 447 *d e* and p 448 *f*, post)

R v Preston [1993] 4 All ER 638 distinguished.

R v Effik (1992) 95 Cr App R 427 considered.

Notes

For the interception of communications, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 270–275.

For the Interception of Communications Act 1985, ss 1, 2, 9, see 45 *Halsbury's Statutes* (4th edn) (1994 reissue) 305, 307, 315.

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a Section 1, so far as material, is set out at p 442 *h j*, post

b Section 9, so far as material, is set out at p 443 *d e*, post

c Section 2, so far as material, is set out at p 445 *g h*, post

Cases referred to in judgment

Malone v UK (1984) 7 EHRR 14, ECt HR.
R v Effik [1994] 3 All ER 458, [1995] 1 AC 309, [1994] 3 WLR 583, HL; *affg* (1992) 95 Cr App R 427, CA.
R v Grant [1995] Crim LR 715, CA.
R v Khan [1996] 3 All ER 289, [1996] 3 WLR 162, HL.
R v Preston [1993] 4 All ER 638, [1994] 2 AC 130, [1993] 3 WLR 891, HL.
R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.

Cases also cited or referred to in skeleton arguments

R v Halpin [1996] Crim LR 112, CA.
R v Morris [1995] 2 Cr App R 69, CA.

Appeals against conviction

Shafgat Rasool and Nassir Choudhary appealed by leave of the single judge against their conviction on 7 March 1996 in the Crown Court at Manchester before Judge Ensor and a jury of conspiracy to supply a Class A drug. They were sentenced to ten years' imprisonment. £4,000 found on Rasool's premises was ordered to be confiscated and applied towards the prosecution costs; £61,842·30 belonging to Choudhary was confiscated under the Drug Trafficking Offences Act 1986. The facts are set out in the judgment of the court.

Roger Backhouse QC and *Arthur Blake* (assigned by the *Registrar of Criminal Appeals*) for the appellant Rasool.
Shaun Spencer QC and *Paul Marshall* (assigned by the *Registrar of Criminal Appeals*) for the appellant Choudhary.
Bernard Lever (instructed by the *Crown Prosecution Service, North West*) for the Crown.

Cur adv vult

5 February 1997. The following judgment of the court was delivered.

STUART-SMITH LJ. On 7 March 1996 in the Crown Court at Manchester before Judge Ensor and a jury the appellants were convicted of conspiracy to supply a Class A drug. A co-accused Sultan Mahmood Kurd was also charged with conspiracy to supply Class A drugs but the jury was unable to agree on their verdict. The appellants now appeal against conviction by leave of the single judge.

It was the Crown's case that Rasool had told an associate, Ghassan Barakat, and his brother Hassan Barakat, that a friend could offer them work which was well paid but could result in a long gaol sentence. He had then introduced them to Choudhary who had offered them a car and large sums of money for delivering goods. He did not say what the goods were but reiterated that it could result in imprisonment. The brothers said they would consider it, but informed the police. Hassan Barakat had no further involvement; but Ghassan acted as a participating informant and gave information which resulted in surveillance and telephone tapping which showed that Choudhary and Kurd were involved in the movement of large amounts of heroin between London and Manchester. Ghassan was to be the main prosecution witness but he disappeared before the trial. Hassan was called to give evidence of the initial conversations. Ghassan

was then traced and brought to court, but effectively refused to give evidence and was treated as a hostile witness. He disagreed with his previous statements and said nothing of evidential value.

So far as Rasool was concerned the only evidence against him was that of Hassan Barakat, together with other evidence which showed that what was to be transported was drugs. Hassan Barakat gave evidence that on 1 February 1995 he and his brother Ghassan had gone to the clothing factory of Rasool, whom Ghassan knew, to ask for work. Rasool had said that he had no work but that his friend had a driving job. He said that Hassan could be rich for a few months but could get ten years in gaol if caught. It was a risky job that involved driving to Liverpool, London and Manchester. Hassan asked Rasool to ring his friend and they arranged to return later that evening.

Hassan returned to Rasool's factory later with his brother. Choudhary then arrived and said: 'Did Rasool tell you what I've got for you?' Hassan asked for an explanation. Choudhary told him he would be required to drive a car between London, Manchester and Liverpool. He told him that the other driver had been locked up, but did not say by whom. He said it was a very risky job and if he was caught he would get ten years. He was told he would be carrying 'stuff', he could not remember if the word drugs had been used. He had been told that he would always receive more than £1,000 for it and that he would get a BMW and a mobile phone. He had indicated that he would like to think about it and Rasool, who had been there throughout the conversation, had said that it was up to him, he could say yes or no.

The remaining evidence in the case involved observation of association between Choudhary and Ghassan Barakat and telephone calls apparently between them. On 21 March Ghassan Barakat returned from London by train to Manchester Piccadilly station. He arrived with a bag and made a telephone call. He then got into a black cab which was followed from the station by Choudhary driving another car. Choudhary followed for three miles until he stopped to shake off surveillance. Ghassan went on in the taxi to his home where he was joined by one of the drugs squad officers. He showed the officer the bag which contained a loaf of bread which itself contained a bag of brown powder weighing approximately a kilogram. The officer replaced the powder and loaf.

Later the same evening a telephone tap on Ghassan's phone led to a call between him and Choudhary being recorded. In it Ghassan is apparently told to expect a black man at 9 pm. Choudhary told him to watch around because he feared he had been followed earlier in the day. There was then further conversation about giving someone who walked past a bag or present. Finally they arranged to meet at Rasool's premises.

On 28 March Ghassan went to London where he met Kurd. He collected a suit bag from Kurd and then caught a train back to Manchester. On the train he was met by the drugs squad officer who opened the bag and found two leather jackets, a leather skirt and a carrier bag containing a loaf of bread. Inside the bread was a bag of brown powder from which he took a sample and replaced the bread. Taped to the exterior of the bag was a small wrap of what appeared to be heroin and the officer took a sample of that too.

Once back in Manchester officers saw Ghassan walking near Choudhary's car in which he placed the suit bag. He then walked around until he was joined by Choudhary and they drove off together. Forty minutes later the car returned containing Choudhary alone and he was arrested.

Choudhary's car was searched and the suit carrier containing the jackets was there, but the loaf of bread had been taken out. Choudhary was taken to the police station by car and the back seat of the car routinely searched afterwards. A small wrap of heroin was found tucked down the back of the seat. Analysis of the samples showed that they were heroin. The carpet of Choudhary's car boot was examined and found to contain morphine, the broken down constituents of heroin. In interview Rasool denied the offence and disputed the account given by Ghassan Barakat that he had sought to involve the brothers in drugs operations. At the time of his interview the police were basing their case on Ghassan's account. Rasool denied that he had anything to do with drugs. He did not give evidence.

Choudhary gave evidence. He said he had been introduced to Ghassan Barakat through Rasool. He needed someone to give him protection against some West Indian men who were threatening him. He said that he and Kurd were in the leather trade. What was collected by Ghassan were leather coats and jackets that Mr Choudhary urgently wanted. He gave an explanation as to why he had followed the taxi in which Ghassan travelled on his return to Manchester.

He agreed that the recorded telephone call was between him and Ghassan Barakat, but he said it was about the West Indians who were threatening him. He said that on 28 March Ghassan was collecting leather goods he urgently needed. He told Ghassan to put them in the boot of his car. He had then joined Ghassan and Ghassan had gone home while he had driven off and was arrested. He said that he lent his car to many people and that could account for the degraded heroin on the carpet. He said the wrap of heroin found in his car was planted by the police.

[His Lordship then considered the grounds of appeal advanced on behalf of the appellant Rasool and concluded that his conviction was unsafe. He continued:]

Turning to the appeal of Choudhary, the principal ground of appeal relates to the admissibility of a record of the telephone conversation between Choudhary and Ghassan Barakat on the evening of 21 March. A tap had been placed on the British Telecom line with the consent of Ghassan Barakat, who at that stage was a cooperating informer. Mr Spencer QC on behalf of Choudhary submitted to the judge that the combined effect of s 1 and s 9 of the Interception of Communications Act 1985 was such as to render the substance of the conversation inadmissible. The judge rejected his submission. Mr Spencer argues that he was wrong.

So far as is material s 1 provides as follows:

> '(1) Subject to the following provisions of this section, a person who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunication system shall be guilty of an offence ...
>
> (2) A person shall not be guilty of an offence under this section if—(a) the communication is intercepted in obedience to a warrant issued by the Secretary of State under section 2 below; or (b) that person has reasonable grounds for believing that the person to whom, or the person by whom, the communication is sent has consented to the interception ...'

Subsections (3) and (4) are not material.

This case fell within s 1(2)(b) and not (a). It was not a warrant case. Sections 2 to 6 are concurred with the circumstances in which a warrant can be obtained and

what is to happen to the product of such information obtained as a result of a warrant. They have no bearing on an interception pursuant to consent (s 1(2)(b)). We shall have to refer later to ss 2(2)(b) and 6.

As Mr Spencer accepts s 1 of the 1985 Act has nothing to do with admissibility of the product of a telephone tap. The fact that it may have been obtained unlawfully, by committing trespass or even in circumstances involving a criminal offence does not render relevant evidence inadmissible. See *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 and *R v Khan* [1996] 3 All ER 289, [1996] 3 WLR 162. If it is inadmissible this can only be the result of a clear statutory provision. This of course is subject to the trial judge's discretion to exclude otherwise relevant evidence pursuant to s 78 of the Police and Criminal Evidence Act 1984, or the court's inherent jurisdiction. No such application was made in this case.

Mr Spencer submits that s 9 of the 1985 Act has the effect of rendering the material inadmissible, at least when it is considered in the light of the judgments in the House of Lords in *R v Preston* [1993] 4 All ER 638, [1994] 2 AC 130.

So far as material, s 9 provides:

> '(1) In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest—(a) that an offence under section 1 above has been or is to be committed by any of the persons mentioned in subsection (2) below; or (b) that a warrant has been or is to be issued to any of those persons.
>
> (2) The persons referred to in subsection (1) above are—(a) any person holding office under the Crown ...'

It is common ground that the constable who intercepted the line was within s 9(2)(a). No problem arises in this case under s 9(1)(b). Moreover on the face of it s 9(1)(a) is not concerned with the admissibility of the contents of a telephone intercept. Furthermore since it is irrelevant to the question of admissibility of the evidence whether an offence has been committed in the obtaining of it, no proper question can in any event be asked in cross-examination to seek to establish that an offence has been committed. This was the approach of the Court of Appeal in *R v Effik* (1992) 95 Cr App R 427. The facts of that case are that the appellants were indicted on counts of conspiring to supply controlled drugs. Part of the evidence consisted of recordings of telephone conversations between them and S which were intercepted and tape recorded by police. The telephone apparatus in S's house consisted of the ordinary fixed handset and a cordless telephone. When the cordless telephone was used, a radio receiver operated by police officers in an adjoining flat picked up the radio signals being transmitted between the base unit and the handset and enabled recordings to be made of the conversations. At trial the appellants applied to the judge to exclude the evidence of the telephone conversations on the grounds that they had been intercepted in the course of transmission by means of public telecommunications systems and were accordingly rendered inadmissible by ss 1 and 9 of the 1985 Act. The judge ruled that the cordless telephone was a privately run system and, although connected to the British Telecommunications system, designated as a public telecommunications system for the purpose of the 1985 Act, was no part of it and consequently the Act did not apply. The appellants were convicted and their appeals against conviction upheld in the Court of Appeal.

It is important to appreciate that in the Court of Appeal the court proceeded on the basis that the interception was of part of the public telecommunications

system and was therefore within the 1985 Act. Steyn LJ, giving the judgment of the court, said ((1992) 95 Cr App R 427 at 431–432): *a*

'The first submission is that section 9 of the 1985 Act renders inadmissible (subject to the exceptions contained in s. 9(3)) any evidence obtained as a result of an interception of a communication by means of a public telecommunication system. That would be a far-reaching provision. For *b* the purpose, *inter alia*, of preventing or detecting serious crime, Parliament has rendered such interceptions lawful, subject to the statutory safeguards being observed. But it would follow that if an interception reveals, for example, compelling evidence of treason, and there is no other evidence of it, that evidence of the interception may never be led. Moreover, it would follow that if the interception reveals evidence which assists a particular *c* defendant, such as an attempt to fabricate evidence against him, that the evidence may never be led. And that would be so whether the statutory safeguards had been observed or not. Such astonishing results do not give the court a licence to depart from the statutory language but it does permit an initial scepticism about the plausibility of the submission as to the true *d* meaning of the language. The starting point is the principle that all logically probative evidence is admissible. Any legislative inroad on this principle requires clear expression. Language to the effect that any evidence obtained as a result of an interception will be inadmissible could achieve such a purpose. But that is not what section 9 provides. It merely provides that no questions may be asked which tend to suggest than an offence under *e* section 1 has been committed by specified persons or that a warrant has been or is to be issued to any of these persons. The forbidden territory is therefore in the first place questions tending to suggest than an offence has been committed. That prima facie prohibits a line of questioning designed to establish that none of the four defences under subsections (2) and (3) of *f* section 1, such as a warrant, consent of the sender of the communication, and so forth, are applicable. Section 9(1) then prohibits questions tending to suggest that a warrant has been or is to be issued. The express terms of section 9 do not provide that no evidence obtained as a result of an interception may be admitted. The forbidden territory is drawn in a much narrower fashion. And there is a logical reason for the narrow exclusionary *g* provision. That is the reflection that it cannot be in the public interest to allow those involved in espionage or serious crime to discover at a public trial the basis on which their activities had come to the notice of the police, the customs and excise or the security services, such as, for example, by questions designed to find out who provided the information which led to *h* the issue of the warrant. So interpreted section 9(1) makes sense. And it would make no sense to stretch that language to become a comprehensive exclusion of all evidence obtained as a result of any interception. It may well be that evidence of interceptions will rarely be tendered. But we are confident that there is no statutory bar to a court ever admitting such evidence. In our judgment, the appellants' first submission must be *j* rejected.'

The court then went on to consider a submission that the evidence of the conversations should have been excluded pursuant to s 78 of the Police and Criminal Evidence Act 1984. This submission was rejected notwithstanding the

assumed basis of the appeal, namely that the police had been committing an offence under s 1 for five days. The case went on appeal to the House of Lords. The actual decision was upheld, but on different grounds, namely that the trial judge had been correct in holding that the interception was not part of the public telecommunications system: *R v Effik* [1994] 3 All ER 458, [1995] 1 AC 309.

If the Court of Appeal decision in *R v Effik* on the assumed facts was still good law then it would clearly be determinative of this ground of appeal in favour of the Crown. But in November 1993 the House of Lords decided *R v Preston* [1993] 4 All ER 638, [1994] 2 AC 130. In that case a telephone interception warrant had been issued pursuant to s 2(2)(b) of the 1985 Act. The defence sought disclosure of the product of the telephone taps on the basis that it might reveal support for the defence of duress. The judge's decision to refuse disclosure was upheld. In the courts below argument had been concentrated on the effect of s 9 of the 1985 Act. But in the House of Lords it was held that it was the combined effect of s 2(2)(b) and s 6 which had the result of prohibiting the product of telephone intercepts carried out under warrant from being admissible in evidence with the corresponding corollary that disclosure to the defence is also prohibited.

The leading speech was given by Lord Mustill, with whose opinion Lord Keith of Kinkel and Lord Browne-Wilkinson agreed. Lord Mustill ([1993] 4 All ER 638 at 664, [1994] 2 AC 130 at 163) referred to s 9 of the 1985 Act and in the subsequent passage indicated why this section had seemed of prime importance at trial, but why in fact the solution is not to be found in s 9. After referring to the Attorney General's advice that s 9 precluded the disclosure of information to the defence he said ([1993] 4 All ER 638 at 665, [1994] 2 AC 130 at 164):

> 'I find no such compulsion in the Attorney General's advice, for even if it gave a sound reason for refusing disclosure to the defence (which for the reason stated I believe it does not) the logic cannot be transferred to the supply of material, admissible or otherwise, to prosecuting counsel. If this, too is to be withheld, a justification must be found elsewhere. I believe that the right place to search for it is in s 2, and that although the way in which the matter arose at the trial made it natural to concentrate on the questions which counsel for the defence might properly ask in cross-examination, the preoccupation with s 9 has tended to obscure the real point in the case.'

Lord Mustill then went on to analyse s 2(2)(b), which provides:

> 'The Secretary of State shall not issue a warrant under this section unless he considers that the warrant is necessary ... (b) for the purpose of preventing or detecting serious crime ...'

He held that this should be narrowly construed as relating only to the first and second stages of fighting crime, namely first forestalling and secondly seeking out crimes, not so forestalled, which have already been committed, but did not extend to prosecution of crime. This conclusion accorded with the practicalities of s 6 of the Act, which requires the narrowest possible currency to the physical products of interception and the destruction of such product as soon as its retention is no longer necessary for the purpose of s 2(2) (see [1993] 4 All ER 638 at 665–667, [1994] 2 AC 130 at 164–166).

Lord Mustill continued ([1993] 4 All ER 638 at 667, 669, [1994] 2 AC 130 at 167, 169):

> 'The narrower reading also makes sense of the otherwise impenetrable s 9. If the purpose of Parliament was to allow the intercept materials to

become part of the prosecution process it is hard to see any point in a provision which would make it wholly or at least partially (according to how the section is read) impossible to use them in that process; and if that had been the intention it is equally hard to understand why Parliament did not say so in plain language. By contrast, on the narrower reading of s 2 there would be no need to make explicit provision for the admissibility of materials which by virtue of s 6 would no longer exist, and the purpose of s 9 can be seen as the protection, not of the fruits of the intercepts, but of information as to the manner in which they were authorised and carried out. Inquiries as to these matters were to be confined to the tribunal under s 7, and the defendant was not to have the opportunity to muddy the waters, at a trial by cross-examination designed to elicit the Secretary of State's sources of knowledge or the surveillance authorities' confidential methods of work. Evidently the proscription of questioning on the existence of warrants was seen as an economical means of achieving this result. The narrower reading of s 2 is strongly supported by the history of the Act. I need not repeat this. The criticisms in *Malone v UK* (1984) 7 EHRR 14 which prompted the government to change its mind and legislate were directed not to the long-established practice but to its inaccessibility, imprecision and lack of formal safeguards. The Act was plainly designed to put these matters right, and I can see no reason to suppose that the government had suddenly and spontaneously decided to go much further and overturn the practice which had persisted for decades of separating the process of surveillance from the prosecution of offenders ... My Lords, I am conscious that in giving my reasons for this opinion I have omitted any detailed analysis of the judgments of the Court of Appeal in *R v Effik* and in the present case. In doing so I intend no discourtesy whatever to the Court of Appeal whose judgements I have studied with care and profit. The fact is, however, that the arguments addressed in *R v Effik* were fundamentally different from those which your Lordships have heard, and the concentration on s 2 rather than s 9 has given a new perspective to the arguments in the present case. I therefore believe it permissible not to prolong an already long judgment by discussion of these cases, and simply to say that I agree with the decision of the Court of Appeal in the present case albeit not altogether with the reasons for it, and that in my opinion the decision in *R v Effik* should be overruled.'

It seems to me to be reasonably clear that the reason why the Court of Appeal judgment in *R v Effik* was overruled is as a result of the combined effect of s 2(2)(b) and s 6 of the Act, and Mr Spencer accepted this. These sections have no application to a consensual interception. Indeed apart from ss 1 and 9(1)(a) all the other main provisions of the Act are solely concerned with the issue of warrants and their scope (ss 2 and 3), the system of issue and their duration and modification (ss 4 and 5), what is to happen to the product of warranted telephone intercepts (s 6); s 7 sets up the tribunal whose concern is ss 2 to 5; s 8 deals with the commissioner whose concern is with ss 2 to 6. In my opinion this is also the effect of Lord Templeman's speech.

Mr Spencer relied on a passage in the speech of Lord Jauncey of Tullichettle. After setting out s 9(1) of the 1985 Act he said ([1993] 4 All ER 638 at 646, [1994] 2 AC 130 at 143–144):

'It was argued by the defendants that this subsection merely prevented the asking of questions as to whether or not an interception had taken place but did not prevent the material derived from such intercept being introduced in evidence in some other way, such as by admission. However, the clear purpose of the subsection is to prevent evidence being elicited which suggests that an intercept has been made and this would be a pointless exercise if, nevertheless, the content of that intercept was to be disclosed. Indeed it is very difficult to see how such content could be used in evidence without disclosure of the circumstances in which it became available. My Lords, I have no doubt that Parliament intended that the existing practice of not using intercepted material as evidence should continue. Thus s 6 provides that there should be the minimum disclosure and retention of intercepted material and s 9 prevents the asking of questions suggesting that a warrant to intercept material has been or is to be issued.'

But it seems to me that this too has to be read in the context of the case, particularly the provisions of ss 2(2)(b) and 6.

Accordingly it seems to me that the general statement of the law on the construction of s 9(1) to be found in the Court of Appeal judgment in *R v Effik* (1992) 95 Cr App R 427, namely that it does not prevent the admission of the product of a telephone intercept to which the 1985 Act applies, is to be modified only to the extent that it relates to a warranted intercept. Accordingly s 9(1)(a) is not sufficient by itself to prevent admissibility of the substance of a consensual interception. Furthermore since on the question of admissibility, the fact that the evidence may have been obtained unlawfully is irrelevant, cross-examination to show that the intercept was not consensual cannot be entertained, quite apart from the prohibition in s 9(1)(a).

In granting leave to appeal the single judge thought arguable the question whether the prohibition effected by s 9(1)(a) on any inquiry as to the genuineness or existence of consent makes the admission of the evidence unfair under s 78 of the Police and Criminal Evidence Act 1984. Mr Spencer did not argue this point either before the judge or this court. He confined his argument to the admissibility of the evidence, rather than on the exclusion of admissible evidence. We do not therefore need to consider this point, but we can see nothing unfair in the admission of the evidence; and this accords with the views of the Court of Appeal in *R v Effik* the facts of which, on the assumption made by the court, involved a serious breach of the 1985 Act.

We turn to the second ground of appeal argued by Mr Spencer in Choudhary's case. This relates to the judge's direction concerning a large sum of money found by the police in the house of one Talbot in Liverpool on 19 January 1995. £4,800 was found in Bank of England notes concealed in underpants and £69,790 in a shoe box in the kitchen. Choudhary admitted that he had taken about £60,000 to the house at about 1 pm on 19 January. While the police were conducting the search, Choudhary's car come up to the house but then drove off. The police obtained a report following a 'Condor' test on the notes. A copy of this report was found in premises occupied by Kurd and Saleen Bhatti (another alleged conspirator) at the time of Kurd's arrest on 28 March.

Choudhary's explanation of the £60,000–70,000 was that it was a joint venture with Talbot in the import of gum arabic. The £60,000 was saved from takings from his shop. He had sent the report to Kurd because he owed Kurd money and it was to show Kurd that he had the money, although it was temporarily in the

custody of the police. He also wanted Kurd's advice as to a London solicitor who might advise on the recovery of the money. In relation to the money the judge gave the jury this direction:

> 'The question is whether you can consider the existence of the money and the claim by Mr Choudhary for it as being relevant to the issue as to whether Mr Choudhary was part of the conspiracy to supply drugs. It is for you to decide whether the money was indicative of an ongoing trading in drugs and you should regard the existence of this money as relevant only if you reject any innocent explanation put forward by Mr Choudhary; that means that you are sure the money was not saved from his takings and not handed over by him in connection with the purchase of gum arabic from Nigeria. If there is any possibility of the money being in Mr Choudhary's possession for reasons other than drug dealing, then this evidence won't prove anything. But if you conclude the money was indicative not only of past dealing but an ongoing dealing in drugs then you can take into account the existence of this money together with the drugs in considering whether the necessary intention has been proved.'

In giving this direction the judge plainly followed what this court said in *R v Grant* [1995] Crim LR 715 should be done when substantial sums of cash are found in the accused's possession on a charge of possession of drugs with intent to supply. Mr Spencer submitted it was not appropriate in the case of conspiring to supply. We have not found Mr Spencer's argument easy to follow. In our judgment since intention to supply is a necessary ingredient in the substantive offence, it must follow that it is relevant where the charge is conspiracy to supply. There is no substance in this ground of appeal.

In the result the appeal in the case of Rasool is allowed. Choudhary's appeal is dismissed.

Appeal in R v Rasool allowed; appeal in R v Choudhary dismissed.

N P Metcalfe Esq Barrister.

Tracey and others v Crosville Wales Ltd

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD MACKAY OF CLASHFERN, LORD LLOYD OF BERWICK, LORD NOLAN AND LORD CLYDE

17 MARCH, 16 OCTOBER 1997

Unfair dismissal – Compensation – Calculation of award – Reduction where employee's conduct or action contributed to dismissal – Dismissal in connection with strike or other industrial action – Re-engagement of some employees – Compensation for failure to re-engage dismissed employees – Whether participation in strike or other industrial action amounting to 'conduct' or 'action' capable of reducing compensation award – Employment Protection (Consolidation) Act 1978, ss 57, 62, 73(7B), 74(6).

C Ltd dismissed 119 bus drivers, who took part in a walk-out in support of union branch officers suspended during a ban on overtime and rest day working in support of a wage claim. Twenty-two of those dismissed were later re-employed following a recruitment exercise for replacement drivers. Seventy-three of the dismissed drivers made complaints to an industrial tribunal of unfair dismissal under ss 57[a] and 62[b] of the Employment Protection (Consolidation) Act 1978. The industrial tribunal upheld the complaints on the ground that the reason why the complainants were not re-engaged did not satisfy the criteria laid down in s 57. It further held that there was no ground for reducing the compensation payable to the complainants under ss 73(7B)[c] and 74(6)[d] of the 1978 Act, which provided for such a reduction where just and equitable where a complainant's 'conduct' or 'action' had contributed to his dismissal. The Employment Appeal Tribunal allowed C Ltd's appeal on the reduction point, but on the complainants' appeal the Court of Appeal affirmed the decision of the industrial tribunal. C Ltd appealed to the House of Lords.

Held – Mere participation in a strike or other industrial action could not in itself amount to 'conduct' or 'action' within ss 73(7B) and 74(6) of the 1978 Act for the purpose of reducing any compensation payable to a complainant on the basis of contributory fault, since it was impossible to allocate blame for the industrial action to any individual complainant. However, individual blameworthy conduct additional to or separate from the mere act of participation could amount to such contributory fault, even if that conduct occurred during the industrial action. In the instant case, there was no evidence that the complainants had been responsible for any such individual conduct of their own additional to their participation in the industrial action contributing to their dismissal. It followed that the industrial tribunal had been correct in not reducing the compensation awarded; and accordingly the appeal would be dismissed (see p 450 *j*, p 451 *a*, p 461 *j* to p 462 *b* and p 464 *j* to p 465 *a f g j*, post).

Courtaulds Northern Spinning Ltd v Moosa [1984] ICR 218 approved.

TNT Express (UK) Ltd v Downes [1994] ICR 1 overruled in part.

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a Section 57, so far as material, is set out at p 454 *f* to *j*, post

b Section 62, so far as material, is set out at p 453 *b* to *g*, post

c Section 73(7B) is set out at p 456 *a b*, post

d Section 74, so far as material, is set out at p 456 *b* to *c*, post

Notes

For unfair dismissal in connection with industrial action, and contributory fault, see 16 *Halsbury's Laws* (4th edn reissue) paras 351–353, 374.

As from 16 October 1992, s 62 of the Employment Protection (Consolidation) Act 1978 was replaced by s 238 of the Trade Union and Labour Relations Act 1992.

As from 22 August 1996, ss 57, 73 (7B) and 74(6) of the Employment Protection (Consolidation) Act 1978, were replaced by ss 98, 122 and 123(6) of the Employment Rights Act 1996.

For the Trade Union and Labour Relations Act 1992, s 238, see 16 *Halsbury's Statutes* (4th edn) (1997 reissue) 416.

For the Employment Rights Act 1996, ss 98, 122, 123, see ibid 654, 683, 684.

Cases referred to in opinions

Allders International v Parkins [1981] IRLR 68, EAT.
Courtaulds Northern Spinning Ltd v Moosa [1984] ICR 218, EAT.
Gallagher v Wragg [1977] ICR 174, EAT.
Nelson v BBC (No 2) [1980] ICR 110, CA.
Parker Foundry Ltd v Slack [1992] ICR 302, CA.
Power Packing Casemakers Ltd v Faust [1983] 2 All ER 166, [1983] QB 471, [1983] 2 WLR 439, CA.
Stock v Frank Jones (Tipton) Ltd [1978] 1 All ER 948, [1978] 1 WLR 231, HL.
TNT Express (UK) Ltd v Downes [1994] ICR 1, EAT.
Williams v National Theatre Board Ltd [1982] ICR 715, CA.

Appeal

Crosville Wales Ltd appealed with leave of the Appeal Committee of the House of Lords given on 13 March 1996 from the decision of the Court of Appeal (Beldam, Waite and Otton LJJ) ([1996] ICR 237) on 31 July 1995 allowing the appeal of Miss Tracey and others from the decision of the Employment Appeal Tribunal on 14 March 1994 whereby it allowed the company's appeal from the decision of the industrial tribunal sitting at Shrewsbury entered in the register on 15 June 1993 in respect of applications for compensation for unfair dismissal made by Miss Tracey and the others pursuant to the provisions of the Employment Protection (Consolidation) Act 1978. The facts are set out in the opinion of Lord Nolan.

Jeremy McMullen QC and *Paul T Rose* (instructed by *Dickinson Dees*, Newcastle upon Tyne) for the employers.

Michael Burton QC and *John Bowers* (instructed by *Lewis Silkin*, agents for *Jack Thornley & Partners*, Ashton under Lyne) for the employees.

Their Lordships took time for consideration.

16 October 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Nolan. For the reasons he has given, I, too, would dismiss this appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Nolan. For the reasons he has given, I, too, would dismiss this appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Nolan. For the reasons he has given, I, too, would dismiss this appeal.

LORD NOLAN. My Lords, this appeal raises the difficult question of the relationship between the provisions of the Employment Protection (Consolidation) Act 1978 concerning the refusal of an employer to re-engage striking employees who have been dismissed, on the one hand, and the provisions under which the compensation payable to unfairly dismissed employees may be reduced by reason of their contributory fault on the other hand. The question is one to which different answers have been given by the Employment Appeal Tribunal in earlier cases. There can, however, be no dispute about the correctness of the view expressed by Mummery J, giving the judgment of the Employment Appeal Tribunal in the present case, when he said: 'The points canvassed in this appeal impinge on a socially sensitive, politically controversial and legally uncertain area of industrial relations.'

Nor, since the decision of the industrial tribunal, has there been any dispute about the matters of fact which are relevant for the purposes of the appeal. They are admirably summarised in the judgment of Mummery J, and I shall follow the example of the Court of Appeal ([1996] ICR 237) in repeating this part of his judgment almost verbatim.

Crosville Wales Ltd, the appellant, employed in its business 119 bus drivers, all members of the Transport and General Workers' Union. In June 1990 a wage review was due. In September 1990 an increase was agreed for the engineering staff, but not for the drivers. On 3 October 1990 the union decided to hold a secret ballot. The ballot held on 8 October 1990 resulted in a majority decision in favour of industrial action short of a strike or strike action.

A union meeting was held on Monday, 23 October. It was decided to operate a ban on overtime working and working on rest days from midnight on Saturday, 27 October. This would have the effect of destroying the Sunday bus routes which were totally reliant on voluntary work from overtime and rest days.

The divisional manager, Mr Ellis-Jones, wrote a letter to all employees on 23 October expressing regret at the decision to implement an overtime ban from Saturday in support of the pay claims. He pointed out that the union representatives were aware of the company's grave financial position and that the company had made the best offer possible. He also stated that the proposed action was in breach of the agreed procedure and was taken before proper negotiations had been concluded. He added that he was particularly concerned about contract work, especially Sundays which, if disrupted, would be reallocated by the county council to the company's competitors. That would result in a loss of jobs at Wrexham, a weaker financial position at the depot and less money for wages. It was conceded by Mr O'Leary, the union's full-time district officer, that the union had not followed the agreed procedure for the avoidance of disputes contained in App E to the Drivers' Instruction Book. In the event of failure to come to an agreement at depot level, the agreed procedure provided for a meeting between the local representatives, the depot official and local union officer and, if there was failure at that level, provision was made for a meeting between a board member, the full-time trade union official and the elected depot representative.

On 25 October there was a joint meeting at Flint of staff and management attended by Mr O'Leary and other representatives of the employees with representatives of the employers. No agreement was reached. On 27 October

the ban on overtime and rest day working began, as threatened. The depot superintendent at Wrexham, Mr Poole, posted a notice in the garage announcing that an 'open forum' had been arranged in the depot canteen for Tuesday, 30 October.

The purpose of the forum was to make sure that everyone was aware of the seriousness of the situation and the possible consequences of continuing the industrial action. During the course of 30 October various events occurred before the meeting. Mr Wooley, the union's branch secretary, and others went to see Mr Poole and asked him if he would take down the compulsory Sunday rota which he had issued following the meeting held on 25 October. Mr Poole refused. Later in the day Mr Wooley was informed that he, along with others who had attended the earlier meeting with Mr Poole, were suspended without pay. When the meeting took place in the canteen about 80% of the drivers were present and there was a mass walk-out. On the following day there was a meeting, which lasted only three or four minutes, at which the union representatives asked for a written apology and a withdrawal of the suspensions.

On 1 November Mr Poole wrote to all employees advising them of the position relating to their decision not to work in accordance with their contracts of employment, and pointing out that each individual employee was in breach of contract and liable to dismissal. He contended that the ballot had not been correctly organised and was invalid and that, in view of the dire financial position of the depot, the company had no option but to require them to return to work by 3 November for normal duty or they would be deemed to have terminated their employment with the company.

The men did not return to work. On 5 November the drivers were dismissed by letter from Mr Poole. On 13 and 15 November there were further meetings at which the union representatives were told that the effects of the dispute meant that there was no question of taking all the drivers back. The best estimate was that 50/60 would now be required. The company rejected the union's proposal that all the drivers should be taken back and that a redundancy exercise should be carried out. The company then carried out a recruitment exercise for replacement staff by notices at the Wrexham depot, press and local radio announcements and advice to local job centres. All the applications were considered whether or not those applying had been involved in the strike action and had been dismissed. Every new employee was offered new terms and conditions of employment in line with the company's final pay offer to those employees who had been dismissed because of industrial action. All the strikers knew that the company was recruiting. They all had an opportunity of obtaining an application form, being interviewed and being considered for re-employment but offers of re-engagement were not made to all of the employees who took part in the industrial action. The final figures were that 25 of those who had been dismissed applied. Those were all offered jobs, but only 22 of them took up the offers.

The strike effectively ended on 23 February 1991 when the Wrexham depot was closed. The drivers at Wrexham were relocated along with the routes at other depots. The company continued to make losses and the Wrexham depot was eventually sold in July 1991.

In the meantime, complaints of unfair dismissal had been made by 73 of the drivers. A preliminary hearing was held on 28 and 29 August 1991 by an industrial tribunal under the chairmanship of Mr Leo Blair in order to determine whether the tribunal had jurisdiction to hear the complaints.

This procedure was necessary because of the terms of s 62 of the Employment Protection (Consolidation) Act 1978 as amended by the Employment Act 1982. These prohibitions have now been re-enacted in s 238 of the Trade Union and Labour Relations (Consolidation) Act 1992, but I shall refer to the 1978 Act as amended because this was the statute in force at the time when the events which have given rise to the present case took place. Section 62 provides:

> '(1) The provisions of this section shall have effect in relation to an employee (the "complainant") who claims that he has been unfairly dismissed by his employer where at the date of dismissal—(a) the employer was conducting or instituting a lock out, or (b) the complainant was taking part in a strike or other industrial action.
>
> (2) In such a case an industrial tribunal shall not determine whether the dismissal was fair or unfair unless it is shown—(a) that one or more relevant employees of the same employer have not been dismissed, or (b) that any such employee has, before the expiry of the period of three months beginning with that employee's date of dismissal, been offered re-engagement and that the complainant has not been offered re-engagement.
>
> (3) Where it is shown that the condition referred to in paragraph (b) of subsection (2) is fulfilled, the prohibitions of sections 57 to 60 shall have effect as if in those sections for any reference to the reason or principal reason for which the complainant was dismissed there were substituted a reference to the reason or principal reason of which he has not been offered re-engagement.
>
> (4) In this section ... (b) "relevant employees" means ... (ii) in relation to a strike or other industrial action, those employees at the establishment who were taking part in the action at the complainant's date of dismissal; "establishment" in sub-paragraph (ii), meaning that establishment of the employer at or from which the complainant works; and (c) any reference to an offer of re-engagement is a reference to an offer (made either by the original employer or by a successor of that employer or an associated employer) to re-engage an employee, either in the job which he held immediately before the date of dismissal or in a different job which would be reasonably suitable in his case.'

The preliminary hearing of the industrial tribunal on 28 and 29 August 1991 was concerned, as I have said, with the question whether the tribunal had jurisdiction under s 62(2). The tribunal held that it did have jurisdiction, firstly because they found it difficult to accept that announcements on the radio, and advertisements in newspapers and job centres, which were open to all and not solely to the ex-employees of the respondent company, were offers of re-engagement which complied with sub-s (4)(c) of s 62. Secondly, and in any event, the tribunal took the view that s 62(4)(c) was not satisfied because the conditions attached to the re-engagement would be inconsistent with it either being the same job as before, or being a reasonably suitable alternative.

Crosville Wales appealed against this decision to the Employment Appeal Tribunal, under the chairmanship of Knox J. On 6 October 1992 the Employment Appeal Tribunal upheld the decision of the industrial tribunal on the first ground, that is on the ground that offers of re-engagement had not been made to the employees. The Employment Appeal Tribunal said:

'What was in our view, on the facts found by the Industrial Tribunal, made available to the employees was the opportunity of having an offer made to them ... In a formal legal analysis what in our view happened when the press, radio and other general notices were issued, was that there was an offer to treat for re-engagement rather than an offer of re-engagement ...' *a*

The matter then returned to the industrial tribunal, this time under the chairmanship of Mr D P Thompson, for a full four-day hearing which began on 19 April 1993. The purpose of this hearing was to give effect to the terms of s 62(3), that is to say to apply the provisions of ss 57 to 60 relating to unfair dismissals as if the references to the reason or principal reason for the dismissal were replaced by references to the reason or principal reason for which the employee had not been offered re-engagement. Before reciting these provisions as thus notionally amended I would refer to s 63. That section provides: *b c*

'In determining, for the purposes of this Part any question as to the reason, or principal reason, for which an employee was dismissed or any question whether the reason or principal reason for which an employee was dismissed was a reason fulfilling the requirements of section 57(1)(b) or whether the employer acted reasonably in treating it as a sufficient reason for dismissing him,—(a) no account shall be taken of any pressure which, by calling, organising, procuring or financing a strike or other industrial action, or threatening to do so, was exercised on the employer to dismiss the employee, and (b) any such question shall be determined as if no such pressure had been exercised.' *d e*

Section 57 (as notionally reworded by s 62(3) in a case of discriminatory non-engagement and as amended by s 6 of the Employment Act 1980) reads:

'(1) In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—(a) what was the reason (or, if there was more than one, the principal reason) for [which the complainant was not offered re-engagement], and (b) that it was a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the [non-offer of re-engagement to the employee concerned]. *f g*

(2) In subsection (1)(b) the reference to a reason falling within this subsection is a reference to a reason which—(a) related to the capability or qualifications of the employee for performing work of the kind of which he was employed by the employer to do, or (b) related to the conduct of the employee, or (c) was that the employee was redundant ... *h*

(3) Where the employee has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer [for not offering re-engagement to the complainant], shall depend on whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for [not offering the complainant re-engagement]; and that question shall be determined in accordance with equity and the substantial merits of the case ...' *j*

Having heard the evidence and considered the matter in the light of these criteria the industrial tribunal gave judgment on 7 June 1993 upholding the employees' complaints in principle and concluding that the failure of Crosville Wales to re-engage them was unfair.

In para 77 of their judgment the industrial tribunal said:

> 'The first question that we must ask is: "What was the reason (or if there was more than one, the principal reason) for which the complainants were not offered re-engagement?" Frankly, that question has been very easy for the tribunal to answer. The reasons were given very clearly and openly by Mr. Rimmington and Mr. Poole when they gave their evidence. They said that the reason for their failure to offer re-engagement was that they thought that advertising through the media and the job centre was sufficient to constitute an offer for compliance with the legislation, and Mr. Poole was told by Mr. Rimmington not to have any contact with the men direct for fear of falling foul of the selective re-engagement provisions. Those were the sole and only reasons for the respondents' failure to offer re-engagement to the complainants.'

The industrial tribunal went on to find that these reasons did not comply with s 57(1)(b): they did not fall under any of the specific heads set out in s 57(2), nor did they constitute 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.' It was therefore unnecessary for the appeal tribunal to consider the meaning of the word 'conduct' in s 57(2)(b) and it was also unnecessary for the tribunal to look at the merits of the industrial dispute under the provisions of s 57(3). For unless the employer had complied with the requirements of s 57(1)(b) which Crosville Wales had not, the provisions of s 57(3) relating to the equity and the substantial merits of the case do not come into play.

There was no appeal against that part of the decision of the industrial tribunal. The concluding remarks of the tribunal on the subject of the conduct of the employee to which s 57(2)(b) refers and on the merits of the industrial dispute in relation to s 57(3) are, however, relevant to the issues which have been the subject of appeals to the Employment Appeal Tribunal, the Court of Appeal, and now your Lordships' House.

These issues arise from the contention of Crosville Wales that the compensation to which the employees became entitled in consequence of the decision of the industrial tribunal fell to be reduced on the ground that the conduct of the employees had contributed to their dismissal. By virtue of s 72 of the 1978 Act this compensation consisted of a basic award to be calculated in accordance with s 73, and a compensatory award to be calculated in accordance with s 74. Under s 73(3) the basic award is related as a general rule to length of service, though the section also contains a large number of specific provisions governing particular cases such as redundancy. Subject again to specific provision for particular cases, the compensatory award under s 74(1) is—

> 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

Both sections provide for the compensation to be reduced in the event of a finding of contributory fault on the part of the employee. Section 73(7B), as

inserted by s 9 of the Employment Act 1980 and amended by s 4(2) of the 1982 Act, provides:

> 'Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

Section 74(6) provides:

> 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding.'

Section 74, but not s 73, is qualified by the provisions of s 74(5) which echo those of s 63, and which reads:

> 'In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer no account shall be taken of any pressure which, by calling, organising, procuring or financing a strike or other industrial action, or threatening to do so, was exercised on the employer to dismiss the employee, and that question shall be determined as if no such pressure had been exercised.'

My Lords, I have set out the main relevant statutory provisions in this laborious and painstaking manner because of their bearing upon the principal question raised by this appeal, which may be stated in the following terms:

> 'When an industrial tribunal has jurisdiction to hear unfair dismissal claims by employees who have been dismissed for taking part in a strike or other industrial action, because some but not all have been offered re-engagement, can participation in the strike or other action in itself amount to "conduct" or "action" within s 73(7B) and s 74(6) of the Act of 1978 respectively for the purpose of reducing any compensation which the industrial tribunal might award for unfair dismissal?'

At the full hearing before the industrial tribunal in April 1993 Mr McMullen had argued that the answer to the question was plainly Yes. Participation in the industrial action plainly constituted both conduct and action on the part of the participators. At the same hearing he took his initial stand at an earlier point in the argument, contending on substantially the same grounds that the participation of the complainants in the industrial dispute was 'conduct' within the meaning of s 57(2)(b) and in addition was relevant to the determination under s 57(3) of the question whether the employer had acted reasonably or unreasonably. As I have mentioned, however, this contention did not fall to be considered on its merits because of the industrial tribunal's decision that the reason for the complainants' dismissal was not a reason relating to their conduct, was not otherwise within s 57(1)(b) and therefore obviated the need for any inquiry under s 57(3) into the reasonableness of the employer's behaviour. Irrespective of the provisions of s 57(3), the dismissal of the complainants fell to be regarded as unfair because the employer's re-engagement of some but not all of them failed to satisfy the criteria laid down in ss 57 and 62(3). The entitlement of the complainants to compensation was thus established, and there remained

the question of contribution. As the industrial tribunal observed in para 82 of their decision 'this is where the matter becomes somewhat complicated'.

The first complication is that although the complainants' claims for compensation only came into existence because of the selective re-engagement carried out by Crosville Wales, this factor must be ignored in determining whether the compensation should be reduced under s 73(7B) or s 74(6). This was decided by the Employment Appeal Tribunal under the chairmanship of Browne-Wilkinson J in *Courtaulds Northern Spinning Ltd v Moosa* [1984] ICR 218. That decision was followed by the Employment Appeal Tribunal under the chairmanship of Wood J in *TNT Express (UK) Ltd v Downes* [1994] ICR 1, and its correctness has not been challenged before your Lordships. The reason for the decision appears from the following passage in the judgment of Browne-Wilkinson J in the *Courtaulds* case [1984] ICR 218 at 223–224. After setting out the terms of s 74(6), and saying that exactly the same considerations applied to s 73(7B), he continued:

> 'Mr. Sedley, for the applicant, submits that, on the true construction of the Act, where section 62(3) requires the industrial tribunal to have regard not to the reason for dismissal but to the reason for failure to re-engage, the contributory fault to be considered under section 74(6) must be conduct contributing to the failure to re-engage not conduct contributing to the original dismissal. Although we can appreciate that there would be much sense if Parliament had so provided, we cannot construe the words of the Act so as to reach that result. Section 62(3) only makes limited consequential amendments where there has been selective re-engagement. It makes no express amendment to the provisions of section 73 or section 74. Nor does it even amend the meaning of the word "dismissal" itself for the purposes of sections 57 to 60: the only amendment relates to the *reasons* for dismissal. In our judgment, when there is a case of selective re-engagement, the employee's complaint remains a complaint that he was unfairly dismissed: his complaint is not that he was unfairly refused re-engagement. The statutory right confirmed by section 54 is to complain of a dismissal as defined in section 55: these sections are not amended by section 62(3). The industrial tribunal's jurisdiction to entertain any claim is conferred by section 67(1) which refers only to a complaint of unfair dismissal. The statutory power to award compensation is contained in section 68(2) and depends upon a finding that a complaint under section 67 is justified, i.e. that the complainant has been unfairly *dismissed*. It therefore seems to us that, whether intentionally or not, in cases of selective re-engagement Parliament has continued to make the basis of the complaint the dismissal and not the failure to re-engage. Accordingly as a matter of construction we can see no reason to give section 74(6) anything but its ordinary meaning, i.e. that even in a case of selective re-engagement the relevant question is whether the employee has contributed to his dismissal: it is neither necessary nor proper to consider whether he has contributed to his failure to be re-engaged.' (Browne-Wilkinson J's emphasis.)

My Lords, I find this reasoning compelling, and would adopt it even if it had not been accepted by both parties and by the Court of Appeal in the present case. At the same time, I have much sympathy with the industrial tribunal, who said, in para 85 of their judgment:

> '... we are in the somewhat ridiculous situation that we have to decide the primary cases on the basis of the respondent's failure to offer re-engagement, but we must decide the other issues, such as contributory fault, in relation to the act of dismissal and not to the failure to re-engage ...'

As it happens, the absurdity of the situation gave rise to no practical difficulties in the present case, because the employer's reasons for the selective re-engagement bore no relation to the conduct of the employees. But it is not difficult to imagine cases in which the two would be closely linked. In the search which your Lordships must make to discover the purpose which Parliament intend to serve by the enactment of s 73(7B) and s 74(6) it is discouraging to have to start from such an unsatisfactory premise.

The second complication is that the question before your Lordships has been answered in opposite senses by two separate divisions of the Employment Appeal Tribunal, each under the chairmanship of a very experienced President, in the *Courtaulds* and *TNT* cases respectively. The relevant passages in the judgments in both cases are fully set out in the judgment of the Court of Appeal, and it is unnecessary for me to repeat them both in full. I must, however, refer to the passages revealing the point at which they part company, namely the significance of s 62 of the Act. In the *Courtaulds* case Browne-Wilkinson J said (at 224–225):

> 'It has always been accepted that the general intention of Parliament lying behind section 62 of the Act is to prevent industrial tribunals from going into the merits or demerits of collective industrial disputes. Both counsel accept this to be the position. The detailed way in which Parliament sought to achieve this result is not entirely clear to us: however the general principle is well established. Strikes and other industrial action normally (although not invariably) involve the employees who are taking part in it in breaches of their contracts of employment. For example, the ordinary strike involves a breach of contract. So, in the present case, the industrial action taken by the applicant and his fellow employees involved a breach of their contracts although the dispute between the employees and the employers was not about the term which they breached. If an industrial tribunal is entitled under section 74(6) to reduce the compensation because of industrial action which constitutes a breach of contract, it will have to enter precisely the arena from which Parliament, in general, decide to exclude it. In *Nelson v. British Broadcasting Corporation (No. 2)* ([1980] ICR 110), the Court of Appeal laid down that in order to justify a reduction in compensation under section 74(6) three things have to be established: first, blameworthy conduct by the employee; secondly, that such conduct contributed to or caused the dismissal; thirdly, that it is just and equitable to reduce the compensation by a given amount. It is possible to suppose that Parliament might have regarded industrial action involving a breach of contract as blameworthy conduct, although we venture to think this very improbable. But we find it impossible to accept that Parliament, in conferring the right to reduce compensation, can ever have intended an industrial tribunal to form a view as to the merits or demerits of any particular industrial action. Without forming such a view it would be impossible for an industrial tribunal to determine the proportion, if any, by which it was just and equitable to reduce compensation. Industrial disputes are often very complex, having a long history and involving many contributory factors. In no area of English law of which we are aware are courts ever entrusted with the determination and

allocation of blame in relation to industrial disputes. Section 62 of the Act of 1978 excludes industrial tribunals from considering whether an employer acted reasonably in dismissing an employee engaged in industrial action. It would be strange indeed if Parliament had intended that the industrial tribunal should consider what is effectively the same point when coming to consider the blameworthiness of the employee's conduct. We therefore reach the conclusion that it is not possible for an industrial tribunal to hold under section 74(6) that the industrial action in which the employee was taking part (whether or not it was in breach of contract) in itself justifies a reduction in compensation, since an industrial tribunal is unable to determine whether or not, and to what extent, it is just and equitable to make such reduction. This does not exclude the possibility that there may be conduct other than the industrial action itself which could justify a reduction under section 74(6). Say, for example, that an employee who was on strike had in fact been dismissed for reasons other than that he was taking part in the strike. If the industrial tribunal came to the conclusion that such dismissal was even so unfair, it might well take the view that the employee's conduct which had caused his dismissal (as opposed to the industrial action itself) merited a reduction under section 74(6). For these reasons the industrial tribunal were in our judgment right in law in not making any reduction in compensation since they could not properly hold that it was just and equitable so to do.'

In the *TNT* case [1994] ICR 1, on the other hand, Wood J attached no such significance to the enactment of s 62. He said (at 7–8):

'Put very shortly, prior to the Employment Protection Act 1975, an employee who was dismissed on the grounds of industrial action was not to be considered unfairly dismissed unless the discriminatory factors were established. By the Act of 1975 the position was radically changed and an industrial tribunal was barred from considering whether a dismissal was fair or unfair unless a discriminatory factor was established. In (*Power Packing Casemakers Ltd v Faust* [1983] 2 All ER 166 at 172, [1983] QB 471 at 478) Stephenson L.J., therefore, concluded: "So industrial tribunals, presented with a complaint of unfair dismissal by an employee alleged to have taken part in industrial action, had from 1971 to 1974 to consider that action and the provisions against victimisation in the course of determining whether he had proved his complaint, but have from 1975 to 1978 and since to consider them in order to determine whether he could even try to prove it." Purchas L.J. in his judgment said ([1983] All ER 166 at 174, [1983] QB 471 at 481): "Mr. Carr submitted ... that ... therefore the words of section 62 of the Act of 1978 could be given their plain and ordinary meaning, namely, once it was established that the employee was, at the date of his dismissal, engaged in a strike or other industrial action, the industrial tribunal could only enter upon a consideration of the merits of the case if it could be shown that the employee had been subjected to discriminatory treatment in the matter of dismissal or re-engagement. I agree with this submission." Thus, we have clear guidance on the purpose of section 62(1) and (2) of the Act of 1978.'

Later Wood J added (at 8–9):

'... in our judgment, the Court of Appeal has shown the purpose behind section 62 and its effect. It goes to jurisdiction. The words used are "shall

not determine." If through voluntary or involuntary "discrimination," which, as in the present case, could be for humanitarian or sound reasons in individual cases, an industrial tribunal is given jurisdiction, then it must carry out its statutory function and seek to do that which is fair, just and reasonable between the parties. All these surrounding circumstances will be examined as in any other case. The concession made in *Courtaulds Northern Spinning Ltd. v. Moosa* ([1984] ICR 218), the premise upon which the decision rests, is in our judgment unsound.'

The full hearing before the industrial tribunal in the present case took place after the decision in the *Courtaulds* case but before the decision in the *TNT* case. The tribunal accordingly applied the former decision and held that it was not entitled to regard the participation of the complainants in the industrial action as a ground for reducing their compensation. The tribunal added, however, in para 89 of its decision, that if it *had* been entitled to reduce the compensation on this ground it would have done so by 50%, since the complainants and Crosville Wales were equally to blame.

By the time that the matter came before the Employment Appeal Tribunal the *TNT* decision had been given. The Employment Appeal Tribunal felt bound to follow this, the more recent decision in preference to the earlier *Courtaulds* decision. It therefore allowed the appeal of Crosville Wales, and also allowed a cross-appeal by the complainants against the 50% reduction, ordering that this latter issue should be remitted to the industrial tribunal for consideration.

When the matter came before the Court of Appeal ([1996] ICR 237), Waite LJ (himself a former President of the Employment Appeal Tribunal), in a judgment with which Otton and Beldam LJJ agreed, approached the matter in this way (at 254–255):

'The best starting point, as with all issues of statutory construction, must be the presumed intention of the legislature. Complex though the legislation may be, the intention is clear. It is to discourage discriminatory re-employment in the immediate aftermath of industrial action. The essence of discrimination, in such a context, is that there should be a picking and choosing from people who have been engaged in the same industrial action. A remedy against discrimination of that kind, and a power to determine issues of contributory fault on the basis of justice and equity, have both been features of the unfair dismissal legislation from its earliest origins. The intention must have been to enable the victims of discrimination to ask the classic question: "Why pick on me?" and to have it answered in a way which will result in an employer who can supply no answer, or no entirely adequate answer, in having to pay such compensation to the victim as justice and equity may require. In a case where A, B, C and D have all been dismissed while participating in the same strike or industrial action, and where A and B alone have been offered re-engagement, the industrial tribunal has a threefold duty. The first is to determine its own jurisdiction: that will involve scrutinising the relevant collective action for the purpose of determining whether it amounts to a strike or other industrial action and inquiring whether there have been any offers of re-engagement to the complainants and if so whether they pass muster under the Act of 1978 for identity or comparability. The second (assuming jurisdiction to be established) is to decide whether C and D have been unfairly dismissed because there was no qualifying reason, or no sufficient justifying reason, for

the discriminatory failure to re-engage. The third (assuming that also to be established) is to determine whether C and D should be regarded as having contributed to their dismissal and if so what reduction (if any) it would be just and equitable to make in the amount of their compensation. When the tribunal is exercising that third duty, it seems to me to be quite impossible that Parliament could ever have contemplated that it would be just and equitable to penalise C and D, the victims of the discrimination, by way of contributory fault, solely for conduct in which they had participated in common with A and B, the beneficiaries of the discrimination. What Parliament must be deemed to have contemplated is that there would be instances in which C and D had been engaged at the relevant time in activities of their own, which although connected with the common action had an identifiably distinctive impact upon the decision to dismiss. In such a case it would not only be appropriate but essential for the industrial tribunal to examine such activities and inquire whether they should be treated as causative or contributory to the dismissal and if so whether it would be just and equitable to take them into account as justifying an abatement of the compensation award. The question, therefore, for the industrial tribunal at the stage of considering contributory fault is: "Have these applicants been responsible, in addition to mere participation in the relevant industrial action, for any conduct of their own contributing to the dismissal which was sufficiently blameworthy to make it just and equitable to reduce their compensation?"'

In a later passage Waite LJ added (at 255–257):

'When tribunals are faced with a dismissal that has been found to be unfair in circumstances of discriminatory failure to re-engage, they will be excluded (on grounds both of equity and of policy) from considering contributory fault if the only conduct relied on is the collective conduct represented by the industrial action in the course of which the dismissal occurred. That is not to say, however, that discriminatory failure to re-engage represents an area of the law from which contributory fault is wholly excluded. It is available to answer the demands of equity and justice in cases where the complainant can be shown to have been individually responsible for activities which are found to have been causative of, or contributory to, his dismissal. When that result is applied to the present case, the consequences in my judgment are as follows. (1) Sections 73(7B) and 74(6) of the Act of 1978 fall to be applied as enacted without any implication that would apply them to failure to re-engage—rather than (or in addition to) dismissal. Sense can be made of the whole legislative scheme without the need to import words that Parliament has not itself used. The decisions in this respect of the appeal tribunal in both *Courtaulds Northern Spinning Ltd. v. Moosa* ([1984] ICR 218) and *TNT Express (U.K.) Ltd. v. Downes* ([1994] ICR 1) were correct. (2) The decision in *Courtaulds* was unquestionably correct upon its facts, because there was in that case no finding that the applicant has been responsible for any activities of his own which might have been adjudged blameworthy. (3) Although that is the primary ground on which (by reason of its consistency with the scheme of the legislation as I have sought to analyse it) I would prefer to hold that *Courtaulds* was correctly decided, that decision was also in my judgment correct in its own chosen ratio (at 224–225), namely that: "it is not possible for an industrial tribunal to hold under section 74(6)

that the industrial action in which the employee was taking part (whether or not it was in breach of contract) *in itself* justifies a reduction in compensation, since an industrial tribunal is unable to determine whether or not, and to what extent, it is just and equitable to make such a reduction." ([Waite LJ's] emphasis.) I would however add to that the qualification that in cases where the complainants have been shown to have been responsible for some additional conduct of their own, then the fact that such conduct occurred during, and as part of, the industrial action does not preclude the industrial tribunal from examining it separately and considering whether it contributed to the complainants' dismissal. If the judgment in *Courtaulds* (at 225) intended to state that such instances should be restricted to cases where the complainant although dismissed while on strike had been in fact dismissed for reasons other than strike participation, I would myself regard that as too restrictive. There must, as I have already indicated, be cases in which it would be entirely reasonable and proper for the tribunal to find that the complainant, regardless of the reason for his dismissal, had by some conduct of his own additional to or separate from the mere act of participation in the action contributed to his dismissal. (4) The decision in *TNT Express (U.K.) Ltd. v. Downes* ([1994] ICR 1) was incorrect upon its facts, for the same reason that *Courtaulds Northern Spinning Ltd. v. Moosa* ([1984] ICR 218) was correct; namely because there were no findings in that case either of any conduct by the complainants which distinguished them from their colleagues. The criticisms of the *Courtaulds* decision made in *TNT* were unjustified (subject only to the qualification that I have mentioned) and the purported grounds for distinguishing it were unsound. In so far as *TNT* held that an industrial tribunal is entitled to go beyond the value judgments it is permitted to make when examining some particular conduct of the complainant additional to mere participation in the dispute itself, and to pass generalised judgments on the merits of the collective action when viewed as a whole, it was wrongly decided and should not be followed. (5) The industrial tribunal in the present case was similarly right to leave contributory fault out of account, because there was no evidence (and no suggestion) that out of the total dismissed workforce the 73 applicants had been responsible for any independent conduct of their own which might qualify for separate consideration on grounds of justice or equity for the purposes of assessing contributory fault. Their paragraph 89 findings do not therefore arise at all for consideration, although I would add that, if they did, they would be open to justified criticism as being precisely the sort of generalised judgment on the merits or demerits of collective action which offends the policy to which the appeal tribunal in *Courtaulds* ([1984] ICR 218) rightly drew attention. In any future case in which the separate conduct of individual complainants fell to be considered for possible contributory fault, I would not expect findings of that general nature to be regarded by the tribunal as either appropriate or relevant ...'

Both in his oral submissions and in the written submissions prepared by him and his junior Mr McMullen QC has deployed a wide and scholarly range of arguments against these conclusions. If I do not deal with all of them it is not for lack of appreciation but because I cannot, for my part, find in this fragmented and constantly amended legislation a sufficient degree of consistency and logic to merit such a thorough analysis.

Mr McMullen's most telling argument, to my mind, was that as a matter of plain English the participation of the complainants in the industrial action involved both conduct and action on their part, and therefore brought them squarely within the terms of s 73(7B) and s 74(5). He reminded us of the emphasis placed by your Lordships' House in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, [1978] 1 WLR 231, a case decided on one of the forerunners to s 62, upon the general principle that where Parliament had expressed itself plainly the courts had no right to depart from the language used. He criticised the formulation by Waite LJ of the crucial question as:

> 'Have these applicants been responsible, *in addition to mere participation in the relevant industrial action*, for any conduct of their own contributing to the dismissal which was sufficiently blameworthy to make it just and equitable to reduce their compensation?' (my emphasis),

for writing words into the statute which were not there, and which greatly restricted its effect.

Looking more generally at the statutory context he submitted that there was nothing in the terms of s 62 to suggest that the courts were precluded from taking account of particular conduct merely because it consisted of participation in an industrial dispute. That section merely laid the ground for determining whether those dismissed for taking part in such a dispute were entitled to claim, by reason of selective re-employment on the part of the employer, that their dismissal was unfair. Once the jurisdictional position had thus been established, the contention of the employee must be considered by reference to all of the circumstances including, in appropriate cases, the conduct of the employee and the equity and substantial merits of the case, under s 57(2)(b) and (3). The provisions of s 63 expressly required the consideration of any pressure which might have been exercised on the employer to dismiss the employee, if only for the purpose of leaving it out of account. (The same consideration is, of course, required by s 74(5) in the context of possible reduction of the employee's compensatory award by reference to contributory fault.) Thus, as Waite LJ had accepted ([1996] ICR 237 at 253), the legislature is not in the least squeamish about involving industrial tribunals in the consideration of disputed issues of collective action.

Mr McMullen acknowledged that attention must be focused upon the conduct of the individual employee in order to determine whether it was blameworthy to a degree which would reduce or eliminate his compensation (a point clearly made in *Parker Foundry Ltd v Slack* [1992] ICR 302 at 308, 311 by Woolf and Balcombe LJJ), but submitted that there was no reason why a number of individuals should not be equally to blame for the same conduct. He referred your Lordships to a passage from the judgment of Lord Denning MR in *Williams v National Theatre Board Ltd* [1982] ICR 715 in which, albeit obiter, he had referred to the striking employees collectively as 'guilty of most serious misconduct'.

Mr McMullen further submitted that the need to focus upon the conduct of the individual employee who is claiming compensation invalidated the comparison drawn by Waite LJ between the treatment of those who had been re-employed and those who had not. Waite LJ's point had been, of course, that if A, B, C and D had all taken part in the industrial action, but A and B had been re-engaged while C and D had not, it could not have been the intention of Parliament to penalise C and D who had suffered from the discrimination, while the equally blameworthy A and B had not suffered. But this, submits Mr McMullen, is no different in principle from the situation in the *Parker Foundry* case where two

employees had been fighting, where one had been dismissed by the management but the other merely suspended, and where it was held that the compensation claimed by the former could properly be reduced by reference to his conduct alone, irrespective of the degree of blameworthiness which should be attached to the other employee.

My Lords, persuasively as this final submission was put, I cannot accept it. For one thing it oversimplifies the comparison between the present case and the *Parker Foundry* case. In the *Parker Foundry* case, for good reason or bad, the management had regarded the other employee as being less culpable than the complainant, but had nonetheless punished him, though to a lesser degree. The issue raised in the case was whether for the purpose of assessing the complainant's compensation claim, the relative merits or demerits of his conduct as compared with that of the other employee should be taken into account and the decision was that it should not. In the present case there is no question of any difference between the relative blameworthiness or non blameworthiness of the employees concerned, A and B on the one hand or C and D on the other. This case, unlike the *Parker Foundry* case, is concerned with collective activity for which all those involved are equally responsible and for which all were dismissed.

Secondly, Mr McMullen's argument carries him too far, because if attention is to be focused upon the behaviour of the individual employee alone, the focus must not only exclude the other employees, but also the employer. This was expressly recognised by May J in *Allders International Ltd v Parkins* [1981] IRLR 68, a decision referred to with approval by Woolf LJ in the *Parker Foundry* case [1992] ICR 302 at 310. Taken as a whole, the *Parker Foundry* judgments appear to me to militate against the arguments of Crosville Wales rather than in their favour. For in the case of collective action by a number of employees against their employer it is surely impossible to judge the blameworthiness or otherwise of a particular employee's conduct without reference to the conduct of the other employees concerned, and to that of the employer.

This does not diminish the force of Mr McMullen's arguments based upon the plain meaning of the words 'conduct' and 'action' and the statutory context in which they appear. It may well have been the intention of Parliament throughout that industrial tribunals should not become involved in the merits or demerits of collective industrial disputes but, as Browne-Wilkinson J said in the *Courtaulds* case [1984] ICR 218 at 224, 'The detailed way in which Parliament sought to achieve this result is not entirely clear ...' The immediate and apparent purpose of s 62 read by itself is simply to make it plain that an employer who conducts a lockout or who carries out a wholesale dismissal of striking employees is prima facie immune from claims for unfair dismissal. If the matter rested there, then the section would be strong evidence of a legislative intention to keep the merits of industrial disputes out of the courts. But the reintroduction of the concept of unfair dismissal by way of the provisions regulating selective re-employment inevitably involves the possibility of the tribunal having to consider the case of the individual employee in the context of the industrial action and of the employer's conduct in applying the provisions of s 57 as notionally reworded. The difficulty for Crosville Wales in the present case is that when one comes to the final stage of deciding whether the dismissed employees' compensation should be reduced one encounters the first of the complications which I have referred to above: the fairness or unfairness of the selective re-engagement must be ignored. It is at this point, to my mind, and on this fairly narrow ground that the argument for the employer fails, because of the sheer

impossibility of the task of allocating the blame for the industrial action to any individual complainant, the more so since the collective blame for the industrial action is shared by those who were re-engaged. I respectfully agree with Waite LJ that this is a consequence which Parliament can never have contemplated. In order to reach this conclusion it is not, in my judgment, necessary to add any words to those which already appear in the Act. The conclusion simply gives effect to the statutory requirement that any reduction in the compensation of an individual employee should be, and should only be, such as is 'just and equitable'.

I would accept that a broader approach must be followed at the earlier stage when the tribunal is considering whether, in a case of selective re-engagement, the particular employee has been unfairly dismissed. At that stage, particularly if the employee's conduct comes into the reckoning under s 57(2)(b), it may well be essential to compare the treatment accorded to that employee with the treatment accorded to others, and to have regard to the employer's conduct and to the general merits of the case. But even here I would stop short of accepting that the consideration of the matter by the tribunal must necessarily extend to the collective merits or demerits of the industrial action. The point is not before us and so it would be wrong to attempt to decide it, but one cannot simply brush aside the preponderance of judicial opinion over the last 20 years which has been to the effect stated by Phillips J in *Gallagher v Wragg* [1977] ICR 174 at 178:

> 'But, of course, the whole policy of the law as enshrined in the Act of 1974 and the later enactments is to withdraw the law from the field of industrial disputes. There is a kind of legal laissez-faire or neutrality as soon as an industrial dispute breaks out.'

If that is *not* the policy of the law it might be argued that Parliament should have taken, or should now take, an opportunity to correct it.

Putting the matter more generally, I agree with the conclusions stated by Waite LJ on the subject of contributory fault. I agree in particular with the qualification or interpretation which he places upon the *Courtaulds* judgment in the third of his conclusions. Individual blameworthy conduct additional to or separate from the mere act of participation in industrial action must in principle be capable of amounting to contributory fault.

It follows that I would dismiss the appeal. I would do so, however, with little sense of satisfaction about the justice of the result, or the state of the law which has given rise to it. This was not, after all, a case of deliberate victimisation by the employers, but they are being required to pay just as much compensation as if it had been. I find it difficult to accept that a policy of laissez faire or neutrality must necessarily lead to such a result. This area of the law appears to me one which would benefit from the attention of the Law Commission.

LORD CLYDE. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Nolan. For the reasons he has given, I, too, would dismiss this appeal.

Appeal dismissed.

Celia Fox Barrister.

Kelley v Corston

COURT OF APPEAL, CIVIL DIVISION
BUTLER-SLOSS, PILL AND JUDGE LJJ
22, 23 APRIL, 10 JULY 1997

Barrister – Negligence – Immunity – Extent of immunity – Barrister advising in relation to financial relief after divorce – Proceedings compromised and settlement embodied in consent order approved by court – Plaintiff suing barrister in relation to settlement – Whether barrister immune from suit in relation to settlement at door of court – Whether barrister immune in relation to consent order approved by court – Matrimonial Causes Act 1973, s 33A.

In November 1991 the plaintiff's marriage was dissolved and the defendant barrister was instructed to represent her at the hearing for ancillary relief. A conference took place the day before the hearing and the following day, at court, on the defendant's advice the proceedings were compromised, and a consent order was made pursuant to the provisions s 33A[a] of the Matrimonial Causes Act 1973. Subsequently the plaintiff brought an action for damages against the defendant alleging that the defendant had been negligent in negotiating and advising her to accept a settlement of her claim for ancillary relief. The plaintiff complained in particular that the overall effect of the settlement meant that she was unable to finance the repayments of the mortgage on the former matrimonial home after it was transferred into her name. The defendant filed a defence denying the allegations of negligence, and contended that the statement of claim did not disclose a reasonable cause of action in that each and every act or omission relied on was covered by her immunity from suit as a barrister. On the defendant's application the district judge struck out the plaintiff's claim under RSC, Ord 18, r 19 on the basis that the defendant's actions in negotiating and advising the plaintiff to accept a settlement of her claim were so closely connected with the conduct of the case in court as to render the defendant immune from an action for negligence and that the advice given the day before the hearing was part and parcel of the defendant's conduct and therefore subject to the same immunity. The judge dismissed the plaintiff's appeal from the district judge's decision and the plaintiff appealed to the Court of Appeal.

Held – (1) Where an advocate's advice culminated in a settlement which required the approval of the court and the settlement received that approval, the advocate was immune from suit in respect of that advice, since (per Judge LJ) otherwise the principle that a judge could not be asked to explain what he had said or done in court was liable to be circumvented. In the instant case, the consent order under the 1973 Act had required the court's approval, and since the court had a duty under s 33A of that Act to consider whether there were other circumstances into which it ought to inquire, it was made with that approval. It followed that the defendant was immune from suit (see p 481 *b* to *e h*, p 486 *e f*, p 487 *d*, p 488 *f g*, p 489 *a* to *d*, p 491 *f* and p 493 *d* to *g*, post); *Rees v Sinclair* [1974] 1 NZLR 180 and *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All

a Section 33A is set out at p 492 *e* to *g*, post

ER 1033 applied; *Landall v Dennis Faulkner & Alsop (a firm)* [1994] 5 Med LR 268 approved; *Thwaite v Thwaite* [1981] 2 All ER 789 and *Peacock v Peacock* [1991] FCR 121 considered; *B v Miller & Co* [1996] 2 FLR 23 overruled.

(2) (Per Butler-Sloss and Pill LJJ) The immunity of an advocate from suit in respect of out of court work which was intimately connected with the conduct of the cause in court extended to the making of a settlement at the door of the court when the trial of the merits was about to begin. Although the conduct at the door of the court precluded the conduct of the cause in court, nevertheless negotiations in such circumstances, and settlements which resulted from them, were an integral part of the conduct of the cause and had the necessary intimate connection with its conduct in court. Moreover, no sensible distinction could be made between a settlement in course of trial and a door of court settlement before the trial began. Accordingly the defendant's conduct was in any event covered by the immunity and (Judge LJ concurring) the appeal would therefore be dismissed (see p 490 *e* to *g*, p 491 *e f* and p 495 *g* to p 497 *e*, post); *Biggar v McLeod* [1978] 2 NZLR 9 considered.

Notes

For the scope of the barrister's immunity from liability in negligence, see 3(1) *Halsbury's Laws* (4th edn reissue) para 529.

For the Matrimonial Causes Act 1973, s 33A, see 27 *Halsbury's Statutes* (4th edn) (1992 reissue) 780.

Cases referred to in judgments

B v Miller & Co [1996] 2 FLR 23.

Bateman v Owen White [1996] 1 PNLR 1, CA.

Biggar v McLeod [1978] 2 NZLR 9, NZ CA.

Cabassi v Vila (1940) 64 CLR 130, Aust HC.

de Lasala v de Lasala [1979] 2 All ER 1146, [1980] AC 546, [1979] 3 WLR 390, PC.

Dean v Dean [1978] 3 All ER 758, [1978] Fam 161, [1978] 3 WLR 288.

Evans v London Hospital Medical College [1981] 1 All ER 715, [1981] 1 WLR 184.

Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

Landall v Dennis Faulkner & Alsop (a firm) [1994] 5 Med LR 268.

Livesey (formerly Jenkins) v Jenkins [1985] 1 All ER 106, [1985] AC 424, [1985] 2 WLR 47, HL.

McFarlane v Wilkinson [1996] 1 Lloyd's Rep 406.

Marrinan v Vibart [1962] 3 All ER 380, [1963] 1 QB 528, [1962] 3 WLR 912, CA.

Palmer v Durnford Ford (a firm) [1992] 2 All ER 122, [1992] QB 483, [1992] 2 WLR 407.

Peacock v Peacock [1991] FCR 121.

Rees v Sinclair [1974] 1 NZLR 180, NZ CA.

Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, [1969] 3 WLR 1666, HL; *affg* [1966] 3 All ER 657, [1967] 1 QB 443, [1966] 3 WLR 950, CA.

Saif Ali v Sydney Mitchell & Co (a firm) (P, third party) [1978] 3 All ER 1033, [1980] AC 198, [1978] 3 WLR 849, HL; *rvsg* [1977] 3 All ER 744, [1978] QB 95, [1977] 3 WLR 421, CA.

Smith v Linskills (a firm) [1996] 2 All ER 353, [1996] 1 WLR 763, CA.

Somasundaram v M Julius Melchior & Co (a firm) [1989] 1 All ER 129, [1988] 1 WLR 1394, CA.

Swinfen v Lord Chelmsford (1860) 5 H & N 890, 157 ER 1436.
Thwaite v Thwaite [1981] 2 All ER 789, [1982] Fam 1, [1981] 3 WLR 96, CA.
Walpole v Partridge & Wilson (a firm) [1994] 1 All ER 385, [1994] QB 106, [1993] 3 WLR 1093, CA.
Warren v Warren [1996] 4 All ER 664, [1997] QB 488, [1996] 3 WLR 1129, CA.
Watson v M'Ewan, Watson v Jones [1905] AC 480, [1904–7] All ER Rep 1, HL.
X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases also cited or referred to in skeleton arguments

Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.
Kitchen v Royal Air Forces Association [1958] 2 All ER 241, [1958] 1 WLR 563, CA.
Stovold v Barlows [1996] 1 PNLR 91, CA.

Appeal

The plaintiff, Lindsey Ann Kelley, appealed with leave from the order of Longmore J on 15 March 1996 dismissing the plaintiff's appeal from the order of District Judge Rutherford on 2 January 1996 striking out the plaintiff's claim in negligence against the defendant, Jean Corston, under RSC Ord 18, r 19 on the ground that it disclosed no reasonable cause of action. The facts are set out in the judgment of Judge LJ.

Peter Smith QC and *Christopher Gosland* (instructed by *Longrigg Harris*, Bath) for the plaintiff.
Rupert Jackson QC and *Susan Solomon* (instructed by *Veale Wasbrough*, Bristol) for the defendant.

Cur adv vult

10 July 1997. The following judgments were delivered.

JUDGE LJ (giving the first judgment at the invitation of Butler-Sloss LJ). On 15 March 1996 Longmore J dismissed the plaintiff's appeal from the decision of District Judge Rutherford on 2 January 1996 that the plaintiff's claim against the defendant should be struck out under Ord 18, r 19 of the Rules of the Supreme Court. He granted leave to appeal.

The defendant is and at all material times was a barrister in practice from chambers in Bristol. Her areas of practice included family law.

In 1984 the plaintiff married Nicholas Davies. In 1991 she was granted a decree nisi of divorce which was made absolute in November. There were no living children of the family. Efforts were made to achieve a negotiated settlement of her claims for financial relief. A hearing was arranged for 18 December 1991 and a few days before the hearing the defendant received instructions 'to advise' the plaintiff. It is however common ground that the instructions represented delivery of a brief to attend the hearing for ancillary relief and represent the plaintiff. A conference was arranged and took place on 17 December. On the next day, at court, when the plaintiff was represented by the defendant the proceedings were compromised, and an order by consent was made by Deputy District Judge Johnson.

The terms of the order record:

> 'UPON HEARING Counsel for both parties AND UPON READING the affidavits sworn herein AND UPON the Petitioner undertaking 1. to use her best endeavours to secure the release of the Respondent from his covenants under the mortgage held with the Halifax Building Society secured on the property known as 3 Edgar Buildings, Bath and until that release is obtained to indemnify the Respondent for any liability arising under the said mortgage 2. to assign within 28 days of the date hereof to the Respondent her interest in the following policies [six policies were then set out]
>
> IT IS ORDERED that: 1. upon the Petitioner securing the release of the Respondent from his obligations due under the said mortgage the Respondent shall transfer to the Petitioner all his estate and interest in the said property 2. the Respondent do pay the Petitioner maintenance in the sum of £300 per month together with the repayments due under the said mortgage until the 31st March 1992 3. the Respondent do pay to the Petitioner a lump sum of £2,500 on or before the 31st May 1992 4. upon the said payment and transfer set out above all capital and income claims that either party may have against the other shall be dismissed and neither party shall be entitled to make any application under Section 23 and 24 of the Matrimonial Act 1979 and under the Married Women's Property Act 1882 [this provision is recorded in counsel's brief as 'dismissal of claim under MCA 1973 and MWPA 1882'] 5. pursuant to Section 15 of the Inheritance (Provision for Family and Dependants) Act 1975 and the Court considering it just so to do, neither the Petitioner nor the Respondent shall be entitled on the death of the other to apply for an order under Section 2 of the said Act 6. it is declared for the purposes of Regulations 96 and 97 of the Civil Legal Aid (General Regulations) 1989 that the said property and lump sum payable by the Respondent be used as a home for the petitioner and her dependants ...'

Agreed provision was made for costs, and the attendance of counsel, and the order concluded 'there be liberty to apply'.

Two particular features of this order should be noted. First, the judge had read the relevant affidavit evidence produced by each side and second, it was expressly recorded that the court considered it 'just' to make an order relating to inheritance arrangements. The reference to the Matrimonial Act 1979 was plainly an error and was meant to be a reference to the Matrimonial Causes Act 1973. The legal effect of the order made by the district judge was dependent not on the consent of the parties but on the making of the order by the court (*de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546 and *Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106, [1985] AC 424).

In *Thwaite v Thwaite* [1981] 2 All ER 789 at 794, [1982] Fam 1 at 7 the Court of Appeal adopted the principle applied in *de Lasala v de Lasala* [1979] 2 All ER 1146 at 1155, [1980] AC 546 at 560 that:

> 'Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of a court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order ...'

This principle was said to—

> 'represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent order ... A distinction, therefore, has to be made between consent orders made in this and other types of litigation.'

The inclusion of s 33A of the Matrimonial Causes Act 1973 by s 7 of the Matrimonial and Family Proceedings Act 1984 confirms this principle. Section 33A(1) provides:

> 'Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.'

Such a provision would not have been necessary if the court had not been under a duty fully to inquire into proposed settlements for financial relief. The effect of the section is that provided prescribed information is before it, the court is permitted to make an order without further inquiry but it is not required to do so, and if there is any reason to think that there are other relevant circumstances the order may not be made until proper inquiry has been made. In *Peacock v Peacock* [1991] FCR 121 Thorpe J considered a consent order which had been made in 1982. In the course of his judgment (at 125) he summarised the principle which has been understood and applied for many years.

> 'All the issues between the parties related to the 1982 consent order, its implementation, and its possible variations ... It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed.'

In July 1995 the plaintiff claimed damages for negligence against the defendant in 'negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief against her husband'. The details of the earlier negotiations and the circumstances in which the eventual compromise were reached do not require amplification in this judgment. The critical allegation is that the overall effect of the settlement meant that the plaintiff was unable to finance the repayments of the mortgage on the former matrimonial home after it was transferred into her name. Having filed a defence which in addition to denying the allegations of negligence, alleged that the statement of claim did not disclose a reasonable cause of action 'in that each and every act or omission of the Defendant relied upon is covered by the immunity from suit of the Defendant as a barrister', the defendant sought to strike out the statement of claim on the basis that—

> 'the whole of the Plaintiff's claim is covered by the doctrine of immunity from suit which covers an advocate in relation to the conduct and management of a case in court, the conference and negotiated settlement being covered by the same doctrine ...'

The grounds of appeal from the decision of Longmore J are that he was wrong in law and in fact in upholding the decision of the district judge that the defendant's actions on 18 December 1991—

> 'in negotiating and advising the Plaintiff to accept a settlement of her claim for ancillary relief against her former husband were so closely connected with the conduct of the case in Court as to render the Defendant immune from an action for negligence on the part of the Plaintiff, and (ii) that the advice given ... on ... 17 December 1991, was part and parcel of and rolled up in the Defendant's conduct on 18 December and therefore subject to the same immunity.'

These grounds of appeal, together with the pleaded defence and the application to strike out the statement of claim, raise the question whether the present defendant is immune from suit, and if so the circumstances, if any, in which any such immunity may arise. For the purposes of the present appeal Mr Peter Smith QC on behalf of the plaintiff accepted that events on 17 and 18 December were so interconnected that if the defendant is indeed immune from suit for the actions on 18 December, there is no prospect of a successful claim in respect of the advice she gave on the previous day.

Perhaps it should not be necessary to begin consideration of these issues by emphasising that the immunity of the advocate from liability is not founded on some special protection granted by the court to the legal profession to enable lawyers to avoid justified complaints by dissatisfied clients. The legal adviser may be held liable for negligent advice to his client in the same way as his medical practitioner or accountant. The immunity arises in very limited circumstances when the general public interest prevails against even a meritorious claim. The trend has been increasingly to limit the circumstances in which immunity may be established and the concept of a blanket immunity is completely out of date. The present claim for immunity therefore requires analysis of the developing principles in this field.

Although some of their Lordships, and in particular Lord Morris of Borth-y-Gest, were considerably influenced by the phrase 'the conduct and management of the cause' derived from the unanimous opinion of the court in *Swinfen v Lord Chelmsford* (1860) 5 H & N 890, 157 ER 1436 in which the action against counsel was based on his alleged mishandling and settlement of litigation, references to statements of principle before *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191 are unhelpful.

In that case the plaintiff alleged negligence against his barrister in the conduct of his defence in criminal proceedings heard before a jury at the Old Bailey. The decision established or, perhaps more correctly, confirmed in modern form the principle that the barrister was immune from suit in the performance of his duties in court. Observations were also made on two connected subjects, first, the ambit of the undoubted immunity and, second, whether it extended to different and if so which aspects of a barrister's professional obligations to his client. In view of the decision in *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All ER 1033, [1980] AC 198 that the immunity was not unlimited and that such immunity as existed extended to solicitors as well as barristers, further consideration of *Rondel v Worsley* can be limited to analysing the extent of immunity envisaged by those of their Lordships who accepted that the immunity was subject to some limitations rather than the blanket immunity which formed

the basis for the conclusion reached by Lord Pearce, and subsequently rejected in *Saif Ali*'s case. In the Court of Appeal Salmon LJ (who was to be one of the majority in the House of Lords in *Saif Ali*) was not prepared to extend the immunity to work of an advisory nature, 'quite separate from' or 'unconnected with the conduct or management of a case in court' (see [1966] 3 All ER 657 at 676, 679, [1967] 1 QB 443 at 520, 524). Within this categorisation at that time he included pleadings, advice on evidence and a notice of appeal. In the House of Lords Lord Reid applied the immunity to 'conducting litigation' and being 'engaged in litigation'. These phrases embodied the work covered in drawing pleadings or conducting subsequent stages in the case, and as if to emphasise the immunity would always extend to such cases, he added that it would also apply to some cases where litigation was 'impending' but not to advisory work where that consideration did not apply (see [1967] 3 All ER 993 at 1000, 1001, [1969] 1 AC 191 at 231, 232). Lord Morris of Borth-y-Gest concluded that immunity extended to the 'conduct and management of a case in court' by the advocate. He did not suggest that this phrase amounted to a gloss on 'the conduct or management of the cause' used in *Swinfen v Lord Chelmsford* but rather approached it as a statement made 'in reference to litigation'. He accepted the correctness of the judgment of Salmon LJ in the Court of Appeal (see [1967] 3 All ER 993 at 1008, 1012, [1969] 1 AC 191 at 243, 248, 249). Lord Upjohn concluded that immunity was essential 'in litigation' and believed that immunity began before the advocate actually walked into court. He considered that it extended to pleadings, advice on evidence and advice on the 'prospects of success' and suggested that the appropriate starting point would be the letter before action (see [1967] 3 All ER 993 at 1035, 1036, [1969] 1 AC 191 at 284, 285). Finally, Lord Pearson referred to 'the conduct of litigation' and later to the 'conduct of a case' as within the scope of the immunity but concluded that 'pure paper work' on the other hand fell outside it (see [1967] 3 All ER 993 at 1038, 1041, [1969] 1 AC 191 at 289, 293). While acknowledging that these observations were unnecessary for the decision in *Rondel v Worsley* and strictly speaking were no more than obiter dicta, on this analysis it is in my judgment clear that if the House of Lords in *Rondel v Worsley* had been invited to answer the question whether immunity from suit extended to the settlement of civil actions at the door of the court when the case was listed for hearing, the undoubted conclusion would have been that it did.

One further feature of the decision in *Rondel v Worsley* needs emphasis. None of their Lordships doubted that in the public interest absolute privilege attached to everything said in court by the judge, jurors, advocates and witnesses and indeed media reporting of words actually spoken. All were equally protected. In *Watson v M'Ewan, Watson v Jones* [1905] AC 480, [1904–7] All ER Rep 1 this protection was extended to cover statements made by a witness preparatory to trial (see also *Marrinan v Vibart* [1962] 3 All ER 380, [1963] 1 QB 528, *Evans v London Hospital Medical College* [1981] 1 All ER 715, [1981] 1 WLR 184, *Palmer v Durnford Ford (a firm)* [1992] 2 All ER 122, [1992] QB 483 and the speech of Lord Browne-Wilkinson in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 386, [1995] 2 AC 633 at 755 agreeing with the observations of Drake J in *Evans'* case 'at least in relation to the investigation and preparation of evidence in criminal proceedings', and in this context, casting no doubt on the decision in *Palmer v Durnford Ford*). The principle

was underlined and adopted in *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, [1980] AC 198.

In *Saif Ali*'s case the extent of the immunity from suit, and in particular whether it covered pre-trial acts or omissions in connection with civil proceedings, was considered by the House of Lords. To the extent that *Rondel v Worsley* decided that immunity extended to acts and omissions in the course of the hearings in court, *Rondel v Worsley* was (despite Lord Diplock's reservations) not reconsidered. Trenchant views were expressed by a minority. Lord Russell concluded that *Rondel v Worsley* had decided that the immunity of an advocate from negligence extended to 'areas which affect or may affect the course of conduct of litigation' and decisions which 'shape, or may shape, the course of a trial ... [including] advice on settlement'. Lord Keith of Kinkel adopted the same approach. The immunity was 'applicable to all stages of a barrister's work in connection with litigation, whether pending or only in contemplation' (see [1978] 3 All ER 1033 at 1053, 1055, [1980] AC 198 at 234, 235). However the majority concluded that the immunity did not extend or apply to every piece of work performed by an advocate in connection with litigation. Instead, on the basis of the second and alternative contention on behalf of the respondent they adopted, with different degrees of emphasis, the test propounded by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 at 187 and adopted by Bridge LJ in the Court of Appeal ([1977] 3 All ER 744, [1978] QB 9):

> 'I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.'

Lord Wilberforce accepted the language of McCarthy P involved a more restricted approach to immunity than the phrase 'conduct and management'. He underlined that interlocutory and pre-trial proceedings could fall within the ambit of the immunity: in other words it was not limited to the substantive hearing alone. He regarded the 'intimate connection with the conduct of the cause in court' as providing a sound basis for analysing whether the immunity applied to the facts of any case. He added that the privilege which protected judge, counsel, witnesses, jurors and parties to proceedings in court could not be 'outflanked by basing a claim on statements made or agreed to be made out of court if these were clearly and directly made in relation to the proceedings in court' (see [1978] 3 All ER 1033 at 1038, 1039, [1980] AC 198 at 214, 215).

Lord Diplock accepted the principle of immunity for the advocate for things said and done (or omitted) in court both on the basis of the decision in *Rondel v Worsley* in relation to court proceedings and by reference to two further grounds developed in his speech.

The principle of immunity extended to advocates as it formed part of the general immunity provided for all who participate in court proceedings:

'The courts have been vigilant to prevent this immunity from indirect as well as direct attack, for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence: see *Marrinan v Vibart* [1962] 3 All ER 380, [1963] 1 QB 528. In *Watson v M'Ewan* [1905] AC 480, [1904–7] All ER Rep 1 this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial, since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented.' (See [1978] 3 All ER 1033 at 1044, [1980] AC 198 at 223.)

Lord Diplock also concluded that litigation about these issues would undermine the integrity of public justice, permitting the retrial of issues already resolved, a consideration which he acknowledged would not apply when there had been no disputed hearing in court. In such cases, of course, the first ground for immunity would continue to apply. However he could find 'no sufficient reason for extending the immunity to anything that a barrister does out of court' unless it fell within a situation analogous to that which arose in relation to the witness providing a statement pre-trial and out of court to a litigant or his solicitor (see [1978] 3 All ER 1033 at 1046, [1980] AC 198 at 224). Accordingly he also accepted that 'intimate connection' with the conduct of the case in court was an appropriate test. As an example, but without attempting any catalogue, he included pre-trial advice on evidence and pre-trial advice which was adopted at the hearing itself.

Lord Salmon rejected as without justification any proposition that the barrister enjoyed a blanket immunity for work done out of court. He modified his own observations in *Rondel v Worsley* that counsel's immunity extended to pleadings and advice on evidence: it would 'sometimes' do so when, for example, the advice—

'would be so closely connected with the conduct of the case in court that it should be covered by the same immunity. It would be absurd if counsel who is immune from an action in negligence for refusing in court to call a witness could be sued in negligence for advising out of court that the witness should not be called. If he could be sued for giving such advice it would make a travesty of the general immunity from suit for anything said or done in court and it is well settled that any device to circumvent this immunity cannot succeed ...' (See [1978] 3 All ER 1033 at 1052, [1980] AC 198 at 231.)

From this analysis the first principle of immunity, and settled law, is that an advocate is immune from suit for negligence for what he (or she) says and does (or omits to say or do) during the course of a hearing in court. The clear division between the views expressed in the House of Lords in *Rondel v Worsley* and the majority view expressed in *Saif Ali's* case about the *extent* of the immunity from suit did not undermine the unequivocal conclusion that those who participate in court proceedings are normally held immune from suit from anything said or decided by them in court, an immunity which extends beyond the confines of the court to protect them from indirect as well as direct attack. Any forensic investigation which contravenes this principle is prohibited. Secondly, immunity is not confined to the conduct of proceedings within the physical confines of the court and in very limited circumstances it extends to events outside the court

door, provided the claim concerns matters which are inextricably connected with the way in which the cause is or would be conducted in court. Both principles have been acknowledged in statute. Section 60 of the Courts and Legal Services Act 1990 underlined, without expressly identifying its full ambit, the existence of an advocate's 'immunity from liability for negligence'. The Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771, made under s 12(4) of the Supply of Goods and Services Act 1982 provided that s 13 should not apply to the services of an advocate in court or before any tribunal inquiry or arbitrator and in carrying out 'preliminary work directly affecting the conduct of the hearing'. The third principle, although not arising for immediate attention in the present appeal, is that proceedings which amount to a collateral attack on a final decision made by a court of competent jurisdiction should be regarded as an abuse of the process of the court (*Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529).

Whatever the basis for the immunity of the advocate and whatever its ambit, the starting point remains that the immunity constitutes an exception to the fundamental principle that those who have suffered loss and damage as a result of the negligence of their professional advisers should normally be entitled to their remedy. Therefore the immunity should be confined as closely as possible to those circumstances where notwithstanding the possible merit of an individual claim the public interest requires that immunity should be recognised. The claim to immunity for the conduct of an advocate can only arise if the case falls squarely within one or more of these three principles, participation in court proceedings, intimate connection with the conduct of the case, or a collateral attack on a final decision. As Lord Salmon warned in *Saif Ali*'s case [1978] 3 All ER 1033 at 1051, [1980] AC 198 at 231, 'it can only be in the rarest of cases that the law confers any immunity on a barrister against a claim for negligence in respect of any work he has done out of court'.

There is no clear authority decisive of the problem which arises in the present appeal which in essence is whether immunity from suit outside the court includes or extends to litigation against an advocate for negligent advice which has culminated in a settlement. Mr Smith submitted that a settlement before the start of the hearing in court has no sufficient connection with the conduct of the case in court to attract immunity: in the context of advice on settlement such immunity would only attach after the hearing had started. Neither the temporal connection (the imminence of the hearing) nor the geographical connection (the door of the court) comes within the principles relating to immunity. The negligence arises from the lack of negotiating skills with the other party to the litigation and the negligent advice about what settlement should be accepted. These are not techniques of advocacy deployed in court. The submission by Mr Rupert Jackson QC, reinforced by the need for a clear workable rule, was that when the advocate arrived at court to conduct the substantive hearing his conduct fell within the acknowledged principles of immunity, whether he presented the case through to the eventual decision by the judge or settled the litigation. Attention was drawn to a number of authorities from which both counsel accepted that no entirely consistent pattern emerged.

Rees v Sinclair [1974] 1 NZLR 180 was first followed in *Biggar v McLeod* [1977] 1 NZLR 321, [1978] 2 NZLR 9, decided after *Saif Ali*'s case had been heard in the Court of Appeal but before the decision in the House of Lords. The allegation in this case arose from alleged negligence in the settlement of matrimonial

proceedings after the hearing had begun. The Court of Appeal in New Zealand applied the principle in *Rees v Sinclair* followed by Bridge LJ in the Court of Appeal and subsequently approved by the majority in the House of Lords. Woodhouse J concluded that work which 'was associated with the ending of an action by a settlement' fell within the principle in *Rees v Sinclair* or 'the conduct of litigation'. He said ([1978] 2 NZLR 9 at 12):

> '... the simple question is whether the step of ending current proceedings by a compromise rather than by obtaining the judgment in due course should properly be regarded as part and parcel of the work of counsel in carrying forward the proceedings to a conclusion. I am in no doubt that this must be so.'

Without expressing reservations about this broad statement of principle Richardson J confined his observations to advice leading to a settlement during the 'course of the trial'. He continued (at 14):

> '... the settling of the terms of a compromise must attract immunity. It is intimately and immediately connected with, and involves the termination of the litigation ... The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel ... Advice on settlement of a cause, during trial, is as much an incident of the conduct of the trial as advice on and decisions as to the calling of witnesses and other matters, which, although not necessarily given and made in the courtroom, cannot in a practical way be severed from and dissociated from the conduct of the cause by the barrister in the presence of the judge.'

Quilliam J agreed with both judgments. The observations of Woodhouse J with which Quilliam J agreed were obiter dicta. *Biggar v McLeod* was cited in argument in the House of Lords in *Saif Ali*'s case without attracting any comment, presumably on the basis that the decision was consistent with *Rees*. Holland J was later to consider the observations by Richardson J in *Landall v Dennis Faulkner & Alsop (a firm)* [1994] 5 Med LR 268, and to apply them or to treat them as if they applied to advice resulting in a settlement at the door of the court before the start of the hearing, which they did not.

The principles in *Saif Ali*'s case have been considered by the Court of Appeal in actions for alleged negligence arising in the conduct both of civil and criminal proceedings. In *Somasundaram v M Julius Melchior & Co (a firm)* [1989] 1 All ER 129, [1988] 1 WLR 1394 complaint was directed at the advice given to the plaintiff in relation to his plea to a charge of malicious wounding. The claim against the barrister was struck out both as an abuse of process in which a collateral attack was being made of the decision of another court (see *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529) and as falling within the principle of 'intimate connection', advice about the plea in a criminal case amounting to 'a preliminary decision affecting the way that the cause is to be conducted when it comes to a hearing ... Indeed it is difficult to think of any decision more closely so connected' (see [1989] 1 All ER 129 at 136, [1988] 1 WLR 1394 at 1403). Nothing which follows in this judgment is to be taken as a gloss on the principle established in *Somasundaram*'s case in relation to criminal proceedings, which in any event is binding authority, but the similarity between the plea of guilty under consideration in *Somasundaram*'s case and the settlement

in a civil action is only superficial. The plea is not a compromise of private litigation which brings proceedings to an end. It is a public admission in court of criminal responsibility, and the case in court proceeds accordingly, and eventually to sentence. In *Somasundaram*'s case the court also accepted as a matter of principle that although the advice on the plea was immune from suit because of its connection with subsequent advocacy in court, immunity did not extend to the plaintiff's solicitor who enjoyed no advocate's role.

In *Bateman v Owen White* [1996] 1 PNLR 1 the plaintiff alleged negligence in the form of wrongful advice or a wrongful judgment exercised by counsel in a criminal case over the question whether particular witnesses should be required to attend the trial. It was held that this fell within the scope of immunity based on the 'intimate connection' principle and that it was also in the public interest to avoid 're-hearings' of matters already heard and decided in another court of competent jurisdiction (see also *Smith v Linskills (a firm)* [1996] 2 All ER 353, [1996] 1 WLR 763).

In *Walpole v Partridge & Wilson (a firm)* [1994] 1 All ER 385, [1994] QB 106 the argument on behalf of the defendant solicitors was that the plaintiff's claim for their negligent failure to lodge an appeal against a criminal conviction contrary to advice from counsel should be struck out. It was held that the principle of abuse of process did not apply to such negligence. In passing the Court of Appeal doubted the correctness of part of the decision in *Palmer v Durnford Ford (a firm)* [1992] 2 All ER 122, [1992] QB 483.

In *Palmer*'s case part way through the trial, when the expert had completed his evidence, the plaintiffs, on advice, abandoned their claims. Accordingly judgment was entered by consent for the defendants. Ignoring for present purposes the subsequent claim by the plaintiffs against their expert witness, they in addition sought damages against their former solicitors on the basis that they had instructed an inadequate expert and failed to appreciate and advise about the extent of the weaknesses in the plaintiffs' case before the start of the hearing. This part of the claim was struck out as an abuse of process on the basis that the consent judgment constituted a final decision on the claim. No argument was addressed about the principle of immunity based on 'intimate connection' and it is unclear whether the solicitors appeared as advocates in the county court. In *Walpole*'s case Ralph Gibson LJ expressed his concern about this decision, after acknowledging that—

> 'if a plaintiff is advised, and agrees, to submit to judgment because, on the available evidence, there is no basis of claim against a party, as in *Palmer*'s case against the repairers, the mere assertion that that judgment against him was brought about by the breach of duty of the solicitors may be insufficient to justify the maintenance of proceedings which depend upon showing that there would have been no such judgment, but a judgment in favour of the plaintiff, if the solicitors had performed their contractual duty. Such a plaintiff may reasonably be required to show that credible evidence which would have supported a judgment in favour of the plaintiff against the repairers would have been available if the solicitors had performed their duty, and would be available in the proceedings against the solicitors ... if I have correctly understood the facts of that case ... I consider that the claim against the solicitors in *Palmer*'s case should not have been struck out.' (See [1994] 1 All ER 385 at 400, [1994] QB 106 at 125.)

This decision, which involved alleged negligence in relation to a criminal appeal, therefore provides a measure of support for the proposition that submission to judgment by a litigant in civil proceedings after the start of the hearing does not necessarily preclude him from claiming damages against his legal advisers for their negligent conduct of litigation.

Three decisions at first instance need attention. In *McFarlane v Wilkinson* [1996] 1 Lloyd's Rep 406 Rix J held that a claim for damages based on alleged negligent advice not to amend particulars after the decision at first instance and before the hearing in the Court of Appeal fell within the immunity principle. As the issue under consideration was, so far as relevant, based on alleged negligence after the conclusion of proceedings at first instance, it is unnecessary to consider the decision further, save to note that it is unlikely to be axiomatic that liability for negligent advice can never arise merely because there has been a concluded hearing and decision at first instance. However in *Landall v Dennis Faulkner & Alsop (a firm)* [1994] 5 Med LR 268 Holland J concluded that a practising barrister who relied on a report from a medical expert was entitled to 'immunity' in relation to advice given to the plaintiff supporting a settlement at the court door. He also struck out a claim against solicitors as 'frivolous vexatious and an abuse of process' because he was not prepared to accept there was any distinction between the solicitors and the barrister. The immunity of the solicitors was based on what would have amounted to 'blatant outflanking' of the barrister's immunity, an argument not apparently advanced and inconsistent with the principle applied by the Court of Appeal in *Somasundaram's* case. However, more significant is his general conclusion that advising settlement at the court door is an activity which is 'intimately connected with court proceedings'. Adopting Richardson J's observations in *Biggar v McLeod* about a settlement during the course of the hearing, he summarised (at 274) the critical considerations:

> 'It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and to the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or may leave issues (typically as to costs) to be resolved by the court—in either event it manifestly affects "the way that cause is to be conducted when it comes to a hearing." Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction—the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant?'

He continued, inconsistently with Lord Diplock's observations in *Saif Ali's* case that reference to counsel's duty to the court was 'no more than a pretentious way of saying that ... a barrister... must observe the rules', 'Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the Court.'

By contrast in *B v Miller & Co* [1996] 2 FLR 23 McKinnon J dismissed an application to strike out a claim on the basis that it amounted to a collateral attack on a final decision taken by a court of competent jurisdiction. The negligence

was said to arise from a consent order made in proceedings for ancillary relief, which was subject to statutory obligations imposed on the court 'to approve the order' in accordance with s 25(1) of the Matrimonial Causes Act 1973. McKinnon J (at 31–32) distinguished between a decision following a contested hearing and was—

> 'prepared to hold that the consent order ... is not to be distinguished for present purposes from a consent order in other Divisions of the High Court. There cannot have been, in this case, any meaningful approval of the agreed terms whereby provision was made for the plaintiff, any more than a judge in the Queen's Bench Division would have inquired into and approved the settlement of a negligence action between parties who were sui juris and not under disability. Thus, there is here, in my judgment, no impediment to the plaintiff's action on the grounds that it mounts a collateral attack upon the court's decision. There has been no real opportunity for the plaintiff to present her true case. She was deprived of that opportunity, as she is entitled to contend and maintain, by the negligence of the defendants.'

In effect therefore McKinnon J held that the action against the plaintiff's former solicitors could proceed notwithstanding that the claim for alleged negligence arose from a consent order in matrimonial proceedings which, as already noticed, took effect with the approval of the court 'as an order of the court', whereas Holland J concluded that immunity from suit applied to a consent order made following a settlement at the door of the court of a claim for personal injuries which would have been enforceable on the basis of an accord and satisfaction. These decisions are not reconcilable.

In reaching his conclusion in the present case Longmore J was faced with the argument, repeated and amplified by Mr Smith before us, that a settlement at any time before the case was started in court could not attract immunity because by definition the policy considerations developed in *Saif Ali*'s case had no application to a settlement. He concluded that the present case was indistinguishable in the principles applied from *Landall*'s case with which he expressed his agreement, concluding that it was difficult 'to conceive of an activity more closely connected with litigation in court than settling at the court door'.

After this analysis of the relevant authorities I can now consider the question whether the advocate is entitled to immunity from suit when settling civil litigation at the door of the court. Settlements of litigation are to be encouraged, and as early as possible. Many settlements are advised before litigation is started, and many more cases are settled long before the date of the substantive hearing. Some cases settle a day or two before the hearing, some at the door of the court, and some indeed after the substantive hearing has begun. Yet others settle on appeal. The advice on which settlements are based will reflect many different considerations. For example in one case the advice to settle may arise from the non-availability of a witness in circumstances where the costs of an adjournment would be disproportionate to the value of a claim. In another the settlement of a claim for personal injuries may be woefully inadequate simply because inexperienced counsel has grossly underestimated the value of the claim. In another case, for reasons of his own the client may insist that the case should be settled on the best available terms because there are no circumstances in which he wishes the case to be heard in court. The circumstances are infinite. One specific feature relating to all settlements needs attention. Every lawyer in

practice and every judge knows that there is no such thing as the case which is bound to succeed. Experience shows that cases with the brightest prospects of success somehow fail and it is difficult to underestimate the value of the certainty provided by a settlement as opposed to the continuing risks of litigation through to judgment. This factor alone should militate against successful proceedings based on criticism of advice leading to a settlement.

It is of course obvious that any settlement is closely connected with the litigation in the sense that it ends it and creates a binding agreement between the parties. Although an imminent hearing, and presence in the court building, often provide the occasion for the advice resulting in the settlement, and in that sense the advice is closely connected with the court hearing, the advocate at court is not conducting the hearing before the tribunal when he is giving his client advice on the settlement. In the ultimate analysis his advice concerns a proposed new contractual arrangement which will bring the litigation to an end and replace the uncertain prospects of success or failure in that litigation with an enforceable accord and satisfaction.

No doubt the advocate at court is in the words of Holland J making his advice 'specific to the tribunal ... and the nature and quality of the opposition' but that means no more than that he is taking into account all the relevant features of the case at the time he is deciding what advice to give his client. The advice to settle will take account of the advocate's assessment of the judge before whom the case is listed, including his experience (or lack of it) and the perception of the likely impact on the judge of the particular circumstances of the case. Assuming that the identity of the trial judge genuinely plays a significant part in the advocate's assessment of his client's prospects which the advocate then seeks to deploy to defend himself from an allegation of professional negligence, notwithstanding the possible embarrassment which would follow I remain unpersuaded that it is in the public interest for that fact to provide an insuperable bar to the plaintiff's claim, nor that its possible deployment in isolated cases justifies an absolute prohibition against further inquiry into the allegation of negligence. As an incorrect decision by any judge is in any event susceptible to appeal, and criticism, the advocate should not advise his client to accept a wholly inadequate settlement remote from the true merits of the case because of the identity of the tribunal. Equally, if counsel's duty to the court has impelled him to give advice which leads to an apparent discrepancy between a fair and reasonable settlement and a grotesquely inadequate one, I cannot see why the advocate should not rely on the performance of his duty to the court to defend himself against the allegation of negligence. It follows that I respectfully disagree with the observations by Holland J in *Landall*'s case.

In my judgment the settlement of litigation is not normally encompassed within the principles on which the immunity of the advocate is based. None of the relevant authorities requires and there are no public policy considerations which justify a blanket immunity from suit for negligent advice to a client which results in a settlement of his claim, whether the advice is given by counsel or a solicitor (whether advocate or not) and whether the settlement is reached before the hearing or at the door of the court.

I can now consider two areas of exception. First, after the hearing has begun in the sense that the judge begins to consider the plaintiff's claim, it is self-evident that any settlement is intimately connected with the conduct of the case in the presence of the judge and it may indeed involve the judge, and any comments or

interventions from him. Accordingly such settlements fall within both the first and the second principles of immunity. It is unnecessary for me to repeat the language of Richardson J in *Biggar v McLeod* with which I respectfully agree.

The second area of exception concerns settlements which are subject to or require the approval of the court. One example is the settlement of a claim by a person under disability: another is settlement of matrimonial proceedings, such as the settlement in the present case. Such settlements involve the direct participation of the judge who is invited to indicate his approval, and who is not bound to give it. This responsibility is clearly imposed on the judge who must make whatever inquiries seem appropriate to him before making his decision. In granting his approval he will of course have in mind the immense value of a settlement outlined earlier in this judgment. Nevertheless if he concludes that the settlement arrangements are inappropriate he cannot his ignore his responsibilities. Litigation which raises the question whether the advocate was negligent in the advice leading to any settlement requiring the approval of the judge is liable to circumvent the principle that the judge may not be asked to explain what he has said or done in court. If such litigation were permitted it is difficult to see how it would be fair to prevent the defendant advocate from seeking to call the judge to demonstrate that the settlement was reasonable. In any event the discussion of the settlement before the judge and response to any inquiries from him as well as the provision of the relevant material for his consideration all form part of the advocate's function in court. In my judgment this form of settlement is therefore immune from suit on the basis of the first two principles justifying immunity. It also follows that I disagree with the decision in *B v Miller & Co.*

For the avoidance of doubt these exceptions do not include settlements which do not require the approval of the court but which are settled and followed by an order made by consent. In such circumstances the judge may be invited to or may offer on his own initiative to assist with the wording of the order but he has no contribution to make to the agreed terms. He simply makes suggestions to assist the parties to find the right words in which to express their agreement. The judge does not participate by approving it. Therefore these considerations do not make such a settlement immune from possible liability. If of course, as a result of something said in court by the judge, the terms of the agreement are varied in a significant respect, or the parties settle their litigation in accordance with their perception of some comment or observation made by the judge before the substantive hearing actually begins, then it would be arguable that the settlement of the action followed a hearing in court, and immunity may arise to protect the advocate.

In my judgment the present case falls within the immunity principle. After negotiations had been carried out between the parties the settlement was placed before the judge for his approval, which he gave. The settlement cannot now be impugned by litigation against either advocate.

Accordingly I should dismiss the appeal.

PILL LJ. The essential facts, and the order by consent made by the deputy district judge, have been set out in the judgment of Judge LJ. Mr Jackson QC has sought to uphold the decision of Longmore J on the basis that 'the defendant's actions at court on 18 December 1991 in negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief fell within the scope of advocate's

immunity'. However, a further question has arisen and it is the resolution of that question which has been decisive in the judgment of Judge LJ: if the respondent fails in her submission, is she nevertheless immune from the suit because of the form of the settlement in this particular case? The defendant's argument at the hearing of the appeal essentially was that the advocate's immunity from suit for negligence in respect of her conduct of litigation covered the settlement in this case, that is, a settlement made at the door of the court on the day of the hearing but before the hearing has begun.

The scope of a barrister's immunity was considered in the House of Lords in *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All ER 1033, [1980] AC 198. Lord Wilberforce stated:

> '... in *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, this House decided that a barrister was immune from any action for professional negligence in respect of acts or omissions during the trial of criminal proceedings against his lay client. Now in this case it is necessary to decide whether the barrister's immunity covers pre-trial acts or omissions in connection with civil proceedings brought by his lay client.' (See [1978] 3 All ER 1033 at 1035, [1980] AC 198 at 210.)

Lord Wilberforce stated that the immunity from an action depended upon public policy and that in fixing its boundary account must be taken of the counter policy that a wrong ought not to be without a remedy:

> 'Furthermore, if the principle is invoked that it is against public policy to allow issues previously tried (between the client and his adversary) to be relitigated between client and barrister, it may be relevant to ask why this principle should extend to a case in which by the barrister's (assumed) fault, the case never came to trial at all. Those two considerations show that the area of immunity must be cautiously defined. How can this be done? "Conduct and management" is the expression which has emerged and no doubt this is not a sharp definition. I think that something more precise is required if immunity in respect of acts out of court is to be properly related to the immunity for acts in court. A helpful expansion of the phrase was suggested by McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair* [1974] 1 NZLR 180 at 187. I quote his words: "But I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated." I do not understand this formulation as suggesting an entirely new test, ie a double test requiring (i) intimate connection with the conduct of the cause in court and (ii) necessity in the interests of the administration of justice. The latter words state the justification for the test but the test lies in the former words. If these words involve a narrowing of the test as compared with the more general words "conduct and management" I think that this is right and for that reason I suggest that the

a passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts, whether immunity exists in any given case.' (See [1978] 3 All ER 1033 at 1039, [1980] AC 198 at 214–215.)

Lord Diplock emphasised two reasons for the immunity. The first is that the b barrister's immunity for what he says and does in court is—

'part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice, judges, court officials, witnesses, parties, counsel and solicitors alike. The immunity is based on public policy, designed, as was said by Lord Morris c of Borth-y-Gest [in *Rondel v Worsley* [1967] 3 All ER 993 at 1013, [1969] 1 AC 191 at 251] to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them. As was pointed out by Starke J in *Cabassi v Vila* (1940) 64 CLR 130 at 141, a case in the High Court of Australia: "The law protects witnesses and others, not for d their benefit, but for a higher interest, namely, the advancement of public justice." The courts have been vigilant to prevent this immunity from indirect as well as direct attack, for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence: see *Marrinan v Vibart* [1962] 3 All ER 380, [1963] 1 QB 528. In *Watson v M'Ewan* [1905] AC 480, [1904–7] All ER Rep 1, this House held that in the case of e witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial, since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented.' (See [1978] 3 All ER 1033 at 1044, [1980] AC 198 f at 222.)

The second reason is also based upon the need to maintain the integrity of public justice. There should not be collateral attacks on the correctness of a subsisting judgment of a court of trial upon a contested issue by retrial of the same issue 'a retrial of any issue decided against a barrister's client in favour of an adverse party g in the action in respect of which allegations of negligent conduct by the barrister are made would be an indirect consequence of entertaining such an action'. Lord Diplock added:

'A similar objection, it may be mentioned, would not apply in cases where h an action has been dismissed or judgment entered without a contested hearing, and there is no possibility of restoring the action and proceeding to a trial. If the dismissal or the entry of judgment was a consequence of the negligence of the legal advisers of a party to the action, a claim in negligence against the legal advisers at fault does not involve any allegation that the order of the court which dismissed the action or entered judgment was j wrong.' (See [1978] 3 All ER 1033 at 1045, [1980] AC 198 at 222–223.)

(I interpose that I agree with Longmore J that in using those words Lord Diplock was not determining whether immunity should be granted in such a case but only whether the particular reason for immunity applied.) Having stated that these two grounds of public policy do not apply 'to what a barrister does outside court

in advising about litigation or settling documents for use in litigation', Lord Diplock continued ([1978] 3 All ER 1033 at 1046, [1980] AC 198 at 224):

> 'Without the support of those additional grounds of public interest, as I have already indicated, I can find no sufficient reason for extending the immunity to anything that a barrister does out of court, save for a limited exception analogous to the extension of a witness's protection in respect of evidence which he gives in court to statements made by him to the client and his solicitor for the purpose of preparing the witness's proof for trial. The extent of this exception was in my view well expressed by [McCarthy P in] the Court of Appeal of New Zealand (where the profession is a fused one) in *Rees v Sinclair* [1974] 1 NZLR 180 at 187: "Each piece of before-trial work should ... be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ..." So for instance in the English system of a divided profession where the practice is for the barrister to advise on evidence at some stage before the trial his protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out. It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court.'

Lord Salmon stated ([1978] 3 All ER 1033 at 1051, [1980] AC 198 at 231):

> 'In my opinion, however, it can only be in the rarest of cases that the law confers any immunity on a barrister against a claim for negligence in respect of any work he has done out of court ... I should have said that the immunity might *sometimes* extend to drafting pleadings and advising on evidence.' (Lord Salmon's emphasis.)

Mr Smith QC, for the plaintiff, submits that a door of court settlement has only a temporal connection with the trial. Unlike an advice on evidence, it has nothing to do with the trial. Because the effect of a settlement is that there is no trial, the settlement can have no intimate connection with a trial. Mr Smith accepted that the situation was different after the trial had begun. Further, if, as a matter of fact, the court had an impact upon the settlement, the immunity arises. If, for example, the judge gives an indication about the case, or about its possible outcome, he has had an impact on any subsequent settlement and the immunity is present.

It is submitted that approval by the court of an infant's claim, though required by rules of court, does not have the required impact even if, for technical reasons, some change in the form of order results. In matrimonial proceedings, dealing with financial arrangements, it would be a question of fact whether any interventions by the judge before the settlement was made had the necessary impact. A line had to be drawn and the point at which to draw it was when the judge can be said to have had an impact upon the settlement.

Mr Jackson, for the defendant, submits that settling a case is one aspect of conducting the case. Advocacy includes negotiating skills as well as presentation of the case in court. A settlement just before a civil trial begins is intimately connected with the conduct of the trial. The process of arguing points in court and resolving them by negotiation at the door of the court cannot sensibly be disentangled. Mr Jackson relied on the decision of Holland J in *Landall v Dennis Faulkner & Alsop (a firm)* [1994] 5 Med LR 268 at 274; also cited and relied upon by Longmore J:

> 'It is difficult to conceive of an activity that is so intimately connected with court proceedings as advising at the court door. (Longmore J relied expressly on that statement.) It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and to the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or it may leave issues (typically as to costs) to be resolved by the court—in either event it manifestly affects "the way that cause is to be conducted when it comes to a hearing." Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction—the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant? Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the Court.'

Holland J cited the dictum of Richardson J in *Biggar v McLeod* [1978] 2 NZLR 9 at 13:

> 'The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel.'

It is common ground that appearance of the parties and their advisers at court on the day of the hearing and in the knowledge that the dispute is about to be resolved one way or the other does, as counsel put it, focus the minds of the parties. This illustrates the intimate connection of the door of court settlement with the trial, Mr Jackson submits. He also submits that door of court settlements are in the public interest. Mr Smith counters that earlier settlements are even more in the public interest and the advocate at the door of the court should be in no better position than the lawyer who advised settlement much earlier.

The difficulty about applying the *Rees* test in the present situation is that, as expressed, the test is concerned essentially with situations in which the case has come to a hearing. The pre-trial work is to be assessed by reference to its impact on a hearing but there is no hearing when there is a door of court settlement. It is not suggested that an advice on evidence is any the less covered because a case does not come to a hearing. The impact upon the present situation of words used to cover a situation of a different type must be considered.

In *Biggar v McLeod* Woodhouse J giving the leading judgment in the New Zealand Court of Appeal, appears to have understood the *Rees* principle to cover

a door of court settlement. Woodhouse J (at 10) referred to the opinion of Lord Reid in *Rondel v Worsley* [1967] 3 All ER 993 at 1000, [1969] 1 AC 191 at 231 that it was in the public interest to retain the immunity of barristers 'at least so far as it relates to their work in conducting litigation'. Having referred to the passage in the judgment of McCarthy P adopted in *Saif Ali*'s case, Woodhouse J stated ([1978] 2 NZLR 9 at 11):

> 'As I read the reference to the Court the learned Judge was not concerned so much to point to the actual activity of counsel inside the courtroom. The phrase as I understand it is intended to qualify the type of legal work which would attract the immunity and, of course, he was concerned in the passage to which reference has been made with questions of pre-trial work in particular, since no question had arisen in the case concerning the importance of what Lord Reid had described as the conduct of litigation. In any event it seems clear to me that McCarthy P intended in no way to limit the breadth of what had been said by Lord Reid concerning the policy reasons underlying the existence of the immunity or the circumstances which would give rise to it.'

Determination of the door of court question will not be necessary if the present case is resolved in the defendant's favour upon an application of the judicial impact test advocated by the plaintiff.

I accept that there are situations in which the intervention of the court is sufficient in itself to give rise to the immunity. A settlement in the course of the hearing, as in *Biggar v McLeod*, may be an example. The intimate connection is established. Further, where a settlement, by the law or by rules of court, requires the approval of the court as to its merits and receives that approval, the advocates who have reached the settlement are in my judgment covered by immunity from suit.

Thus under Ord 80, r 10:

> 'Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court.'

Order 80, r 11 provides a procedure for obtaining the court's approval for a settlement made before proceedings in which the claim for money is made by or on behalf of a person under disability are begun. The procedure protects minors and patients from any lack of skill of their legal advisers and also provides the means by which a defendant may obtain a valid discharge from a minor's or a patient's claim.

Consent orders following settlements which do not require the approval of the court in my view fall into a different category. It may be that some or most judges do take an interest in the terms of a settlement referred to them and express views if they see fit. However there is no obligation upon them to do so. Immunity from suit (if not otherwise present) should not in my judgment depend upon the degree of conscientiousness of the judge who makes the consent order. If he is not under an obligation to consider the merits of the order, the existence of the immunity should not depend upon the degree of interest he shows in the settlement. Dependence of the immunity upon comments made by the judge when the settlement is brought before him would be haphazard in operation and

would also involve calling evidence of the degree of interest shown and the care taken by the judge to investigate the merits and fairness of the settlement.

A further difficulty with a test by way of judicial impact, though not one which affects the outcome of the present case, is that in some situations the judicial involvement is, at least in part, for reasons other than concern for the interests of the parties. Before granting injunctions by consent (or upon ex parte applications), for example, the judge may investigate the circumstances of the dispute. His concern will not however be primarily for the interests of the parties and their protection from incompetent lawyers but with whether the jurisdiction of the court is properly invoked. The same will apply when prerogative orders are granted by consent. To define the limits of an immunity by reference to judicial intervention would be to give an apparent but illusory protection to the litigant in the exercise of some areas of the courts' jurisdiction. The judicial impact test will provide situations in which the immunity exists but I do not regard it as a satisfactory test of the limits of the immunity.

The settlement in the present case led to a consent order under the Matrimonial Causes Act 1973 and the question arises whether it did or did not require the approval of the court. A consent order under the 1973 Act was considered by McKinnon J in *B v Miller & Co* [1996] 2 FLR 23. The plaintiff sought to sue her solicitors on the ground that she agreed to the consent order because of their negligent advice. Though it is not expressly stated in the report, the settlement does not appear to have been a door of court settlement. The defendants sought to strike out paragraphs of the statement of claim on the basis that the consent order was a final order of the court in ancillary relief proceedings made pursuant to the court's examination of the parties' respective financial means as jointly disclosed by them in Form 76A. (The amount of information required by the present form 'M1—Statement of Prescribed Information' is similar.) It was submitted that the action constituted a collateral attack on a final decision taken by a court of competent jurisdiction.

The judge referred to s 33A(1) of the Act, which provides that 'on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.' (Supplied in the present case as in *B v Miller & Co*.) However, the judge based his conclusion upon s 25, which provides:

> 'It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above [orders for ancillary relief] and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.'

McKinnon J stated (at 31–32):

> 'The court was required under s 25 to look at all the circumstances of the case. One of those circumstances was that the parties had reached agreement. I do not see that what happens in the approval of an agreement, with no more information than is before the court than is required by form 76A, or was provided to the court in this case, begins to equate the true status of a consent order with that of an order made following a contested hearing. It seems to me that the consent order in this case is much closer to the category of case referred to by Lord Diplock in the *Saif Ali* case ([1978] 3 All

ER 1033 at 1045, [1980] AC 198 at 223), which I have already cited—much closer to that category of case than any of the other orders or decisions referred to in any of the cases cited to me. I would be prepared to hold that the consent order in this case is not to be distinguished for present purposes from a consent order in other Divisions of the High Court. There cannot have been, in this case, any meaningful approval of the agreed terms whereby provision was made for the plaintiff, any more than a judge in the Queen's Bench Division would have inquired into and approved the settlement of a negligence action between parties who were sui juris and not under disability. Thus, there is here, in my judgment, no impediment to the plaintiff's action on the grounds that it mounts a collateral attack upon the court's decision.'

The action was allowed to proceed but it appears that the collateral attack issue was the only one raised by the defendants. They did not seek to strike out on the basis of the advocate's immunity for work intimately connected with the conduct of the cause in court, the point taken by the defendant in the present case.

Livesey (formerly Jenkins) v Jenkins [1985] 1 All ER 106, [1985] AC 424 was mainly concerned with the disclosure of information by the parties upon an application for an order for financial provision and property adjustment. Lord Brandon stated that the principle of full and frank disclosure of all material facts depended on—

'the statutory requirement imposed by s 25(1), that the court must exercise its discretion to make orders under ss 23 and 24 in accordance with the criteria prescribed by that subsection, and that, unless the parties make full and frank disclosure of all material matters, the court cannot lawfully or properly exercise such discretion.' (See [1985] 1 All ER 106 at 115, [1985] AC 424 at 440.)

While the court has a discretion as to whether to make an order, it has a duty before exercising it to have regard to certain matters. These are relevant to the merits of the claim. In effect, a consent order under s 25 requires the court's approval based upon criteria specified in the statute. Referring to the then new s 33A and rules of court made under it, Lord Brandon stated ([1985] 1 All ER 106 at 118, [1985] AC 424 at 444):

'The procedure so laid down includes the lodging of a statement containing the kind of information which the court needs to have before making an order in accordance with ... s 25 ...'

In *Peacock v Peacock* [1991] FCR 121 Thorpe J considered an application to vary a consent order made under the 1973 Act to conclude financial proceedings between divorced spouses. He stated (at 125):

'All the issues between the parties related to the 1982 consent order, its implementation, and its possible variation ... It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed.'

Peacock v Peacock does not appear to have been cited to McKinnon J in *B v Miller & Co.*

Section 33A deals expressly with consent orders for financial relief. It was enacted to enable courts to deal with consent applications upon a consideration of the papers. However it does not in my judgment remove the duty of the court to consider the merits of the settlement. The parties have a duty of full and frank disclosure. They must disclose the information prescribed by rules of court. The court then has a duty, in the context of the statute, to consider whether there are other circumstances into which it ought to inquire. It follows from the existence of that duty, which will no doubt lead to the making of further inquiries in some cases, that, if a consent order is made, it is made with the approval by the court of its contents. The court having assumed a responsibility for the merits of the order, the advocate is immune from suit for his part in the settlement.

In my judgment *B v Miller & Co* was wrongly decided in so far as it is based on the proposition that no immunity arose out of the approval of the agreed terms. In the case of an order under s 33A of the 1973 Act, the immunity arises from the duty of the court to approve the terms of the settlement. It does not depend upon a further investigation of the manner, if at all, in which the duty has been performed by the court.

That finding does not in my view conclude the present appeal in the defendant's favour. Until the point was raised by the court itself during the hearing of the appeal, it had not been taken by the defendant either in the pleadings or in argument. Paragraph 1 of the defence does assert that 'each and every act or omission of the Defendant relied upon is covered by the immunity from suit of the Defendant as a barrister'. The affidavit sworn on behalf of the defendant in support of the summons to strike out claims that 'the conference and negotiated settlement [were] covered by the said doctrine [of immunity from suit]'. It is not suggested in either document that the act of the judge in approving the settlement has created an immunity otherwise absent. It is clear from the judgment of Longmore J that the point was not taken before him. Subject to a claim of immunity, the statement of claim discloses a reasonable cause of action. Upon a striking out application it appears to me that an immunity based on judicial intervention ought to have been pleaded and argued if the defendant sought to rely on it. Moreover, public policy does not normally require or entitle the court to take a point on immunity not taken by the defendant.

For that reason, I am unable to decide the appeal on the basis that an immunity, which would not otherwise exist, is created by judicial intervention by way of approval of the settlement in this case. I would not dismiss the appeal on the ground which has found favour with Judge LJ and am driven to consider the question whether the defendant succeeds on the basis alleged on her behalf and mentioned at the beginning of this judgment.

It is common ground that the existence of the barrister's immunity, however defined, may result in a wrong to the litigant. The law requires toleration of a possible wrong because of the public interest in immunity. Immunity during the trial exists as much for an elementary error in failing to call a witness as for a difficult decision as to whether to ask a question in cross-examination. An unsatisfactory settlement at the door of the court may result from an elementary misapprehension of the law or the facts or only a misapprehension of the likely attitude of the particular judge to the particular facts. Because the reason for the immunity is in public policy, no attempt has been made to define it by reference to the enormity or triviality of the error involved.

In *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 380, [1995] 2 AC 633 at 749 Lord Browne-Wilkinson, agreeing with Bingham MR in the Court of Appeal in the same case, stated that 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to override that policy'. The question is whether there are in this case, as there were held to be in *Re X and ors (minors)*, such considerations.

In *Somasundaram v Julius Melchior & Co* [1989] 1 All ER 129 at 136, [1988] 1 WLR 1394 at 1403 it was held that advice as to plea in a criminal trial is—

> 'something which is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that the cause is to be conducted when it comes to a hearing, within the test proposed by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 and approved by the House of Lords in *Saif Ali*'s case [1978] 3 All ER 1033, [1980] AC 198. Indeed it is difficult to think of any decision more closely so connected.' (Per May LJ, giving the judgment of the court.)

May LJ also stated that 'it is difficult in principle to draw any distinction between the decision of a criminal court and a civil court'.

I recognise the public interest, for the protection of litigants in general, in keeping the immunity as narrow as possible. However it does in my judgment cover the defendant's conduct in the present case in making a settlement at the door of the court when the trial of the merits was about to begin. The conduct at the door of the court, while precluding the conduct of the cause in court, is nevertheless intimately connected with it. Negotiations in such circumstances, and settlements which result from them, are an integral part of the conduct of the cause having the necessary intimate connection with its conduct in court within the meaning of that expression adopted in *Saif Ali*'s case. They cannot sensibly be distinguished from the advocate's conduct of the cause once the trial has begun. I can see no sensible distinction between a settlement in course of trial, which may be reached for reasons connected with or unconnected with the events of the trial so far, and a door of court settlement before the trial begins. The immunity cannot in my judgment be so narrowly defined as to exclude conduct which involves predicting the likely outcome of a case at the door of the court and settling it before the hearing has begun.

One consideration, though not one which applies in this case, is that the door of court settlement may well be made in reliance upon the door of court statement of a prospective expert witness as to what he would say in court upon certain eventualities. Lord Diplock drew an analogy between the position of the advocate and that of the witness. It would be curious if the expert witness's door of court conduct was covered by immunity (as would appear to follow from Lord Diplock's analysis) but the advocate's was not (see also *Palmer v Durnford Ford (a firm)* [1992] 2 All ER 122, [1992] QB 483 and Lord Browne-Wilkinson in *Re X and ors (minors)* [1995] 3 All ER 353 at 386, [1995] 2 AC 633 at 755 stating that nothing he has said cast any doubt upon that decision). The protection of the witness illustrates the intimate connection between advice at the door of the court and the conduct of the cause in court.

The intimate connection is also illustrated by the investigation as to the advisability of the settlement which would be necessary in the absence of an

immunity. Consideration of what would have happened at the avoided hearing and what the particular judge is likely to have decided would be necessary and though, as Lord Diplock stated, it would not be a collateral attack on the correctness of a subsisting judgment of the court, it would be a collateral investigation into the likely conduct of the case by the judge. Moreover, I find it difficult to see how advice as to how to plead in a criminal case (as in *Somasundaram*'s case), which may be based upon a misunderstanding of the law or the evidence, is covered by the immunity but advice at the door of the court as to whether to settle a civil claim is not. While I accept that the plea of guilty has a public impact not always present in civil litigation, the potential wrong to the litigant may be as great in one situation as the other and the role of the person giving the advice is the same. In some situations, such as assaults in their various forms, proceedings may on the same facts be either criminal or civil or both. The door of court settlement in the civil case has the more intimate connection with the hearing about to begin. In my judgment the reasons for which the law, for better or worse, recognises the advocate's immunity for what he says and does in court apply also to a door of court settlement such as that in the present case. The difficulty of deciding where the line is to be drawn should not deter from such a conclusion.

The position of a solicitor who is advising a client along with a barrister instructed by him does not arise for decision in this case. I say only that I do have difficulty with any general application of the distinction drawn in *Somasundaram*'s case as to their relative positions.

I would dismiss this appeal.

BUTLER-SLOSS LJ. I have had an opportunity of reading the judgment of Judge LJ in draft and gratefully adopt his recital of the facts. I have also had an opportunity of reading the judgment of Pill LJ in draft and agree with his conclusions.

The submissions of counsel before this court and before Longmore J were directed to the principles applicable to civil litigation generally and the extent of the immunity from liability granted to the legal profession. Before turning to consider whether that immunity covers settlements generally 'at the door of the court' it is important to consider the facts of this appeal.

The present appeal does not arise out of the settlement of civil proceedings in the Queen's Bench Division, but from the conclusion of ancillary relief proceedings after a decree absolute of divorce in the family jurisdiction of the county court. The order with which we are concerned was made by Deputy District Judge Johnson. It recites: 'Upon hearing counsel for both parties and upon reading the affidavit sworn herein and upon the petitioner undertaking ...' Although we are told that the proceedings in court took ten minutes, the court heard both counsel and read the affidavit and accepted undertakings made to the court. The order included the dismissal of any further claims by the parties and under para 5:

> '... pursuant to Section 15 of the Inheritance (Provision for Family and Dependants) Act 1975 and the Court considering it just so to do, neither the Petitioner nor the Respondent shall be entitled on the death of the other to apply for an order under Section 2 of the said Act ...'

An ancillary relief application may be launched in accordance with the provisions of the Matrimonial Causes Act 1973, as amended by the Matrimonial Proceedings Amendment Act 1984, and the relevant regulations, now the Family Proceedings Rules 1991, SI 1991/1247.

Although it is possible for parties, after dissolution of their marriage, to agree a settlement without recourse to the courts, it is a widespread practice to embody the agreement in a court order with the advantages of court enforcement of the provisions of the order if not complied with (see *de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546). In *Thwaite v Thwaite* [1981] 2 All ER 789 at 794, [1982] Fam 1 at 8 Ormrod LJ applied the principle in *de Lasala v de Lasala*, that the legal effect of a consent order derives from the order and not from the terms of the agreement, to ancillary relief applications made under the provisions of the 1973 Act. He said:

> 'We respectfully adopt [the principle] and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however, represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent order ... A distinction, therefore, has to be made between consent orders made in this and other types of litigation.'

The present practice in respect of consent orders for ancillary relief is to be found in s 33A of the 1973 Act as amended by s 7 of the 1984 Act. It reads:

> '(1) Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.
>
> (2) Subsection (1) above applies to an application for a consent order varying or discharging an order for financial relief as it applies to an application for an order for financial relief.
>
> (3) In this section—"consent order", in relation to an application for an order, means an order in the terms applied for to which the respondent agrees; "order for financial relief" means an order under any of sections 23, 24, 24A or 27 above; and "prescribed" means prescribed by rules of court.'

Rule 2.61 of the 1991 rules sets out the prescribed information to be provided in a consent application. The prescribed information includes the duration of the marriage, the age of each party and of the children, an estimate of the capital resources and net income of the parties, the arrangements for the accommodation of the parties and the children, remarriage or proposals for remarriage or cohabitation, and 'any other especially significant matters'. The statement of prescribed information was formerly form 76A but since the 1991 rules is now identified as D81 or M1. The order may be made with or without an oral hearing.

In *Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106, [1985] AC 424 the principle of full and frank disclosure by each party of all material facts to the other party and to the court in consent orders was clearly stated by the House of Lords. The (new) s 33A was referred to in the speech of Lord Brandon (see [1985] 1 All

ER 106 at 118, [1985] AC 424 at 444). He set out in his speech that the decision of the Court of Appeal in the *Livesey* appeal had been the reason for the introduction of the amendment, (see also the *Report of the Special Standing Committee on the Matrimonial and Family Proceedings Bill*, 10 and 15 May 1984, Solicitor-General *Hansard* pp 684 and 690). It was clearly not the intention of Parliament to affect the powers and duties of the court in ancillary relief consent orders but to restore the status quo before the Court of Appeal decision.

In my judgment, therefore, the jurisdiction of the court to deal with consent orders, provided by the 1973 Act and amended for procedural purposes by s 33A, remains unchanged. Thorpe J in *Peacock v Peacock* [1991] FCR 121 at 125 set out the duty of the court with regard to a consent order:

> 'It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed.'

(See also Bush J in *Dean v Dean* [1978] 3 All ER 758 at 762ff.)

The court retains the duty laid upon it under s 25 in respect of consent orders as well as contested proceedings. It has to scrutinise the draft order and to check, within the limited information made available, whether there are other matters which require the court to make inquiries. The court has the power to refuse to make the order although the parties have agreed it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp. In cases where a direction under s 15 of the 1975 Act is to be part of the order (as in the present appeal) the court must also be satisfied that it is just to make the direction. This duty of the court is in marked contrast to the approach of the High Court and county courts to settlements in civil litigation other than those which specifically require the approval of the court such as child settlements. It follows therefore that there is in relation to consent orders made under the 1973 Act such an intimate connection with the conduct of the cause in court that those consent orders come, in my judgment, clearly within the test propounded by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 and approved by Lord Diplock in his speech in *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All ER 1033 at 1046, [1980] AC 198 at 224.

There is a decision contrary to the view I have expressed above. In *B v Miller & Co* [1996] 2 FLR 23 McKinnon J dismissed a summons by a firm of solicitors to strike out a claim by a divorced wife that they had given her negligent advice in the settlement of her ancillary relief applications. The consent order had provided for a 'clean break' and had dismissed all ancillary relief claims by either party. The information provided to the court was in accordance with s 33A and contained the prescribed information on form 76A (the prescribed form in 1988). There was also a direction under s 15 of the Inheritance (Provision for Family and Dependants) Act 1975. McKinnon J recognised that consent orders in ancillary relief proceedings were unlike consent orders in other proceedings outside the jurisdiction of the Family Division and referred to *Thwaite v Thwaite*. He said (at 31):

> 'In my judgment, there is a difference between an order in ancillary relief proceedings following a contested hearing and a consent order made following an application for it, accompanied by the information required to

be set out in form 76A. I accept Mr Spon-Smith's argument. I do not believe that this court can close its eyes to the reality of the situation. Very little information was provided to the court in form 76A in this case—certainly, insufficient to enable the court to assess the sufficiency or propriety of the agreement made between the parties, at least insofar as it made provision for the plaintiff ... I would be prepared to hold that the consent order in this case is not to be distinguished for present purposes from a consent order in other Divisions of the High Court.'

In my view, McKinnon J came to the wrong conclusion about consent orders in ancillary relief proceedings. *Peacock v Peacock* [1991] FCR 121 was not, however, cited to him. He failed to take into account the duty of the court under s 25 towards the consent order and the scope of s 33A including the power of the court not to accept the draft order presented to it, a situation entirely different from the jurisdiction in the other Divisions of the High Court or civil litigation in the county court. A problem would arise, in this specialist type of litigation, if *B v Miller & Co* was correctly decided, as to the degree of involvement of the judge and the extent to which he has, or has not had, a 'hands on' approach to the draft order presented to him. In the more inquisitorial atmosphere of family proceedings it might well be difficult to establish, in the absence of evidence from the judge himself, the extent to which he made some 'input' to the order finally made. It is clear that judges would not give evidence as to how they dealt with the individual case (see *Warren v Warren* [1996] 4 All ER 664 at 671, [1997] QB 488 at 497 per Lord Woolf MR), and there might well not be agreement among the advocates, about what happened, even if they had the relevant knowledge. Since I am satisfied that the judge has a duty to consider the order, it would be inappropriate to look at individual cases to see how far he carried out that task. It falls within the wider considerations of public policy to which I shall turn in a moment.

I have looked first at ancillary relief proceedings, since those are the proceedings before us on appeal. In my judgment, the judge was right to dismiss the appeal from the district judge and to hold that the appellant's case disclosed no reasonable cause of action on the grounds which I have set out above. The defendant's case before Longmore J was not, however, pleaded nor argued on the basis of the special position of ancillary relief proceedings, nor was it so argued before us. The judge's decision was not based upon the special position of ancillary relief proceedings. The question of the duty upon the court in consent ancillary relief orders was raised for the first time by this court during argument. Although it would be possible to limit this judgment to the particular facts of this appeal, not only would the pleadings present an obstacle to the defendant succeeding on appeal, but my judgment would not represent my conclusions on the arguments actually presented to this court and to the judge. With some hesitation and recognising that my views may be said to be strictly obiter, I feel I cannot refuse to express an opinion on the wider issues raised by the arguments of counsel and decided by the judge.

The special categories of civil cases where the approval of the court is required for a settlement are in my view indistinguishable from consent orders in ancillary relief applications. The problem arises as to the extent of the immunity from civil action afforded to advocates in 'door of court' settlements in all other cases. As Judge LJ has pointed out in his judgment, the immunity of the advocate from liability for negligence is not for the special protection of the legal profession.

The purpose of the immunity is based upon public policy where the public interest in the good administration of justice must prevail over the claims, however well-based, of the individual litigant. Lord Wilberforce in *Saif Ali*'s case [1978] 3 All ER 1033 at 1037, [1980] AC 198 at 213 said: 'Some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer.'

It is not limited to counsel. Lord Reid in *Rondel v Worsley* [1967] 3 All ER 993 at 999, [1969] 1 AC 191 at 229 said:

> 'It has long been established that judge, witnesses and barristers alike have absolute privilege with regard to what is said by them in court: and for reasons similar to those which apply to proceedings in Parliament.'

This immunity from liability for negligence of the advocate has been recognised in the Courts and Legal Services Act 1990, s 62, which provides:

> '(1) A person—(a) who is not a barrister; but (b) who lawfully provides any legal services in relation to any proceedings, shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services ...'

The immunity of the advocate is limited. He/she may be held liable for negligent advice in the same way as any other professional adviser. Lord Wilberforce in *Saif Ali*'s case [1978] 3 All ER 1033 at 1039, [1980] AC 198 at 215 said:

> 'In principle, those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area, the normal rule must apply.'

The limits of the immunity are not yet clear but I agree with Judge LJ that the trend is to limit the circumstances in which it will be recognised and to scrutinise carefully claims by those seeking its protection.

The starting point has to be whether it is in the public interest that 'door of the court' settlements should be given this protection. That in turn may depend upon ambit of the test in *Rees v Sinclair* [1974] 1 NZLR 180. McCarthy P said (at 187):

> 'I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.'

The majority of the House in *Saif Ali*'s case approved the test propounded by McCarthy P. In my view, the policy considerations developed in *Saif Ali* are equally capable of being applicable to a settlement by the parties before the case started in court, if it can be said to be closely connected with the litigation which

is about to start. Longmore J, in the present case, followed the decision of Holland J in *Landall v Dennis Faulkner & Alsop (a firm)* [1994] 5 Med LR 268. Holland J held that a barrister who relied upon a report from a medical expert was immune from liability with respect to the advice he gave 'at the door of the court' on a settlement of the action. In coming to that conclusion Holland J said (at 274):

> 'It is difficult to conceive of an activity that is so intimately connected with court proceedings as advising at the court door. It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and to the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or it may leave issues (typically as to costs) to be resolved by the court—in either event it manifestly affects "the way that cause is to be conducted when it comes to a hearing". Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction—the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant? Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the Court.'

Holland J relied upon a passage from the judgment of Richardson J in *Biggar v McLeod* [1978] 2 NZLR 9 at 13:

> 'The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel.'

Although Richardson J was dealing with a settlement during the trial and not before it started, for the reasons given by Holland J, with which I respectfully agree, the observations of Richardson J are equally applicable to the door of the court settlement.

The problem is where to draw the line? It is important not to extend the protection of the advocate beyond that which is genuinely needed to maintain the integrity of public justice. It is also important to have a clear workable rule which would be well understood that the advocate was or was not covered by immunity from suit at the door of the court. There may be an illogicality in protecting the advocate in giving his advice on the day of the hearing and not protecting him in giving the same advice in chambers or the office on the day before. But the reasons advanced by Holland J in *Landall*'s case seem to me to be most persuasive.

There is, in my view, a real public interest in not allowing litigation to develop over consent orders which come before the court. The alternative, litigation over the door of the court settlement, might raise not only the considerations affecting the minds of the advocates in advising a settlement, but might well require a case by case investigation of whether the court had or had not in the particular case some input. Take an example, a case has not started but the judge

has called the parties and advocates into the county court to obtain a realistic time estimate and in discussion with the advocates he has expressed a preliminary opinion. If the observations of the judge have an effect on the settlement, no doubt that would come within the *Rees v Sinclair* test. But there would be a real possibility of the need to investigate in each case whether in court or waiting outside court, the settlement had been affected by the court. A conclusion as to the relevance of these considerations to the settlement arrived at may be very difficult to prove either way, may become expensive for the parties, time-consuming for the courts and may be an added drain upon the public purse. In my view, there is no real distinction between coming to an agreement while waiting to start a case or, after the case has started, asking the judge for time to discuss a settlement at any time during the hearing. A major advantage of door of court immunity is the avoidance of investigation of the effect of or exact role played by the judge or district judge.

In the difficult and sensitive balance between the right of a litigant to seek redress for the negligent advice of his lawyers and the need to maintain protection of the administration of justice, we should be exceedingly cautious about encouraging any opportunity to investigate in subsequent litigation what actually happened in court when the settlement was presented to the judge.

The compromise of proceedings immediately before or during the trial is an important and valuable part of the litigation process and ought to be encouraged. For my part, I do not believe it is in the interests of the administration of justice that any distinction should be drawn between the point at which the advocates attend court and thereafter for immunity against suit to apply. It would also be a clear workable rule which was easy to apply.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Owners of cargo lately on board the River Gurara v Nigerian National Shipping Line Ltd The River Gurara

COURT OF APPEAL, CIVIL DIVISION
HIRST, PHILLIPS AND MUMMERY LJJ
9, 10, 11 JUNE, 15 JULY 1997

Shipping – Carriage by sea – Damages for breach of contract – Loss of or damage to goods – Limitation of liability – 'Package' – Meaning – Cargo loaded in containers – Bills of lading stating containers 'said to contain' specified number of items such as bales, parcels, bags, crates, cartons, or pallets – Liability to be calculated by reference to package – Whether containers or bales etc to be treated as package – Hague Rules, art IV, r 5.

The defendant shipowners shipped a containerised cargo on board their vessel for carriage from Africa to Europe. The bills of lading issued by the defendants were subject to the provisions of the Hague Rules and stated that the containers were 'said to contain' a specified number of items such as bales, parcels, bags, bundles, crates, cartons or pallets. On 26 February 1989 the vessel suffered an engine breakdown and, after being stranded on the coast of Portugal, broke up with a loss of life and a total loss of cargo. Thereafter the plaintiff cargo owners issued proceedings against the defendants on the bills of lading. The defendants contended that art IV, r 5 of the Hague Rules limited their liability to '£100 per package or unit', and that for those purposes the containers constituted the package or unit. The plaintiffs contended that it was the items within the containers that constituted the relevant packages or units. On the trial of various preliminary issues, the judge held inter alia that the basis for calculating the limit of liability under the Hague Rules was the number of items described by the bill of lading as being within the containers, rather than the number of the containers themselves. The defendants appealed, contending (i) that the basis for calculating the limit of liability under the Hague Rules depended on the agreement of the parties, as embodied in the bills of lading, and that the effect of the 'said to contain' qualification was that the bills of lading lost their evidential significance and merely enumerated the containers, so that it was the number of containers which formed the basis for computing the limit of liability; and (ii) that for the purpose of calculating the limit of liability, the description of the goods in the bills of lading was definitive.

Held – For the purposes of art IV, r 5 of the Hague Rules, where parcels of cargo were loaded in containers, it was the parcels and not the containers which constituted the relevant 'packages'. What constituted the relevant 'packages' did not (Hirst LJ dissenting) depend on the agreement of the parties, as represented by the description on the bill of lading, since if parties were permitted to agree their own definition shipowners would, by applying that definition to containers, be able to evade the minimum limit of liability that the Hague Rules aimed to secure. Furthermore, statements in a bill of lading describing the cargo shipped did not constitute an agreement between the parties as to the identity of that

cargo. Moreover, on the assumption that the 'said to contain' qualification on the bills of lading had the effect of rendering them not even prima facie evidence that the goods detailed by the shipper had been shipped, the onus was on the plaintiffs to prove their loss by extrinsic evidence. Accordingly, the defendants' limit of liability under the Hague Rules fell to be calculated on the number of packages that were proved to have been loaded within the containers rather than by reference to the description in the bills of lading. The appeal would therefore be dismissed (see p 504 *b c g h*, p 509 *h* to p 510 *b*, p 511 *a* to *c e* to *h*, p 512 *b c e j* and p 513 *a*, post).

Notes

For limitation of the liability of a carrier of goods by sea, see 43(2) *Halsbury's Laws* (4th edn reissue) para 1841.

For the Hague Rules, see ibid para 1453.

Cases referred to in judgments

A-G of Ceylon v Scindia Steam Navigation Co Ltd [1961] 3 All ER 684, [1962] AC 60, [1961] 3 WLR 936, PC.

Aegis Spirit, The [1977] 1 Lloyd's Rep 93, US District Ct.

Bekol BV v Terracina Shipping Corp (13 July 1988, unreported), QBD.

Binladen BSB Landscaping v MV Nedlloyd Rotterdam (1985) 759 F 2d 1006, US Ct of Apps (2nd Cir).

Chellaram (P S) & Co Ltd v China Ocean Shipping Co [1989] 1 Lloyd's Rep 413, NSW SC.

Comesmar (Cia Mediterranea Servizi Marittimi SpA) v A Carniti & C SpA (27 April, 1984) No 2643, Court of Cassation (Italy).

Grant v Norway (1851) 10 CB 665, 138 ER 263.

Haverkate v Toronto Harbour Comrs (1986) 30 DLR (4th) 125, Ontario High Ct.

Hayes-Leger Associates Inc v M/V Oriental Knight (1985) 765 F 2d 1076, US Ct of Apps (11th Cir).

Hollandia, The [1982] 3 All ER 1141, [1983] 1 AC 565, [1982] 3 WLR 1111, HL.

Johnston (J A) Co Ltd v Tindefjell, The Tindefjell [1973] 2 Lloyd's Rep 253, Can Fed Ct.

Leather's Best Inc v The Mormaclynx, The Mormaclynx [1971] 2 Lloyd's Rep 476, US Ct of Apps (2nd Cir); *affg in part* [1970] 1 Lloyd's Rep 527, US District Ct.

Mitsui & Co Ltd v American Export Lines Inc, Armstrong Cork Canada Ltd v American Export Lines Inc (1981) 636 F 2d 807, US Ct of Apps (2nd Cir).

New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd [1917] 2 KB 664, CA.

Nichimen Co v MV Farland (1972) 462 F 2d 319, US Ct of Apps (2nd Cir).

Noble Resources Ltd v Cavalier Shipping Corp, The Atlas [1996] 1 Lloyd's Rep 642.

Rosenbruch v American Export Isbrandtsen Lines Inc, The Container Forwarder [1974] 1 Lloyd's Rep 119, US District Ct.

Royal Typewriter Co v MV Kulmerland, The Kulmerland [1973] 2 Lloyd's Rep 423, US Ct of Apps (2nd Cir).

Shinko Boeki Co Ltd v Pioneer Moon, The Pioneer Moon [1975] 1 Lloyd's Rep 199, US Ct of Apps (2nd Cir).

Stag Line Ltd v Foscolo Mango & Co Ltd [1932] AC 328, [1931] All ER Rep 666, HL.

Standard Electrica SA v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft [1967] 2 Lloyd's Rep 193, US Ct of Apps (2nd Cir).

Yeramex International v The Tendo 1977 AMC 1807, US District Ct.

Cases also cited or referred to in skeleton arguments

Allied International American Eagle Trading Corp v SS Yang Ming (1982) 672 F 2d 1055, US Ct of Apps (2nd Cir).

Allstate Insurance Co v Inversiones Navieras Imparca CA (1981) 646 F 2d 169, US Ct of Apps (5th Cir).

Aluminios Pozuelo Ltd v SS Navigator (1968) 407 F 2d 152, US Ct of Apps (2nd Cir).

Cameco Inc v American Legion, Cameco Inc v Sullivan Security Services Inc, United States Lines Inc v Sullivan Security Services Inc, The American Legion [1975] 1 Lloyd's Rep 295, US Ct of Apps (2nd Cir).

CN Marine Inc v Carling O'Keefe Breweries of Canada Ltd [1990] 1 FC 483, Can Fed CA.

Encyclopaedia Britannica Inc v The Hong Kong Producer [1969] 2 Lloyd's Rep 536, US Ct of Apps (2nd Cir).

Gulf Italia Co v The Exiria (1958) 160 F Supp 956, US District Ct.

Inter-American Foods Inc v Coordinated Caribbean Transport Inc 1970 AMC 1303, US District Ct.

International Adjusters Inc v Korean Wonis-Son (1988) 682 F Supp 383, US District Ct.

Jessel v Bath (1867) LR 2 Exch 267.

Lebeau v General Steam Navigation Co (1872) LR 8 CP 88.

Lufty Ltd v Canadian Pacific Rly Co, The Alex [1974] 1 Lloyd's Rep 106, Can Fed Ct.

Mitsubishi International Corp v SS Palmetto State (1962) 311 F 2d 382, US Ct of Apps (2nd Cir).

Monica Textile Corp v SS Tana (1991) 952 F 2d 636, US Ct of Apps (2nd Cir).

Orion Insurance Co plc v M/V Humacao (1994) 851 F Supp 575, US District Ct.

Primary Industry Corp v Barber Lines A/S, The Fernland [1975] 1 Lloyd's Rep 461, US Civil Ct.

Quebec Liquor Corp v Dart Europe 1979 AMC 2382, Can Fed Ct.

Rederiaktiebolaget Gustav Erikson v Ismail, The Herroe and The Askoe [1986] 2 Lloyd's Rep 281.

Seguros Illimani SA v M/V Popi P (1991) 952 F 2d 89, US Ct of Apps (2nd Cir).

Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd, The Nagasaki Spirit [1997] 1 All ER 502, [1997] AC 455, HL.

Sperry Rand Corp v Norddeutscher Lloyd, The Bischofstein [1984] 1 Lloyd's Rep 122, US District Ct.

St John (H W) & Co Inc v The Flying Spray (1956) 149 Fed Supp 737, US District Ct.

St Paul Fire and Marine Insurance Co v Sea-Land Service Inc (1990) 735 F Supp 129, US District Ct.

Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd [1937] 4 All ER 304, [1938] 1 KB 459.

Van Breems v International Terminal Operating Co Inc, The Prinses Margriet [1974] 1 Lloyd's Rep 599, US District Ct.

Vegas v Cia Anonima Venezolana de Navegacion 1984 AMC 1600, US Ct of Apps (11th Cir).

Whaite v Lancashire and Yorkshire Rly Co (1874) LR 9 Exch 67.

Appeal

The defendants, Nigerian National Shipping Line Ltd (the shipowners), appealed from the decision of Colman J ([1996] 2 Lloyd's Rep 53) on 29 January 1996 on preliminary issues in the action brought by the plaintiffs (the cargo owners) for damages in respect of the loss of their cargo on the ship River Gurara. The facts are set out in the judgment of Phillips LJ.

Jervis Kay QC and *Christopher Smith* (instructed by *Hill Dickinson Davis Campbell*, Liverpool) for the shipowners.

Jeremy Russell QC and *Robert Thomas* (instructed by *Waltons & Morse*) for the cargo owners.

Cur adv vult

15 July 1997. The following judgments were delivered.

PHILLIPS LJ (giving the first judgment at the invitation of Hirst LJ). On 26 February 1989 a disastrous shipping casualty occurred. The River Gurara was on a laden voyage from Africa to Europe, when she suffered an engine breakdown. She stranded on the coast of Portugal and subsequently broke up with a loss of life and a total loss of cargo. Consignees of the cargo have sued on the bills of lading. Those bills were subject to the Hague Rules and the issue raised on this appeal is the manner of calculating the limit of the shipowners' liability under those rules. That issue arises in relation to cargo that was containerised. The bills of lading describe the cargo that was said by the shippers to be within the containers as constituting a specified number of 'bales' or 'parcels' or 'bags' or 'bundles' or 'crates' or 'cartons' or 'pallets'. Article IV, r 5 of the Hague Rules limits shipowners' liability to '£100 per package or unit'. The principal issue to be resolved is whether, in the circumstances of this case, the packages on which the limit is to be calculated are the containers, or the individual items within them. Such an issue has been the subject of judicial decision in many other jurisdictions, but this is the first time that it has arisen for determination in this country.

The bills of lading

The bills of lading were on the form of the UK West Africa Line. Under that form the carriage of the goods was, by a clause paramount, made subject to the Hague Rules if they formed part of the law of the place of shipment. The law of the places of shipment of the River Gurara's cargo incorporated the Hague Rules, in their unamended form, and thus the contract of carriage was rendered subject to those rules.

Clause 9(B) of the bills of lading provides:

> '*Shipper Packed Containers*. If a Container has not been packed or filled by or on behalf of the Carrier ... (B) notwithstanding any provision of law to the contrary the Container shall be considered a package or unit even though it has been used to consolidate the Goods the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by or on behalf of the Merchant and the liability of the Carrier (if any) shall be calculated accordingly.'

It is the shipowners' case that the containers in any event constitute the package or unit for the purpose of calculating the Hague Rules limit but that, should there be any doubt about this, cl 9(B) resolves it in their favour. It is the cargo owners' case that, on the true interpretation of art IV, r 5 it is the items within the containers that constitute the relevant packages or units and that cl 9(B) is rendered ineffective by art III, r 8 of the Hague Rules, which provides:

> 'Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations

provided in this Article or lessening such liability ... shall be null and void and of no effect.' a

On the application of the cargo owners, an order was made for the trial of the following preliminary issues:

'(a) Whether clause 9(B) of the UKWAL form of the bill of lading is contrary to Article III r. 8 of the Hague Rules and hence void. (b) If the answer to (a) is no whether the burden of proving that any particular container is "shipper packed" rests upon the Plaintiffs or the Defendants; (c) In circumstances where a container or pallet has been used to consolidate goods and the bill of lading states not only the number of containers and/or pallets, but also quantifies the number of goods loaded therein or thereon, whether the Defendants are entitled to limit their liability pursuant to Article IV, r. 5 of the Hague Rules by reference to (a) the number of containers or (b) the number of pallets or (c) the number of goods described by the bill of lading as having been loaded therein or thereon ...' b c

To answer issue (a) it is necessary first to address issue (c), in order to see whether there is any conflict between cl 9 of the bills of lading and art III, r 8. That was the approach adopted by the trial judge, Colman J (see [1996] 2 Lloyd's Rep 53). He held that it was the number of items described by the bill of lading as being within the containers, rather than the number of the containers themselves, that was the basis for calculation of the limit. He further held that, in so far as cl 9 provided to the contrary, it was contrary to art III, r 8, and therefore void. In those circumstances issue (b) did not arise. The shipowners now appeal against the judge's decision. d e

Question (c) is phrased on the premise that the Hague Rules limit falls to be calculated on the cargo, as described in the bill of lading. Colman J's decision proceeded on that basis. In the course of argument it became apparent that there was an important issue between the parties as to the effect of the description of the goods in the bill of lading. For the shipowners, Mr Kay QC, argued that, for the purpose of Hague Rules limitation, the description of the goods in the bill of lading was the definitive basis for calculating the limit. For the cargo owners, Mr Russell QC, argued that the limit fell to be calculated on the cargo as actually loaded. The bill of lading would normally be of evidential value, whether simply as prima facie evidence or as a result of estoppel, as to what was loaded, but it was not necessarily conclusive. f g

This issue is not merely academic. It goes to the root of the approach to the calculation of the limit in this case for which Mr Kay contends. In these circumstances the parties agreed that issue (c) required to be reformulated into a number of separate questions and suggested how this should be done. Varying slightly their suggestion, I propose to consider the following questions. h

(1) Where packages are shipped in containers does the Hague Rules limit, on its true construction, fall to be calculated on the number of packages or the number of containers? j

(2) What is the effect of the description in the bill of lading on the basis for calculating the Hague Rules limit? In particular,

(3) What is the effect of qualifying the description of the contents of a container by the words 'said to contain'.

The approach to the construction of the Hague Rules

The Hague Rules were the product of international convention. They were incorporated into the domestic legislation of a large number of seagoing nations and became widely used as the terms which governed the international carriage of goods by sea. Two considerations follow from this. First, it is legitimate when construing the rules to have regard to their objects, as disclosed by the travaux préparatoires of the convention. Second, particular respect should be paid to decisions of other jurisdictions in respect of the meaning of the rules, for the stated object of the convention was the unification of the domestic laws of the contracting states relating to bills of lading (see *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 at 342, 350, [1931] All ER Rep 666 at 673, 677 per Lord Atkin and Lord Macmillan and *The Hollandia* [1982] 3 All ER 1141 at 1145, [1983] 1 AC 565 at 572 per Lord Diplock.)

The objects of the limitation provisions of the Hague Rules are considered in a number of the United States authorities to which we have been referred and in a number of learned articles. For present purposes it is helpful to note that—

> 'one of the main purposes of limitation was to benefit cargo owners ... The intention of The Hague Rules was to give cargo a liberal limit of liability so as to preclude shipowners from inserting clauses in their bills of lading purporting to limit liability to ridiculously low figures.' (See Anthony Diamond QC 'The Hague-Visby Rules' [1978] 2 Lloyd's MCLQ 225 at 229.)

Mr Kay did not seek to gainsay this purpose of limitation, but he submitted that there was another purpose, to which he sought to give paramount effect. He contended that one of the objects underlying the rules was to ensure that the shipowner was able to verify the extent of his liability. Where the nature and value of the goods inside a package were not specifically declared, the limit of liability would attach to the package itself. The number of packages would be apparent to the shipowner so that he could verify the limit of his liability. It followed that if a number of smaller packages were encased in a larger package, the appropriate package for limitation purposes was the larger one, for that was the only one that the shipowner could verify. Applying this principle, where packages were put inside a container, the container was the appropriate package for limitation purposes.

Colman J was not attracted by this argument, nor am I. The verification principle is not apparent from consideration of the travaux préparatoires of the convention. Furthermore, as Colman J observed, rr 3 to 5 of art III, to which I shall refer in due course, envisage circumstances in which the shipowner will not be able to verify the number of packages shipped.

Mr Russell submitted that, when the convention was concluded in 1924, a figure of £100 represented a fair figure for the average value of a package shipped. To apply the same figure to a huge container stuffed with many packages would defeat the object of preventing shipowners from limiting their liability to sums that were absurdly low by reference to the average values of cargoes shipped. I consider that there is force in this submission. If Mr Kay is correct, the change in the method of stowing and carrying cargo that occurred when containerisation was introduced effected a radical change in the limitation regime. I would not readily reach such a conclusion.

Mr Russell further submitted that to describe a container as a package was to strain the natural meaning of that word. With this also I agree. In *Bekol BV v*

Terracina Shipping Corp (13 July 1988, unreported), which seems to be the only recorded case in which the English court has considered the meaning of 'package' in the Hague Rules, Leggatt J referred to the definition of that word in the *Oxford English Dictionary*: 'A bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up ...' A huge metal container stuffed with goods which will normally themselves be made up in individual packages is not naturally described as a package.

These two considerations alone would lead me, in the absence of authority, to conclude that where the Hague rules limit falls to be computed in relation to parcels of cargo which are loaded in containers, it is the parcels, and not the containers, which constitute the relevant packages.

When I turn to consider decisions on the point in other jurisdictions, they reinforce my conclusion. They attach significance to the manner in which the bill of lading describes the cargo—and that is a matter which I shall come to in due course—but where the bill of lading describes the cargo by reference to a specified number of packages loaded inside a specified number of containers, the courts have calculated the Hague Rules limit on the basis of the packages and not the containers. The reasons for so doing have been the same as those which have led me to favour this approach. Thus, in *Leather's Best Inc v The Mormaclynx, The Mormaclynx* [1971] 2 Lloyd's Rep 476 at 486, in a passage of his judgment which was repeatedly cited in later cases, Chief Judge Friendly, sitting in the United States Court of Appeals (Second Circuit), said:

> 'Still we cannot escape the belief that the purpose of sect. 4(5) of COGSA [US Carriage of Goods by Sea Act] was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that "package" is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be "contained."'

The preference for the packages, rather than the containers in which they are stuffed, at least where the bill of lading states the number of each, has been shown, not merely by the courts of the United States, but by those of Canada, Australia, France, Holland, Italy and Sweden. The weight of this international authority, coupled with my provisional conclusion formed independently of it, leaves me in no doubt that in the present case the shipowners' limit of liability should be calculated on the basis of the number of packages carried in the containers rather than the number of containers, unless the manner in which the cargo has been described in the bills of lading requires a contrary approach. That, however, is precisely the position for which Mr Kay contends, and it is helpful at this stage to summarise his submissions as to the effect of the bills of lading.

The effect of the description of the cargo in the bill of lading: shipowners' submissions

Mr Kay's submission is that whether the containers or the packages within them provide the basis for calculating the limit of liability depends upon the agreement of the parties, as embodied in the bills of lading. If the bills of lading state the number of containers, but not the number of packages within them, they choose the containers as the basis for limitation. In the present case most of the bills of lading itemise the contents of the containers, but subject to the

qualification of 'stc' ('said to contain'). Mr Kay submits that the effect of this qualification is to rob the statement of the contents of the containers of all evidential significance, so that all that the bills of lading do is to enumerate the containers. It follows that it is the number of containers which forms the basis for computing the limit of liability. In so submitting, Mr Kay has relied heavily on decisions of the United States courts, and those of other jurisdictions which have followed them, and I now turn to review those authorities.

The United States authorities

The United States enacted the relevant Hague Rules limit of liability in s 4(5) of the US Carriage of Goods by Sea Act 1936 in the following form:

> 'Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit ...'

In 1968 a protocol was agreed by a number of the states which had enacted the Hague Rules in an attempt to resolve the very problem with which this appeal is concerned. The rules, as amended by this protocol, are known as the Hague-Visby Rules. The material provision is art IV, r 5(c), which provides:

> 'Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.'

The United States did not enact this protocol but, as will become apparent, it had some influence on some of the relevant decisions none the less.

In *Standard Electrica SA v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft* [1967] 2 Lloyd's Rep 193, one finds in the decision of the Court of Appeals (Second Circuit) a theme that recurs in most of the subsequent decisions—the importance of the description of the goods on the face of the bill of lading. In that case seven pallets were lost, each of which contained six cartons, and the issue was whether the pallets or the cartons constituted 'packages' for the purpose of limitation. Chief Judge Lumbard commented (at 195):

> 'The dock receipt, the bill of lading, and libellant's claim letter all indicated that the parties regarded each pallet as a package ... Inasmuch as we are not faced with a case where the parties have attempted to define the word package by their agreement in a manner that might be repugnant to the Act ... we think that such characterizations are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a "package" and reflect the meaning given that term by the custom and usage of the trade.'

The court held that the pallets constituted packages for limitation purposes.

I have already referred to *The Mormaclynx*, another decision of the Second Circuit. In that case the bill of lading described the goods shipped as '1 container s.t.c. 99 bales of leather'. The bill of lading had a clause which provided 'shipper

hereby agrees that carrier's liability is limited to $500 with respect to the entire contents of each container ...' The court held that each of the 99 bales constituted a separate package and that the clause was an invalid limitation of liability as it was in conflict with the Act. That decision was followed by the same Circuit in *Shinko Boeki Co Ltd v Pioneer Moon, The Pioneer Moon* [1975] 1 Lloyd's Rep 199, where (at 201) Judge Friendly commented on an argument that a clause in the bill of lading deemed portable tanks to be packages: 'If, as we hold, the tanks furnished by the carrier were not packages, the quoted provision from the bill of lading could not make them so ...'

Meanwhile, in *Royal Typewriter Co v MV Kulmerland, The Kulmerland* [1973] 2 Lloyd's Rep 423, the Second Circuit had introduced a new concept. The bill of lading described the goods shipped as '1 Container said to contain Machinery'. The evidence showed that the container contained 350 adding machines, each in a cardboard carton. The issue was whether the limit of liability fell to be computed on the basis of 1 or 350 packages. Judge Oakes advanced the following proposition (at 431–432):

> 'The statutory purpose here leads us to suggest what for want of a better term we will call the functional economics test. In this regard, the first question in any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper. Here it is plain that they could not ... When, as here, the shipper's own individual units are not functional or usable for overseas shipment the burden shifts to the shipper to show why the container should not be treated as the "package."... Absent shipment in a functional packing unit, the burden is on the shipper to show by other evidence that his units are themselves "packages." Only then does custom and usage in the trade, the parties' own characterization or treatment of the items being shipped in supporting documentation or otherwise, and any other factor bearing on the parties' intent become relevant ...'

For a while the functional economics test was adopted, at least on the Second Circuit, coupled with the approach of attempting to deduce the intention of the parties as to what was to constitute a 'package' from the description of the goods used in the bill of lading: see *Nichimen Co v MV Farland* (1972) 462 F 2d 319 and *Rosenbruch v American Export Isbrandtsen Lines Inc, The Container Forwarder* [1974] 1 Lloyd's Rep 119. But in 1976 the scene shifted to the Pacific seaboard where, in *The Aegis Spirit* [1977] 1 Lloyd's Rep 93, District Judge Beeks, an experienced Admiralty practitioner, sitting on the Ninth Circuit in Seattle, subjected it to a powerful attack. In that case, the bill of lading stated under the heading 'No. of Containers or Pkgs.' '2 containers'. It went on to state under the heading 'Kind of Packages; Description of Goods': 'SHIPPER'S LOAD COUNT AND SEAL. Said to contain ... 601 cartons ...' Judge Beeks held that the cartons and not the containers constituted the packages for limitation purposes. He began his analysis by stating (at 99):

> 'To be satisfactory, a test for determining whether a container is a package must reflect the realities of the maritime industry of today while remaining faithful to the express language and the legislative policy embodied in the pertinent COGSA provisions.'

He then went on to observe that it was impossible to derive the functional economics test from the legislation. He added (at 100):

> 'Second, the "functional economics" test suffers from a more serious flaw: it makes the intent of the parties, as revealed by the available evidence, the touchstone in applying the COGSA liability to a containerized shipment. This is true because evidence of intent will serve to rebut the initial presumption and identify conclusively, it would appear, the COGSA package. The better and more traditional approach, which I adopt, is to conscientiously construe the legislation in the factual context seeking to effectuate the *legislative*, not the parties', intent and purpose. The undoubted objective of 46 U.S.C. s. 1304(5) was to establish a minimum floor below which carriers subject to the act could not reduce their liability for cargo damage. If carriers alone, or even carriers and shippers together, are allowed to christen something a "package" which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable. The package limitation provision serves no purpose whatsoever if the Courts' function in applying it is to merely identify and uphold the parties' private definition of COGSA package. Of course, the parties' characterization may often be wholly reasonable and consistent with the language and purpose of the statute, but the point to be made is that it is not the parties' characterization of the shipment, but the Court's interpretation of the statute, that controls. A further undesirable side effect of a rule based upon the parties' intentions is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill can never be sure what the shipper and carrier "intended" to treat as a package, except to the extent that said intent can be deduced from the four corners of the bill itself. Bills of lading, though, are hardly appropriate vehicles for such expressions of mutual intent, because their contractual terms are commonly the product of unilateral draftsmanship by the carrier incorporating largely self-serving provisions.' (Judge Beeks' emphasis.)

Judge Beeks' disapproval of the functional economics test swiftly received the indorsement of other Circuits. Thus in *Yeramex International v The Tendo* 1977 AMC 1807 District Judge Kellam, sitting in Virginia, followed Judge Beeks in rejecting the functional economics test and holding that 'packages' must be given their normal meaning. Then, in *Mitsui & Co Ltd v American Export Lines Inc, Armstrong Cork Canada Ltd v American Export Lines Inc* (1981) 636 F 2d 807, a decision of the Court of Appeals on the Second Circuit, Judge Friendly commended Judge Beeks' judgment in *The Aegis Spirit* and rejected the functional economics test. After referring to the protocol, he said (at 821):

> 'Even if the language and purposes of COGSA left us in doubt as to whether carrier-furnished containers whose contents are disclosed should be treated as packages, the interest in securing international uniformity would thus suggest that they should not be so treated.'

This decision was followed by a number of cases in which the courts treated the unamended provisions of COGSA as having the same effect if they had been amended in accordance with the protocol.

In *Binladen BSB Landscaping v MV Nedlloyd Rotterdam* (1985) 759 F 2d 1006, a decision of the Second Circuit, Judge Mansfield set out a number of 'basic principles' the first of which was 'that the touchstone of our analysis should be the contractual agreement between the parties, as set forth in the bill of lading' (see at 1012–1013). After reviewing the authorities, he propounded the following rule which 'not only accords with the 1968 Brussels Protocol, but has the virtue of certainty'—

> 'when the bill of lading does not clearly indicate an alternative number of packages, the container must be considered as a COGSA package if it is listed as a package on the bill of lading ...' (See at 1015.)

He stated, however, that because this rule might produce unexpected results it would not be applied retroactively, but only to bills of lading prepared after the date of the decision.

The *Binladen* case was followed by the Eleventh Circuit in *Hayes-Leger Associates Inc v M/V Oriental Knight* (1985) 765 F 2d 1076. In that case Judge Kravitch (at 1080) summarised the law in the following two rules:

> '(1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves.'

Once again the court said that the second rule would only be applied prospectively.

Other foreign decisions

A similar approach to that of the recent American decisions has been adopted by the Canadian courts: see *J A Johnston Co Ltd v Tindefjell, The Tindefjell* [1973] 2 Lloyd's Rep 253 and *Haverkate v Toronto Harbour Comrs* (1986) 30 DLR (4th) 125 and by the New South Wales Supreme Court in *P S Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's Rep 413. The courts of Holland and France and Sweden appear to have adopted the same approach. Italy seems to strike a discordant note. In *Comesmar (Cia Mediterranea Servizi Marittimi SpA) v A Carniti & C SpA*, a decision of the Court of Cassation of 27 April 1984, No 2643 the court held:

> 'The container, if used by the carrier, is, in fact, only a delimitation of space used to organise the on-board goods—packaged or loose—and is equivalent to loading in a hold. If, as in this case, the shipper uses a container, there are two possibilities: either the packages contained in it will be indicated, in which case the package will be the unit of measurement; or there will be no indications, and in this case, according to the ratio of the convention regulations, the unit of measurement will not be the container, understood as a "package", but the freight unit of the goods contained in it.'

Colman J held that, adopting a purposive approach to construction, it was appropriate to follow the approach of the American, Canadian, Australian, French and Dutch courts. His conclusions were as follows ([1996] 2 Lloyd's Rep 53 at 62–63):

'I therefore hold that where: (i) separately packed items have been loaded into a container by the shipper or his agents and the carrier has had no opportunity to tally or verify the contents of the container; and (ii) the carrier or his agent signs a bill of lading which, as here, describes under the heading "container No.s" the identification numbers of the various containers received and states under the heading "Number and Kind of Packages; Description of Goods" words such as "1 x 20' container stc: 8 cases" of goods there are for the purposes of art. IV, r. 5, eight packages and not one. Moreover, if the contents of the container are described by words which leave it unclear whether they are separately packed for transportation, the container will be the package and not the individual items. If the contents of the container are described in the bill of lading as said to contain so many separately packed items which in turn are said to contain a specified number of separately packed items, the number of packages will be the smallest category of separately packed items so described. For example, in the present case, typical of several bills of lading is one (interest 32) which bears the words "1 x 20' container STC: 8 pallets STC: 1855 bundles Ghana Makore and Sapele Veneer". The correct approach is clearly to treat the bundles and not the pallets as the packages under art. IV, r. 5. Once the verification principle has been rejected and it is accepted, following the authorities to which I have referred, that it is the intention of the parties as expressed in the bill of lading which is the main determinant of what is to be treated as a package, there is no logical justification for confining consideration as packages, to the larger separately-packed items identified in the bill of lading. The insertion in the bill of lading of the lesser separately-packed items, although they are bound together on pallets or in similar consolidated groups, is a clear indication that those lesser items are to be treated as the unit of measurement for limitation purposes.'

Mr Kay's principal criticism of the judge's conclusions is that he treated the bills of lading as enumerating the packages stowed within the containers, notwithstanding that the bills were qualified by the letters "stc". Mr Kay submits that the judge should have held that this qualification had the effect that there was no effective enumeration of the contents of the containers, so that the containers fell to be treated as the packages for limitation purposes.

Conclusions

While I appreciate the desirability of international uniformity, I am unable to accept that the basis of limitation under the unamended Hague Rules depends upon the agreement of the parties as to what constitute the relevant "packages", as represented by the description of the cargo on the face of the bill of lading. In according to the unamended Hague Rules the same effect as the protocol the American courts were, in effect, legislating, as was recognised by the remarkable decision of the Second and Eleventh Circuits to apply their interpretation prospectively only. I do not believe that it is an interpretation that can properly be given to the unamended Hague Rules. My reasons echo those of Judge Beeks in *The Aegis Spirit*.

(1) The Hague Rules limitation provisions were designed to prevent shipowners imposing on shippers unrealistically low limits of liability. If the parties are permitted to agree their own definition of "packages", shipowners will, by applying that definition to containers, succeed in evading the minimum

limit of liability that the Hague Rules aimed to secure. The American courts repeatedly held that so-called 'boilerplate' clauses in bills of lading, stating that containers were to be deemed to be "packages", were ineffective as being in conflict with the COGSA limit. I find it illogical that they held that shipowners could achieve the same result by ensuring that the number of containers, but not of the packages within them, should appear on the face of the bill of lading.

(2) Statements in a bill of lading describing the cargo shipped do not constitute an agreement between the parties as to the identity of that cargo.

The effect of the bill of lading

The Hague Rules deal specifically with the effect of the description of the goods in the bill of lading. Article III provides:

> '... 3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper; (c) The apparent order and condition of the goods: Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.
>
> 4. Such a bill of lading shall be primâ facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c).
>
> 5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.'

Thus, under the Hague Rules, an unqualified description of the goods in the bill of lading does not constitute a binding agreement between the shipper and the carrier that the goods have been shipped as stated, but merely prima facie evidence of that fact. Furthermore, even before the initiation of container carriage, the rules catered for the possibility that the carrier would have no reasonable means of checking the 'number of packages or pieces, or the quantity, or weight', in which case he was under no obligation to record these matters on the bill of lading.

Nor, prior to the Carriage of Goods by Sea Act 1992 did a statement in a bill of lading give rise to an estoppel against the shipowner: see *Grant v Norway* (1851) 10 CB 665, 138 ER 263.

It is important to bear in mind that, before any question of limitation of liability can arise, the onus is on the cargo owner to prove his loss. Where he does so by reliance on the bill of lading as prima facie evidence of what is shipped, the description of the goods in the bill of lading will also form the basis of calculation of the Hague Rules limit of liability. Where, however, the shipowner discharges the heavy onus of displacing the evidential effect of the bill of lading, or the cargo owner establishes his claim to damages by reference to evidence extrinsic to the bill of lading, then I am of opinion that the Hague Rules limit of liability falls to be calculated by reference to the particulars of the cargo and its packaging as it is proved to have been on loading, not by reference to the description in the bill of lading. A consignee who proves that he has lost a container containing 3 packages will be subject to a limit calculated by reference to those packages, even though they were not enumerated in the bill of lading. If the shipowner finds himself exposed to a greater limit than that which would have resulted from the goods as described in the bill of lading, he may have a claim for breach of warranty against the shipper under art III, r 5.

The position that I have depicted is inconvenient and can lead to uncertainty, which the United States decisions avoid, but that cannot justify an interpretation which the rules cannot bear. Furthermore, in most cases the problem is theoretical rather than practical, for the parties usually accept that the description in the bill of lading is accurate and base the limit upon it. The protocol has largely removed the problem in those cases to which the Hague-Visby Rules apply, by substituting a very different limitation regime.

The effect of qualifying the description in the bill of lading

Under the proviso to art III, r 3 of the Hague Rules the carrier is not required to state on the bill of lading the number of packages received when he has had no reasonable means of checking this. The proviso plainly applies in relation to packages stuffed in containers by the shipper or his agent. In such circumstances it is commonplace for the bill of lading to state the number of packages as furnished by the shipper, but to qualify the statement with the words 'weight, number and quantity unknown'. Where the bill of lading is so qualified it does not even constitute prima facie evidence that the goods detailed by the shipper have been shipped: see *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2 KB 664, *A-G of Ceylon v Scindia Steam Navigation Co Ltd* [1961] 3 All ER 684, [1962] AC 60 and *The Atlas* [1996] 1 Lloyd's Rep 642. In such circumstances the onus is on a claimant to prove by extrinsic evidence the shipment of any goods which he claims have been lost or damaged. The shipowner similarly has to rely on extrinsic evidence—probably the same evidence—to demonstrate the number of packages upon the basis of which his limitation of liability falls to be computed.

In the present case, the description of the goods in the bills of lading was qualified simply be the letters 'stc'. Mr Kay submitted that such a qualification has the same effect as qualifying the description of the goods 'weight, quantity, number unknown'. Assuming that this is correct, I do not see how Mr Kay could properly contend that the parties had agreed that containers were to be the relevant packages for limitation purposes. Where the shipper gives details of the packages shipped and the carrier clauses the bills of lading to indicate that he does not accept those details, the bills of lading manifestly do not indicate any agreement at all as to the description of what has been shipped. Thus even if Mr Kay were correct in his contention that the American authorities should be

followed, this would not lead to the conclusion that limitation fell to be calculated on the basis of the number of containers rather than the number of packages proved to have been lost. a

The effect of 'stc'

Mr Russell conceded in argument that the effect of qualifying a description of the goods within a container by the words 'said to contain' was the same as using the qualification 'contents unknown' or 'weight, number, quantity unknown'. If this concession is rightly made, it will follow, as Mr Russell accepted, that his clients will have the onus of showing, by extrinsic evidence, what cargo was loaded aboard the Gurara and lost with the ship, and that the shipowners' limit of liability will similarly fall to be calculated on the basis of extrinsic evidence. b

The effect of the qualification 'said to contain' does not seem to have been canvassed in argument in the court below. Colman J proceeded on the basis that that qualification had no effect on the evidential status of the bills of lading. The American decisions equally do not seem to have attached any significance to that qualification. While I appreciate the reasoning that led Mr Russell to make his concession, it seems to me at least arguable that the words 'said to contain' do no more than make plain that the carrier is, as required by art III, r 3, stating on the bill the 'number of packages ... as furnished in writing by the shipper' without dissenting from the description, so that the description can be relied upon as providing prima facie evidence as to what was within the containers. c d

For the purposes of resolving the preliminary issues brought before the court, the governing principle is that the shipowners limit of liability under the Hague Rules falls to be calculated on the number of packages that are proved to have been loaded within the containers and not upon the number of containers. e

Before Colman J a subsidiary issue also arose as to whether what he described as 'obscure wording' on bills of lading which referred to containers loaded with pallets of bales constituted agreement between the parties that the pallets or the bales should constitute 'packages' for the purpose of limitation. On a narrow balance he came to the conclusion that the bales were to be treated as packages. I have dissented from the approach of attempting to deduce an agreement of the parties as to limitation from the face of the bill of lading. In the light of Mr Russell's concession, there is also now doubt as to whether the description in the bills of lading is any evidence of the contents of the containers. If one assumes, however, that the bills of lading do constitute such evidence, and that the court has no other evidence, I would agree with the conclusion of the judge that the bales rather than the pallets constitute 'packages' for limitation purposes. f g

Clause 9(B) of the bill of lading h

Mr Kay did not seek to challenge the judge's decision that, on the premise that packages rather than containers provided the basis for the calculation of the Hague Rules limit, cl 9(B) of the bill of lading was rendered ineffective by virtue of art III, r 8 of the Hague Rules. The order of Colman J must be varied so as to accord with this judgment. j

The effect of this judgment must be to dismiss the appeal, albeit that neither the issues dealt with nor the answers given to them precisely accord with the decision of the judge.

MUMMERY LJ. I agree with the judgment of Phillips LJ.

HIRST LJ. I agree that this appeal should be dismissed, though I for my part would do so on precisely the same grounds as those adopted by Colman J, ie applying the approach now adopted by the American, Canadian, Australian, French and Dutch courts, and in effect treating the unamended Hague Rules as having the same effect as the protocol.

I fully recognise the shortcomings of this approach as demonstrated by Phillips LJ, but in my judgment these are outweighed by the need for international uniformity.

Appeal dismissed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce

COURT OF APPEAL, CIVIL DIVISION
NOURSE, EVANS LJJ AND SIR RALPH GIBSON
30 APRIL, 25 JUNE 1997

Sale of goods – Payment – Confirmed letter of credit – Fob contract – Freight pre-paid bills of lading – Whether buyers entitled to require sellers to present 'freight pre-paid' bills of lading in order to obtain payment.

Contract – Repudiation – Charterparty – Repudiation for wrong reason – Contracting party entitled to refuse performance of contractual obligations – Sellers repudiating contract for late arrival of vessel – Late arrival not valid reason for repudiation – Sellers later claiming to be entitled to repudiate because letter of credit opened by buyers not conforming to contract – Whether contracting party entitled to rely on non-contractual letter of credit as reason for repudiation.

The buyers agreed to purchase 25,000 tonnes of wheat at the price of $US 135 per tonne with an additional payment of $7 per tonne payable if the buyers failed to take the contractual quantity. The terms of the contract specified fob shipment on a vessel chartered by the buyers and that payment was to be by an irrevocable and confirmed letter of credit. In order to comply with the requirements imposed on them by their principal, the buyers stipulated that payment under the letter of credit would be made on terms that the sellers presented bills of lading issued as 'freight pre-paid'. The buyers' vessel was late arriving at the loading port and gave notice of readiness one day later than stipulated in the contract. The sellers refused to load and made extra-contractual demands for pre-payment of the price and for an additional payment of $7 per tonne on the grounds of the late arrival of the vessel. The buyers' claim for damages for the sellers' refusal to load and failure to ship the contract goods was referred to the Board of Appeal of GAFTA. The board made an award in favour of the buyers, holding that the late arrival of the vessel was not in the circumstances a valid reason for refusing to load or to claim the additional payment of $7 per tonne and that the buyers were entitled to demand that the letter of credit be restricted to payment against 'freight pre-paid' bills of lading. The award was upheld by the judge on appeal, but on the grounds that although a term could not be implied in the contract that the buyers were entitled to stipulate that payment was to be made under the letter of credit only against freight pre-paid bills of lading, so that the buyers were in breach of contract, the sellers could not rely on that breach as a justification for their refusal to load the vessel because they had not relied on it at the time of refusal and it would be unfair and unjust to permit them to do so. The sellers appealed and the buyers cross-appealed.

Held – (1) In the absence of any special agreement, the sellers under a sale contract on normal fob terms were entitled to see a conforming letter of credit in place before they began shipment of the goods and their obligation was to ship the contract goods on board the vessel provided by the buyers for carriage on whatever terms as to freight and otherwise the buyers agreed with the shipowner. The sellers were expressly free of any obligation to pay freight, since

freight pre-paid bills of lading were contrary both to the underlying concept of the fob contract and to the essential commercial purpose of the letter of credit machinery. Accordingly, the buyers were not entitled to require the sellers to procure and produce freight pre-paid bills of lading in order to receive payment under the letter of credit. It followed that the buyers were in breach of contract by their failure to open a letter of credit conforming with the sale contract (see p 525 *b* to *f*, p 526 *d* and p 531 *j*, post).

(2) A contracting party who, after he became entitled to refuse performance of his contractual obligations, gave a wrong reason for his refusal, did not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not. However, that principle did not apply if the point which was not taken could have been put right, or if an unequivocal representation to the contrary effect was made and acted on by the other party, so that it would be unfair and unjust for the party who made the representation to rely on his contractual rights. In the instant case, the buyers' breach of contract could not have been put right by the buyers because by then the time for contractual performance of the buyers' letter of credit obligation had passed and the sellers' refusal was already justified by the buyers' breach. Furthermore, in the absence of any unequivocal representation by the sellers that they relinquished or would relinquish their rights arising out of the buyers' failure to open a letter of credit in the form required by the sale contract, the sellers could not be said to have misled the buyers into believing that the freight pre-paid requirement was no longer important to them. It followed that the sellers were entitled to rely on the buyers' breach of contract in failing to open a letter of credit conforming with the sale contract even though they had not asserted that they were relying on it at the time of their refusal to perform the contract. Accordingly, the appeal would be allowed and the cross-appeal dismissed (see p 526 *f g*, p 527 *d e* and p 530 *j* to p 531 *b e* to *j*, post); dictum of Greer J in *Taylor v Oakes Roncoroni & Co* (1922) 127 LT 267 at 269 and of Somervell LJ in *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770 at 773 applied; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 considered.

Notes

For fob contracts generally, see 41 *Halsbury's Laws* (4th edn) paras 931–939, and for cases on the subject, see 39(2) *Digest* (Reissue) 584–591, *4956–4998*.

Cases referred to in judgments

Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D [1985] 2 All ER 796, [1985] 1 WLR 925, CA.

Berg (V) & Son Ltd v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep 499, CA.

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1982] 1 All ER 925, [1979] 1 WLR 783; *affd* [1982] 1 All ER 925, [1981] 1 WLR 232, CA; *affd* [1982] 1 All ER 925, [1983] 2 AC 352, [1982] 2 WLR 253, HL.

Bremer Handelsgesellschaft mbH v C Mackprang Jr [1979] 1 Lloyd's Rep 221, CA.

Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109, HL.

Central London Property Trust Ltd v High Trees House Ltd (1946) [1956] 1 All ER 256, [1947] KB 130.

Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd (NV Handelsmaatschappij J Smits Import-Export, third party) [1954] 1 All ER 779, sub nom *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 2 WLR 496.

Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri [1979] 1 All ER 307, [1979] AC 757, [1978] 3 WLR 991, HL.
Ficom SA v Sociedad Cadex Ltda [1980] 2 Lloyd's Rep 118.
Fisher Reeves & Co Ltd v Armour & Co Ltd [1920] 3 KB 614, CA.
Green v Sichel (1860) 7 CBNS 747, 141 ER 1009.
Heisler v Anglo-Dal Ltd [1954] 2 All ER 770, [1954] 1 WLR 1273, CA.
Heyman v Darwins Ltd [1942] 1 All ER 337, [1942] AC 356, HL.
Ismail v Polish Ocean Lines [1976] 1 All ER 902, [1976] QB 893, [1976] 2 WLR 477, CA.
Panchaud Frères SA v Etablissements General Grain Co [1970] 1 Lloyd's Rep 53, CA.
Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila [1988] 3 All ER 843.
Pyrene Co v Scindia Steam Navigation Co Ltd [1954] 2 All ER 158, [1954] 2 QB 402, [1954] 2 WLR 1005.
Stach (Ian) Ltd v Baker Bosley Ltd [1958] 1 All ER 542, [1958] 2 QB 130, [1958] 2 WLR 419.
Taylor v Oakes Roncoroni & Co (1922) 127 LT 267, KBD and CA.
Toepfer (Alfred C) v Cremer [1975] 2 Lloyd's Rep 118, CA.

Cases also cited or referred to in skeleton arguments

Alma Shipping Corp v Union of India, The Astraea [1971] 2 Lloyd's Rep 494.
André et Cie v Cook Industries Inc [1987] 2 Lloyd's Rep 463, CA.
Avimex SA v Dewulf & Cie [1979] 2 Lloyd's Rep 57.
Cerealmangimi SpA v Toepfer, The Eurometal [1981] 1 Lloyd's Rep 337.
Denmark Productions Ltd v Boscobel Productions Ltd [1968] 3 All ER 513, [1969] 1 QB 699, CA.
Etablissements Chainbaux SARL v Harbormaster Ltd [1955] 1 Lloyd's Rep 303.
Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd [1952] 1 Lloyd's Rep 527, CA.
Rickards (Charles) Ltd v Oppenheim [1950] 1 All ER 420, [1950] 1 KB 616, CA.
Scandinavian Trading Co A/B v Zodiac Petroleum SA, The Al Hofuf [1981] 1 Lloyd's Rep 81.
State Trading Corp of India Ltd v Cie Francaise d'Importation et de Distribution [1983] 2 Lloyd's Rep 679.
Syros Shipping Co SA v Elaghill Trading Co, The Proodos C [1980] 2 Lloyd's Rep 390.
Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA [1979] 2 Lloyd's Rep 98, CA.
Universal Cargo Carriers Corp v Citati [1957] 2 All ER 70, [1957] 2 QB 401; *affd* [1957] 3 All ER 234, [1958] 2 QB 254, CA.
Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] 2 All ER 271, [1972] AC 741, HL.

Appeal and cross-appeal

By notice dated 12 June 1996 Glencore Grain Rotterdam BV (formerly Richco Rotterdam BV) (the plaintiffs/sellers) appealed from the decision of Longmore J ([1997] 1 Lloyd's Rep 578) delivered on 7 February 1996 dismissing their appeal from, and affirming, the award of the Board of Appeal of GAFTA dated 17 October 1995 awarding the defendants/buyers, Lebanese Organisation for International Commerce, damages of some $500,000 plus interest and costs for the seller's refusal and failure to ship cargo of 25,000 tonnes of Turkish soft

milling wheat from Iskenderun, Turkey on the mv Christinaki. By notice dated 20 June 1996 the defendants cross-appealed. The facts are set out in the judgment of Evans LJ.

Timothy Young QC (instructed by *Richards Butler*) for the plaintiffs.
Mark Havelock-Allan QC (instructed by *Turner & Co*) for the defendants.

Cur adv vult

25 June 1997. The following judgments were delivered.

EVANS LJ (giving the first judgment at the invitation of Nourse LJ). This appeal is from a judgment of Longmore J ([1997] 1 Lloyd's Rep 578) in the Commercial Court, by which he upheld an award of the Board of Appeal of GAFTA dated 17 October 1995, though on different grounds. It raises two issues of law. The first issue, put shortly, is whether the buyers under a sale contract on fob terms incorporating GAFTA Form 64 were entitled to open a letter of credit in favour of the sellers which was restricted to payment against freight pre-paid bills of lading. The second is whether, if the buyers were not so entitled and were thereby in breach of contract, the sellers can rely on that breach to justify their own refusal and failure to ship the contract goods.

The judge has certified two questions of law of general public importance, pursuant to s 1(7)(b) of the Arbitration Act 1979, in the schedule to his order dated 19 April 1996. I should set them out here:

> '(1) What approach should the Court adopt on seeking to ascertain, by a process of implication, what terms of a letter of credit are contractual under an FOB sale which provides for payment to be made by an irrevocable and confirmed letter of credit but does not otherwise specify the terms which that letter of credit should contain?
>
> (2) Whether the principle that a party, giving a wrong or inadequate reason for refusal to perform a contract, may justify his refusal by relying on some other reason not relied on at the time, is qualified by a further principle (a) that such other reason is one which, if relied on at the time of refusal to perform, could not have been put right; and/or (b) that a party who gives one ground for his refusal to perform may by his conduct be precluded from setting up a different ground if it would be unjust or unfair to allow him to do so.'

The Board of Appeal found that the buyers were entitled to limit the letter of credit to payment for freight pre-paid bills of lading. They awarded the buyers damages totalling about $500,000 plus interest and costs for the seller's refusal and failure to ship. The sellers appealed to the Commercial Court with the leave of Colman J. Longmore J held that the buyers were not so entitled, but he upheld the award on the ground that the sellers were precluded from relying on the buyer's breach, because they did not refer to the defect in the letter of credit at the time of their refusal to ship the goods, and in the circumstances it would be unfair and unjust to permit them to rely on the defect as a defence to the buyer's claim. He applied what he held was the underlying principle of the decision in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53.

The objection based on the *Panchaud Frères* case made fleeting appearances both at the Board of Appeal hearing and before Longmore J, but it was not

developed or made the subject of detailed submissions on either occasion. Mr Young QC, counsel for the sellers, asked the judge, after his judgment was given but before his order was drawn up, to hear further submissions on the issue. The judge refused this application, but as already stated he certified the issue as the second question of law in the appeal.

The contract

The appellants, Glencore Grain Rotterdam BV (formerly Richco Commodities Rotterdam BV), agreed to sell 25,000 tonnes of Turkish soft milling wheat at the price of $US135 per tonne 'FOB stowed trimmed one safe berth Iskenderun' for shipment 'March 1993 M/V Christinaki—eta Monday 29.03.1993'. The relevant terms as to payment were:

> 'Payment: Cash at sight by an irrevocable letter of credit which shall be opened prior loading vessel M/V Christinaki ready to load Monday 29. 03. 1993 ... Certificates of weight, quality and conditions to be issued by T.M.O and/or first class superintendence company ...'

The terms and conditions of the TMO (Turkish Grain Board) contract and of GAFTA Form 64 (General contract fob terms for grain in bulk) were expressly incorporated. Clause 10 of the TMO terms contains certain more detailed provisions for payment by means of a letter of credit, but these are not relevant for present purposes, the issue being whether a letter of credit which required the sellers to present 'freight pre-paid' bills of lading was or was not in conformity with the sale contract.

The sellers and the buyers, each to the knowledge of the other, were in effect intermediaries between TMO, who were the suppliers and intended shippers of the wheat, and the Ministry of Supply and Internal Trade of the Syrian Arab Republic, known as 'Hoboob', who were the ultimate buyers. The Board of Appeal found that each party was aware of the terms on which the other had bought and sold the wheat, from TMO and to Hoboob respectively. What became relevant was that the sellers' purchase from TMO required February shipment, TMO as seller having the right to cancel from 30 March in the event that the appellants, as their buyers, failed wholly or partly to take the contractual quantity, 'and also to ask a penalty of US$7·00 per mt on the unlifted balance quantity' (award para 7). The respondents' sale to Hoboob was on c and f (cost and freight) terms which required them to provide a full set of bills of lading marked 'freight pre-paid'.

The sale contract was dated 22 March 1993. It was apparent from the contract itself that the vessel would present itself for loading close to the end of the March 1993 shipment period. The terms included cl 8.2:

> '... NOR [notice of readiness] to be given only in official working hours [defined as 8.00–17.00 Monday to Friday] in written form WIBON but customs cleared, passed inspection and granted free pratique. After acceptance of valid NOR, time starts to count ...'

Letter of credit

The buyers having formally nominated the Christinaki (or substitute) to load under the contract 'ETA Iskenderun 28th March', their bank on 24 March sent a tested letter of credit telex to the sellers. According to para 16 of the award:

> 'It provided for shipment: "April 1993" and had a validity until 21st May. It required a full set of marine Bills of Lading marked (inter alia) "freight prepaid". It also required various certificates ... [On the following day, 25 March] the Sellers (through the brokers) acknowledged receipt of the Letter of Credit that day, which however, was not (they said) in accordance with the terms of the Contract. They therefore prepared their own draft L/C, the text of which they were sending on by fax separately and they asked the Buyers to open the L/C exactly as per the Sellers' draft ... [The sellers' draft] differed from that drawn by the Buyers in a number of minor points and in the following principal respects ... (b) The Bills of Lading were to be marked "freight payable as per Charterparty" and; (c) It provided:—"Shipment Period: latest 30.04.1993".'

In addition, according to para 16 of the award, the sellers asked the buyers to confirm that they had—

> 'given your instructions to the Owners and Master of the "CHRISTINAKI" to unconditionally release all original bills of lading to (the Sellers) ... on completion of loading of the vessel as per the wording requested by (the Sellers) ...'

The next communication between the parties regarding the letter of credit terms was on 29 March, when, as para 19 of the award states—

> 'the Buyers advised the Sellers that they had instructed their bank: "To amend the L/C in a way to comply the maximum we can with sellers' requirements without affecting our need for docs to comply also with our receivers' L/C requirements. B/L shall be released immediately upon completion of load and shall show freight pre-paid without any problem. Freight shall be paid prior to completion of load."'

Paragraph 20 of the award reads:

> 'Later that same day, 29th March, the Buyers advised their bankers of amendments required to their Letter of Credit, which had already been opened, to meet the Sellers' requirements. These included deleting the requirements as to legalisation of certain documents by the Syrian Embassy and amending the shipment clause to read: "Shipment: April 1993 from Iskenderun". No change however was proposed to the endorsement to the Bills of Lading as "freight pre-paid". A copy of these amendments was immediately faxed to the Sellers.'

The sellers did not acknowledge this communication and there are no further findings which refer to the letter of credit or its terms. It continued to specify 'freight pre-paid' bills of lading. The board found as a fact (in para 63 of the award) 'that the shipment period under The Contract was by mutual agreement of the parties amended to April 1993'. There is no finding that the sellers accepted or the parties agreed that the letter of credit, as it was opened, was in conformity with the contract.

Other communications

These were concerned on a daily basis with two main topics: the expected arrival of the vessel, which was discharging a previous cargo at Nemrut Bay, and a projected visit by a Syrian delegation to inspect the goods intended for shipment

at the loading port. The sellers were also in communication with TMO as required by their contract with them. Additionally, according to para 17 of the award, on 26 March there was a telephone conversation between sellers and buyers which resulted in the following telex message sent by the buyers (set out in para 17 of the award):

> 'We are ready to negotiate the request of Sellers for payment outside LC provided payment to be effected upon completion of loading and subject reaching an agreement with Sellers [regarding inspection before loading].'

On 29 March the vessel completed discharge and sailed from Nemrut Bay, the master giving an ETA Iskenderun 31 March at 2000 hrs. The buyers advised the sellers accordingly (para 22 of the award). The buyers later encouraged the master to arrive by 1700 hrs on 31 March. This presumably was to enable him to give notice of readiness during working hours that day.

In the event, the vessel arrived on 31 March but not until 2315 hrs. She tendered notice of readiness which was endorsed as received by TMO on 1 April at 0900 hrs, and she was customs cleared between 0900 and 1000 hrs that morning. However, she was rejected by SGS because of loose rust in all holds, which required sweeping, and she was not re-inspected and found ready to load until sometime on 2 April, which was a Friday. TMO accepted the notice of readiness on Monday, 5 April at 0800 hrs.

Meanwhile, there were further communications referred to in the award, which have to be set out in full:

> '26. Just before 1900 hours that evening the Buyers sent a further telex to the Sellers complaining that their delegates had been in Turkey for 2 days and the Syrian delegates for 3 days, only to be told that afternoon that T.M.O. advised everybody that only SGS delegates were allowed to enter the silos to effect sampling and analysis. The Buyers expressed their disappointment and thereby put Sellers on notice that: "Unless the Syrian delegation/Buyers' delegations are allowed same as SGS delegation, cargo cannot be loaded and all parties shall face a situation of impossibility of execution of Contract."
>
> 27. On 31st March at 15.29 hrs. the Sellers telexed the Buyers stating that they had sold goods to be shipped with M.V. "CHRISTINAKI" vessel load ready in loadport on 29.03.93. Vessel (they said) did not arrive in loadport and the Sellers thereby informed the Buyers "that as per T.M.O. Contract conditions they have the option to debit us US$7-/mt or to cancel the Contract". There was to be a meeting that day in T.M.O. office where they would make a decision about this, but the Sellers meanwhile held the Buyers responsible for all the costs and consequences that would result from late arrival of the vessel in loadport ...
>
> 31. On 1st April the Buyers sent a telex reply to the Sellers' telex of 31st March at paragraph 27 above advising them to: "... note that M.V. "CHRISTINAKI" arrived at Iskenderun and tendered its NOR on Wednesday 31.03. 1993 at 23.15 local time which is as per contract terms." The Buyers therefore rejected the Sellers' telex and asked the Sellers to advise urgently when they expected to load her "since as you know the Lebanese/Syrian delegation is already waiting to check the goods at loading since 2 days as per Contract/broker confirmation". The Buyers alleged that the Sellers "did not instruct T.M.O. about loading operation and did not pass to them documentary instructions which will delay the commencement of loading."

The tele went on: "Re your proposition through brokers for prepayments of goods against a discount in the price (after the goods are completely checked in the silo and analysed by the delegation) as you are aware T.M.O. still not authorize this delegation to enter the silo." They asked the Sellers to advise clearly their position towards the "CHRISTINAKI" ...

33. Later on 1st April the Sellers telexed the Buyers, further to their telex of 31st March as paragraph 27 above, to say: "T.M.O. decided that vessel will be loaded under the condition that Buyers pay the US$7,-/m ton penalty before loading. Therefore we request you to arrange that you pay us, together with the prepayment of the goods, this USD 7,-/m ton penalty, otherwise vessel will not be loaded." ...

35. The Buyers responded the same day to the Sellers' above telex of 1st April, completely rejecting it because of the following: (1) There was no clause in The Contract that price was to be increased by US$7,-/pmt if the vessel arrived after 31/3/93. (2) Vessel arrived and tendered its Notice of Readiness on 31/3/93. (3) Until now the delegation was not authorised by shippers to inspect the cargo according to The Contract terms. (4) If the vessel failed inspection, time of cleaning would not count, but vessel could not be rejected. It was understood that another inspection was ordered for the following morning. (5) The purchase was payment by Letter of Credit which the Buyers opened in due time. Consequently, the Buyers held the Sellers fully responsible for not loading the vessel and would consider them to be in breach of contract if by the following morning loading operations had not started ...

36. The Sellers responded shortly on 2nd April stating: "Please note that we are only prepared to load M.V. 'CHRISTINAKI' in case prepayment has been effected." ...

37. Later on 2nd April, solicitors acting for the Buyers sent an urgent letter to the Sellers referring to the Sellers' telexes of 1st and 2nd April in which the Sellers complained that the vessel arrived too late, and that the Buyers must pay a penalty of US$7 pmt together with prepayment of the goods as otherwise the vessel would not be loaded. The Buyers' solicitors stated that these demands were completely in breach of contract and in their view amounted to a repudiatory breach of The Contract and the Buyers reserved all their rights. After dealing with the points raised in the Sellers' telexes, the Buyers' solicitors stated that, without prejudice to their position as explained in that letter, they called upon the Sellers as a matter of urgency to remedy their breaches by Tuesday 6th April 1000 hours local time Iskenderun by withdrawing their uncontractual demands on or before that deadline, time being of the essence, and by confirming the Sellers' agreement to load as per The Contract.

38. The deadline of 1000 hours Tuesday 6th April local time Iskenderun came and went without any response from Sellers, whereupon the Buyers' solicitors wrote again (6th April) to state that the Buyers accepted the Sellers' repudiatory breach of contract, thereafter bringing The Contract to an end but under full reservation of the Buyers' rights to claim whatever losses, costs and consequences arose out of the Sellers' failure to perform.'

Further negotiations followed, and a substitute shipment was made, but it is common ground between the parties that no goods were loaded under the relevant sale contract and that the contract was terminated on 6 April, if not before.

Appeal award

This recorded that arbitrators found the sellers to be in breach of contract to the buyers and that the parties were granted legal representation by counsel for the appeal (award, paras 1 and 2).

The board's findings were these:

> '66 ... *WE FIND* that the Buyers as FOB Buyers under the contract, who had time chartered the "CHRISTINAKI", to be perfectly entitled to demand that the Bills of Lading be issued as "freight pre-paid" provided that they did indeed ensure that such freight was paid by the completion of loading. Again, since the Sellers never began to load, the point never finally arose, but insofar as it is material, *WE FIND* as a fact that the Buyers were not in default for allegedly failing to open a contractual Letter of Credit. The Buyers had opened a Letter of Credit which was in conformity with the Contract, in so far as The Contract specified any terms for the Letter of Credit; the requirement of Certification of Invoices was a minor detail and the fees for such were for Buyers' account (see Payment terms, para 4 above) and it appears that freight pre-paid Bills of Lading were issued for the Rouen shipment without difficulty. The Sellers were wrong to refuse such Letter of Credit and in breach of contract for insisting instead on pre-payment of the goods ...
>
> 68. Consequently, *WE FIND AND HOLD* the Sellers to be in default and in breach of contract for making uncontractual demands on 1st April namely that the Buyers should pay a penalty of US$7-/mt and pre-pay the value of the goods prior to loading, notwithstanding the Letter of Credit, and asserting that unless these conditions were complied with, the vessel would not be loaded.'

Two other passages of the award were referred to in argument, but it is not necessary to quote them in full. Paragraph 59(b), under the heading 'Submissions and contentions', records Mr Havelock-Allan QC, for the buyers, as having made certain assertions of fact, and Mr Young QC, for the sellers, before us relies upon these either as admissions made by the buyers or as findings of fact by the board. I do not think that, given the context, it would be right to treat them as either of these. Secondly, in para 67 the board made findings as to the commercial factors which, as they put it, drove the sellers to make the proposals which they did on 1 April and to claim that the buyers were in default, when in the opinion of the board it was the sellers rather than the buyers who were in default (award, para 68). These findings, however, in my view do not foreclose the questions of law which are raised by this appeal. If the letter of credit did not conform with the sale contract and the buyers were thereby in breach of contract, then regardless of their commercial motives (though subject to any waiver of the breach) the sellers were entitled by reason of that breach to make non-contractual demands, including pre-payment of the price and payment of an additional amount, corresponding to the penalty which TMO was claiming from them. If they were not so entitled, then again regardless of their motives or reasons for acting as they did they undoubtedly themselves committed a repudiatory breach of contract which the buyers were entitled to accept, as they did on 6 April, so bringing the contract to an end. In law, this was an anticipatory breach (see *Heyman v Darwins Ltd* [1942] 1 All ER 337, [1942] AC 356). The board regarded it as a default (para 68) and Mr Young suggested that by reason of that finding it should be regarded as an actual rather than an anticipatory breach. The distinction may be relevant for the purposes of legal analysis, and if it is, then in

my view the correct legal categorisation of the refusal on 1 April should be anticipatory breach, for the sellers refused rather than failed to load and the period for loading, if it had begun, certainly had not expired.

The judgment

Longmore J held ([1997] 1 Lloyd's Rep 578 at 583):

> '... I fear I cannot agree with the Board of Appeal that in the circumstances it is right to imply an entitlement on the part of the buyers that payment under the letter of credit need only be made if the bills of lading are marked "freight pre-paid".'

He said this for two reasons. First, because such a term would be inconsistent with the operation of a fob contract. Applying *Green v Sichel* (1860) 7 CBNS 747, 141 ER 1009 and Devlin J's description of the parties' duties under a fob contract in *Pyrene Co v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158 at 167, [1954] 2 QB 402 at 424, he held that the seller is normally obliged to procure a bill of lading from the shipowner and present it to the buyer, but he is not obliged to pay the freight: 'It is for the buyer to make and pay for such carriage arrangements as are made.' Therefore, the payment of freight was under the buyer's rather than the seller's control, and the buyer could not be entitled to insist upon the seller presenting a bill of lading 'if it is necessary to pay freight, in order to get the bill of lading'. He also referred to *Benjamin's Sale of Goods* (4th edn, 1992) para 20-020 where *Green v Sichel* is so regarded (see [1997] 1 Lloyd's Rep 578 at 583).

The second reason was that the implied term found by the board, namely that the buyers were entitled to demand freight pre-paid bills of lading 'provided that they did indeed ensure that such freight was paid by the completion of loading', was inconsistent with the seller's right to know that a letter of credit has been issued in accordance with the sale contract before he begins loading the goods. If the implied term was upheld, the seller would not know whether the freight had been pre-paid and whether the bill of lading would be indorsed accordingly until the loading was complete, and if the payment had not been made he would lose the security of the letter of credit for payment of the price.

The judge therefore turned to the second question, 'whether the sellers are entitled to rely on the non-contractual letter of credit as a justification for their refusal to load the vessel'. He recognised the general principle that a party can justify his refusal to perform the contract on a ground which he did not specify at the time, but he noted also that this is subject to two qualifications which are set out in *Chitty on Contracts* (27th edn, 1994) para 24-012:

> 'However, a party cannot rely on a ground which he did not specify at the time of his refusal to perform "if the point which was not taken could have been put right." [cf *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770, [1954] 1 WLR 1273.] Further, in *Panchaud Frères SA* v. *Etablissements General Grain Co.* ([1970] 1 Lloyd's Rep 53 at 56) it was suggested that the rule was subject to the qualification that a party who at first gives one ground for his refusal to perform may, by his conduct, be precluded from setting up later a different ground where it would be unfair or unjust to allow him to do so.'

Longmore J held that the buyers could not rely on the first qualification in the present case. A contractual letter of credit had to be in place before the first day for shipment, which was 1 April, and the sellers' refusal to perform was either on that date or later, when they 'took no steps to conform to the requirements of the

buyers' solicitors' letter on or about Apr. 6'. He concluded (at 584): 'In fact, therefore, the buyers could not have put the position right at the time when the point could have been but was not taken.' a

He then accepted Mr Havelock-Allan's submission that he should give effect to the 'wider principle' set out in *Chitty*, and he held in the buyers' favour that the principle applied, because— b

> 'although the seller raised the point now relied on, on Mar. 25 the buyers attempted to meet the point on Mar. 29 and there was never any reply to that attempt. The fresh ground that led directly to the sellers holding the buyers in repudiation was that the vessel arrived late. That was the reason used by the sellers ... This was held not to be justified. It would, in my view, be unjust to allow the sellers to go back to an old ground which was not pursued at the time when it might have been possible for the buyers to do something further about it.' (See [1997] 1 Lloyd's Rep 578 at 585.) c

Issues d

It is convenient to begin with a summary of the essential facts. The sale contract, as amended, called for shipment during April. The buyers were obliged to open a letter of credit in accordance with the contract requirements before the shipment period began, that is, by 1 April at the latest. The terms of the letter of credit which were notified on 24 March were not as required by the contract, and the sellers proposed different terms on 25 March. On 29 March the buyers said e that they had instructed their bank to make certain amendments 'in a way to comply the maximum we can with sellers' requirement' without affecting their own position vis-à-vis their own buyers. The amended terms were such that the sellers could not obtain payment under the letter of credit unless they presented bills of lading indorsed 'freight pre-paid'. The vessel named in the sale contract f failed to arrive at the loading port until 2315 hrs on 31 March which was after business hours. It gave notice of readiness on 1 April but was not ready to load in fact until the following day, a Friday, and the notice was not accepted until Monday, 5 April. Meanwhile, on 1 April the sellers under pressure from their own suppliers TMO made extra-contractual demands for pre-payment of the price and for an additional payment of $7 per tonne. They gave as their reason g the late arrival of the ship, which was rendered invalid as an excuse for their refusal and failure to ship the goods on and after 1 April by the board's other findings. They relied in the alternative on the fact that the letter of credit opened by the buyers called for 'freight pre-paid' bills of lading. That was not a reason which they gave at the time nor was it raised until, at the earliest, during the h appeal hearing before the board.

The contractual analysis in my judgment is clear. The buyers claim damages for the sellers' refusal and failure to ship the contract goods, which under the contract as amended they were required to do in April. They refused to do so on 1 April, when they demanded payment on extra-contractual terms, and if their j refusal was not justified then the buyers were entitled to accept it as an unlawful repudiation—strictly, an anticipatory breach—of the contract on 6 April, as they purported to do. But if the buyers were already themselves in repudiatory breach on 1 April, by reason of their failure to open a letter of credit which guaranteed payment in accordance with the agreed payment terms, then (subject to waiver) the sellers were entitled to refuse to perform the contract, as they did by refusing

and failing to ship the goods (except at a later date and upon other terms, with which this dispute is not concerned).

The first issue, therefore, is whether the buyers under a sale contract on what are described as normal fob terms are entitled to open a letter of credit which requires the sellers to present 'freight pre-paid' bills of lading if they are to receive payment from the buyers' bank. Absent any special agreement, the sellers are entitled to see a conforming letter of credit in place before they begin shipment of the goods, and then their obligation is to ship the contract goods on board the vessel provided by the buyers, for carriage on whatever terms as to freight and otherwise the buyers have agreed with the shipowner. The sellers are expressly free of any obligation to pay freight (special terms apart, fob is the antithesis of c and f—cost and freight) and in the normal course they cannot be sure before shipment that the shipowner will issue freight pre-paid bills of lading, unless they are prepared if necessary to pay the amount of freight themselves, or unless some other guaranteed payment mechanism is already in place. I would put the matter broadly in that way, because it may be that an undertaking from the shipowner himself, or a third party guarantee of the payment of freight following due shipment of the goods, would suffice. It is unnecessary to consider that aspect further in the present case, because all that was offered by the buyers was their own assurance that the freight would be paid, by them or on their behalf. It is abundantly clear, in my judgment, that the buyers' own assurance cannot be enough to serve as a guarantee to the sellers that 'freight pre-paid' bills of lading will be issued when shipment is complete. That would mean, as the judge pointed out, that the security of a bank guarantee for the payment of the price, which is what the letter of credit mechanism provides, would be destroyed. I therefore agree with the judge's observations that the buyers' contention, that the letter of credit terms were in conformity with the contract, is contrary both to the underlying concept of the fob contract (subject always to what special terms may be agreed in a particular case) and to the essential commercial purpose of the letter of credit machinery.

The buyers' submission is that there were special features which entitled the board to reach the conclusion that the buyers were entitled to require freight pre-paid bills in this case. In my judgment, the board's conclusion that the buyers were so entitled 'provided that they did indeed ensure that such freight was paid by the completion of loading' is open to the objections set out by the judge. More generally, Mr Havelock-Allan refers to certain specific facts. The sellers knew that Hoboob, the receivers and sub-buyers, had bought on c and f terms and themselves required freight pre-paid bills. The named vessel was time-chartered to the buyers, and so they were entitled to instruct the master to issue 'freight pre-paid' bills (see *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] 1 All ER 307, [1979] AC 757). The buyers gave their assurance (though not until 29 March, after the dispute had arisen) that the freight would be paid before the bills were issued 'without any problem'. But none of this, in my judgment, justifies the implication of a term which, for the reasons stated above, would be wholly at variance with the express terms of the fob sale in fact agreed.

In this context, the buyers referred to the judgment of Robert Goff J in *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118 at 131, which was quoted by the judge. This judgment distinguishes between implying a term in the sale contract and, on the other hand, establishing what the parties agreed should be the terms of the letter of credit issued or to be issued under that contract. The latter process

may result in a letter of credit agreement which supplements or even varies the terms originally agreed. This is demonstrated in the present case by the agreement to vary the shipment date to include the month of April. But I do not consider that it is relevant to the question in issue. The freight pre-paid requirement, unless it was a term of the sale contract itself, was introduced by the buyers and immediately rejected by the sellers. The buyers maintained their requirement on 29 March and it is of the essence of their case that the sellers made no further reference to it before the contract came to an end. The sellers thereafter did not act inconsistently with their previous refusal, and their silence on this matter cannot be regarded as an acceptance of the buyer's demand: *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796 at 805, [1985] 1 WLR 925 at 936–937 per Robert Goff LJ. In short, the buyers cannot allege that there was a fresh agreement as regards this term of the letter of credit which had the effect either of supplementing or varying the requirements of the sale contract.

For these reasons, as well as those given more succinctly by Longmore J, in my judgment the buyers were not entitled to require the sellers to procure and produce freight pre-paid bills of lading in order to receive payment under the letter of credit opened by them. It follows that the buyers failed to open a letter of credit conforming with the sale contract and, subject to the question of waiver considered below, they were thereby in breach of contract. The second issue is whether the sellers can rely on that breach to justify their own refusal and failure to ship on the contract terms. They did not assert that they were relying on it at the time.

Basic rule

> 'It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.' (See *Taylor v Oakes Roncoroni & Co* (1922) 127 LT 267 at 269 per Greer J.)

First qualification—Heisler v Anglo-Dal Ltd

> 'This rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply.' (See [1954] 2 All ER 770 at 773, [1954] 1 WLR 1273 at 1278 per Somervell LJ.)

The buyers' duty was to open a conforming letter of credit by the beginning of the shipment period (this is the prima facie rule: *Ian Stach Ltd v Baker Bosley Ltd* [1958] 1 All ER 542, [1958] 2 QB 130). Under the sale contract as varied, therefore, they were required to do this by 1 April. The sellers demanded a price increase and insisted on more onerous payment terms on that day. Undoubtedly, the buyers were entitled to regard this demand as a refusal by the sellers to ship goods on the contract terms. They contend, however, that the sellers 'did not convey any acceptance of a termination. It made an extra contractual demand based on a false premise (that the vessel was late)', and that if the sellers had specified the letter of credit defect as a reason for their attitude, then they would or might have been able to dispense with the freight pre-paid requirement, after making some further arrangements with the receivers. The correct legal analysis, Mr Havelock-Allan submits, is that the contract remained in existence after 1 April,

because it was not terminated; the sellers waived the buyers' breach, or alternatively they extended the time within which the buyers might open a conforming letter of credit; therefore, they could or might still have remedied the defect, if it had been relied upon by the sellers in their message of 1 April.

Longmore J rejected this submission, on the ground that a contractual letter of credit had to be in place 'strictly before the first day for shipment ... In fact, therefore, the buyers could not have put the position right at the time when the point could have been but was not taken' (see [1997] 1 Lloyd's Rep 578 at 584). He also said, however, that 'the refusal to perform was as early as Apr. 1, or (perhaps more likely) when the sellers took no steps to conform to the requirements of the buyers' solicitors' letter on or about Apr. 6'. Mr Havelock-Allan submits that the later date, 6 April, should be preferred, and that the judge's conclusion therefore is not inconsistent with his waiver submission, as set out above.

In my judgment, however, the submission falls at the first hurdle. The sellers' demand for an increased price etc on 1 April was undoubtedly a refusal to perform the contract, even though if viewed in isolation from the buyers' previous failure to open a conforming letter of credit it was an anticipatory rather than an actual breach. If the buyers' breach is included in the perspective, the refusal was justified by it and the sellers' failure to refer to it then does not necessarily preclude them from relying on it now (the basic rule). The *Heisler v Anglo-Dal* qualification in my judgment does not apply, because by 1 April the time for contractual performance of the buyers' letter of credit obligation had passed. I do not see how the sellers' refusal to perform the contract could either extend the time for performance by the buyers or amount to a waiver of their right to refuse performance, if such a right existed.

I would add that in any event the buyers' language in their response on 29 March was peremptory ('the maximum we can') and there was no further indication from them, either before or after 1 April, that the freight pre-paid terms of the letter of credit could or might be deleted. On the board's findings, therefore, the possibility of such a change was entirely speculative, and both Longmore and Colman JJ, when giving leave to appeal, decided against remitting the award for further reasons.

Second qualification—waiver and estoppel

There has been much debate as to the basis of the *Panchaud Frères* judgment [1970] 1 Lloyd's Rep 53, which may represent a species of estoppel, perhaps embracing the broad 'requirement of fair conduct' referred to by Winn LJ (at 59), or the application of the common law rule regarding the acceptance of non-contractual goods delivered under a sale contract which is now embodied in s 35 of the Sale of Goods Act 1979. No one doubts, however, that what may be called the classic rules of estoppel and waiver can apply in circumstances such as these, so as to prevent a party who fails or refuses to perform the contract from relying upon conduct by the other party which would otherwise justify his doing so. The occasions when these rules may be invoked in these circumstances are limited, for example, by the fact that it is rarely if ever possible to imply an unequivocal representation of fact from a party's silence on the relevant issue. The buyers do not suggest that these rules apply in the present case, and therefore I need say no more about them.

Third qualification—acceptance of goods (s 35 of the Sale of Goods Act 1979)

This explanation of *Panchaud Frères* was adopted by Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925, [1979] 1 WLR 783 and it is preferred also by the editors of *Benjamin's Sale of Goods* para 19-139. Section 35 reads as follows:

> '(1) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or ... when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them ...'

The authorities cited in *Chalmers' Sale of Goods* (18th edn, 1981) p 195 for the last proposition include *Fisher Reeves & Co Ltd v Armour & Co Ltd* [1920] 3 KB 614 at 624, where Scrutton LJ said:

> 'When one party to a contract becomes aware of a breach of a condition precedent by the other he is entitled to a reasonable time to consider what he will do, and failure to reject at once does not prejudice his right to reject if he exercises it within a reasonable time.'

(This was an obiter dictum but nevertheless it is of undoubted authority, more particularly because it is the rule enacted in s 35.)

It should be noted that the deemed acceptance under s 35 is based simply on the buyer's retention of the goods which have been delivered to him and his failure to intimate to the seller that he has rejected them. If these facts are established, then the buyer cannot thereafter raise a ground for rejection, however valid it may be, and the 'basic rule' in *Taylor v Oakes Roncoroni & Co* (1922) 127 LT 267 does not save him. He is precluded from raising even a valid ground, not because he failed to raise it at the time but because he retained the goods and did not reject them on any ground. (The basic rule could apply, of course, if he did reject the goods, though giving an invalid reason for doing so.)

The facts in *Panchaud Frères* were that cif buyers accepted the documents of title to goods, by retaining them without claiming to reject them on the grounds of late shipment which appeared sufficiently from the documents themselves, and subsequently they claimed to reject the goods on that same ground. The cif buyer has a separate right to reject the goods when they are physically delivered to him (see *Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd (NV Handelsmaatschappij J Smits Import-Export, third party)* [1954] 1 All ER 779 at 790–791, [1954] 2 QB 459 at 480–481). The decision of the Court of Appeal was that the buyers could not reject the goods for a reason which had been available to them when they accepted documents which disclosed a non-contractual shipment.

I would hold that 'acceptance' of goods in the circumstances specified in s 35 may bring about a further (third) qualification to the basic rule that a party can rely upon a matter which he did not raise at the time. I would also hold that this provides an acceptable basis for the decision in *Panchaud Frères*. The effect of the decision is that the cif buyer's right to reject non-contractual goods is not entirely separate from his right to reject the documents, if they are non-contractual also.

A further qualification—'unfair and unjust'?

Giving the leading judgment in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 57 Lord Denning MR based the decision squarely on the principle of estoppel by conduct, which he stated as follows:

> 'The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct ...'

He applied the principle to the particular facts of that case by reference to the cif buyer's acceptance of documents which gave him 'the full opportunity of finding out ... what the real date of shipment was'. He could not thereafter reject the goods by reason of their late shipment. Cross LJ (at 61) saw it as a question of fact and degree, and pre-eminently one for the Board of Appeal to decide. Winn LJ expressed his entire agreement with Lord Denning MR, adding (at 59):

> 'In my own judgment it does not seem possible in this case to say affirmatively that there was here ... anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel ... what one has here is something perhaps in our law not yet wholly developed as a separate doctrine—which is more in the nature of a requirement of fair conduct—a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct.'

What Winn LJ saw as an emerging 'separate doctrine' has received no support, in my judgment, from any of the later authorities. Counsel have tended to invoke this passage from his judgment, as Robert Goff J noted in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 947, [1979] 1 WLR 783 at 811, 'as an argument of last resort, when they find it difficult to bring their case within the established principles of estoppel, waiver, or election'.

Lord Denning MR referred to it subsequently as 'a kind of estoppel. He cannot blow hot and cold according as it suits his book' (see *Alfred C Toepfer v Cremer* [1975] 2 Lloyd's Rep 118 at 123, where Orr and Scarman LJJ agreed with him). Lord Denning MR held that a similar estoppel by conduct arose in different circumstances in *Ismail v Polish Ocean Lines* [1976] 1 All ER 902 at 907, [1976] QB 893 at 903. In *V Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499 at 502–503 he referred to *Panchaud Frères* as 'a case where there was a waiver by one person of his strict right—or an estoppel—whatever you like to call it—whereby a person cannot go back on something he has done'. The same case gave Roskill LJ (at 504) an opportunity to comment on what he called—

> 'the so-called principles laid down by this Court in the *Panchaud* case ... This Court then laid down no new principles of law. It merely applied well-established principles of law to the particular facts of that case, and those principles ... are no more than if in the course of the working out of a contract one party by his conduct leads the other party to think that he will not insist on the strict performance of a particular term in the contract so that the other party alters his position, the former party will not be permitted to resile and to seek to insist upon strict performance—at least without notice.'

Lawton LJ supported these remarks, adding trenchantly (at 505) that merchants and brokers in the international grain trade should not be regarded as 'fragile

characters', and 'There must be more robustness in the application of the *Panchaud* principle'.

In the leading case of *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 the House of Lords upheld Mocatta J's judgment, including his finding that a plea of waiver was established. There is no express reference to *Panchaud Frères* in the judgment or in any of the speeches, and the decision turned on the questions whether an unequivocal representation could be spelled out of a series of 'no less than 10 communications' between the parties and whether the other party had acted upon it (see [1978] 2 Lloyd's Rep 109 at 126–127 per Lord Salmon). This is the conventional analysis of estoppel and waiver, and soon afterwards it was hailed by Lord Denning MR as 'a most important decision on waiver. As Mr. Davenport said, it is the final step in the series', citing *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256, [1947] KB 130 and *Panchaud Frères*. He stated the principle as applied to GAFTA cases thus:

> 'If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect—whether he knows of it or not—then he cannot afterwards set up the defect as a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so.' (See *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221 at 226.)

In that case, Stephenson LJ (at 229) dissented on the question whether an unequivocal representation had been made, but Shaw LJ (at 230), agreeing with Lord Denning MR, saw no difficulty 'in distilling from the stream of telexes sent by the buyers in the circumstances which then obtained coupled ... with their delay in rejecting the documents a strong indication that they waived their right to treat the sellers as being in default'.

These authorities were reviewed and extensively quoted by Hirst J in *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila* [1988] 3 All ER 843. He concluded (at 852):

> 'Perhaps the best lesson to be drawn from all this subsequent commentary is that no distinctive principle of law can be distilled from the *Panchaud* case ... Counsel for the sellers invited me to accept the interpretation in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, but if I have to choose, I should feel bound to prefer the estoppel explanation, since it has the greater weight of authority behind it.'

In my judgment, the following conclusions can now be drawn.

(1) The *Panchaud Frères* case is authority for the application of the common law rule of acceptance, now established in s 35 of the Sale of Goods Act 1979, in the comparatively limited circumstances of a case where a cif buyer accepts documents but rejects or purports to reject the goods.

(2) The decision can equally be said to represent a form of 'estoppel by conduct', but there is no 'separate doctrine' derived from *Panchaud Frères* alone.

(3) Like all other forms of estoppel or waiver, the facts must justify a finding that there was an unequivocal representation made by one party, by conduct or otherwise, which was acted upon by the other.

(4) When the facts do justify that finding, it is likely to be regarded as 'unfair and unjust' for the party which made the representation to a contrary effect, to rely upon its contractual rights.

(5) Without such a representation, no estoppel or waiver can arise, and there is no general rule that what the court or tribunal may perceive as 'unfairness or injustice' has the same effect.

(6) *Panchaud Frères* and subsequent cases illustrate the possible scope of an estoppel or waiver in circumstances such as these, but they do not reveal a further exception to the basic rule, that a party is entitled to rely upon his contractual rights.

(7) Unfairness and injustice, however, will always be relevant where the court is required to exercise a discretionary power, e g where a party seeks leave to raise a fresh matter by way of amendment or at a late stage of the proceedings before it (see the example given by Lord Denning MR in the *Panchaud Frères* case [1970] 1 Lloyd's Rep 53 at 57).

Conclusion

The judge held ([1997] 1 Lloyd's Rep 578 at 585) that it would be unjust to allow the sellers (appellants) 'to go back to an old ground which was not pursued at the time when it might have been possible for the buyers to do something further about it'. This conclusion might be criticised on the narrow semantic ground that it does not sit easily alongside the judge's earlier finding (at 584) that the *Heisler v Anglo-Dal* qualification did not apply because 'the buyers could not have put the position right at the time when the point could have been but was not taken'. I would however put the matter more broadly. There was no finding by the board or by the judge of any unequivocal representation by the sellers that they relinquished or would relinquish their rights arising out of the buyers' failure to open a letter of credit in the form required by the sale contract. Nor in my judgment could any such finding be justified by the facts found by the board. The buyers made their position clear on 29 March, saying that no further changes were possible. This was immediately over-shadowed by the ship's failure to meet the contractual eta on 29 March and, in the event, to arrive and give valid notice of readiness before the amended loading period began on 1 April. The fact that the sellers made no further reference to the letter of credit issue after 29 March cannot be said to have misled the buyers into believing that the 'freight pre-paid' requirement was no longer important to them, nor so far as we know is there any evidence to that effect.

In my judgment, the judge was wrong to hold that the sellers were unable to rely upon the buyers' breach as a defence to the claim for damages for refusal and/or failure to load. I would answer the certified questions of law accordingly, and as stated in this judgment, and I would allow the sellers' appeal, and dismiss the cross-appeal.

SIR RALPH GIBSON. I agree that the appeal of the sellers should be allowed, and that the cross-appeal should be dismissed, for the reasons given by Evans LJ.

NOURSE LJ. I also agree.

Appeal allowed. Cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

R v Sefton Metropolitan BC, ex parte Help the Aged and others

COURT OF APPEAL
LORD WOOLF MR, ROCH AND HENRY LJJ
23 JULY, 31 JULY 1997

Housing – Persons in need of care and attention – Duty of local authority to provide accommodation – Whether local authority entitled to have regard to its limited financial resources in deciding if elderly person in need of care and attention – Whether local authority entitled to have regard to resources of person in need of care and attention in determining if care and attention is not otherwise available to that person – National Assistance Act 1948, s 21.

Following hospital treatment in May 1996, B, an 87-year-old woman, was admitted to a nursing home. From that time her initial capital of approximately £17,500 was used to fund her care. In June 1996, when B's capital fell below £16,000, an assessment of her needs was conducted by the local authority which concluded that she required continuing nursing care and was therefore a person in need of care and attention within s 21(1)[a] of the National Assistance Act 1948 (as amended). Under s 22 of the 1948 Act and the National Assistance (Assessment of Resources) Regulations 1992, in determining a person's ability to pay for accommodation provided under s 21, capital under £10,000 was to be ignored. The authority, which did not have the resources to meet the needs of all its applicants who fell within s 21, considered B's case under its system of prioritisation by which elderly applicants were required to fund their own care where their capital exceeded £10,000 and were not considered to be in a priority category under which they would receive financial assistance until their capital had been reduced to below £1,500. It consequently deferred commencing its funding of B's accommodation until May 1997 when her capital fell below £1,500. The appellant, a charity closely involved with the elderly, B and another applicant under s 21, applied to the court for judicial review of the decision to adopt the local authority's prioritisation policy. The judge dismissed the application and the appellant appealed to the Court of Appeal.

Held – (1) In deciding under s 21(1) of the 1948 Act if an elderly person was in need of care and attention, a local authority was entitled to have regard to its own limited financial resources. However, if the authority decided that the person was in such need, they were under an obligation to fulfil their statutory duty to make arrangements for accommodation to be made available for that person and a lack of resources was no excuse. Accordingly, since the authority in the instant case clearly had accepted after their initial assessment of B's needs that she met their own threshold as a person in need of care and attention they could not from that time, notwithstanding their lack of resources, fail to meet the duty thereby placed on them by s 21 to fund her residential accommodation (see p 533 *j* to p 534 *a*, p 543 *b c e f* and p 544 *b*, post); *R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1 considered.

a Section 21, so far as material, is set out at p 534 *h* to p 535 *b*, post

(2) For the purposes of s 21(1)(a) of the 1948 Act, care and attention was not to be regarded as 'otherwise available' if the person concerned was unable to pay for it according to the means test regime provided for in s 22 of the Act and the 1992 regulations. Since the local authority was required by s 22(5) to give effect to those regulations, it followed that as B's resources fell below the levels prescribed therein the local authority had not been entitled to take them into account in determining if care and attention was not otherwise available to her. The appeal would therefore be allowed (see p 534 *b*, p 543 *f* to *j* and p 544 *b*, post).

Notes

For provision of accommodation by local authority, see 33 *Halsbury's Laws* (4th edn) paras 919–926.

For the National Assistance Act 1948, ss 21, 22, 26, see 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 20, 23, 26.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

R v Gloucestershire CC, ex p Barry [1997] 2 All ER 1, [1997] 2 WLR 459, HL.

Cases also cited or referred to in skeleton arguments

Bolton Metropolitan BC v Secretary of State for the Environment (1990) 61 P & CR 343, CA.

Chief Adjudication Officer v Quinn, Chief Adjudication Officer v Gibbon [1996] 4 All ER 72, [1996] 1 WLR 1184, HL.

Steane v Chief Adjudication Officer [1996] 4 All ER 83, [1996] 1 WLR 1195, HL.

Appeal

By notice dated 26 March 1997 the appellants, Help the Aged (a charity) and Mrs Charlotte Blanchard, appealed from the decision of Jowitt J on 26 March 1997 whereby he dismissed their application (but allowed that of Cyril Pinch) for judicial review of the decision of the respondent, Sefton Metropolitan Borough Council, to defer the exercise of its statutory duty under s 21 of the National Assistance Act 1948 to provide financial assistance to persons whom it assessed as being in need of care and attention until such individuals had personal resources of less than £1,500. The facts are set out in the judgment of Lord Woolf MR.

Richard Drabble QC, *Helen Mountfield* and *Andrew Sharland* (instructed by *Jean Gould*, Public Law Project) for the appellants.

Andrew Gilbart QC and *John Barrett* (instructed by *Rex Whitrow*, Southport) for Sefton.

Cur adv vult

31 July 1997. The following judgments were delivered.

LORD WOOLF MR. As both parties acknowledge this is a test case which is of considerable significance for both elderly members of the community and local authorities. It raises three issues.

(1) Whether a local authority in deciding if an elderly person is in need of care and attention, in which case it will be required to make arrangements for

residential accommodation to be made available for her, is entitled under s 21(1) of the National Assistance Act 1948 (as amended) to have regard to its limited financial resources.

(2) If its limited resources are relevant do they justify the policy which Sefton Metropolitan Borough Council (Sefton) has adopted.

(3) Whether, in determining if 'care and attention is not otherwise available to a person' an authority is entitled to take the resources of that person into account even though that person's resources fall below the levels prescribed by regulations for the purposes of s 22 to 26 of the 1948 Act.

Sefton recognises that, if its arguments are correct and these issues have to be determined in its favour, this will have serious financial implications for the elderly who reside within its locality. However Sefton emphasises it recognises the importance of giving assistance to all persons who require the help of its social services, but regrets that because of the other demands on its limited resources, it has no alternative but to restrict the assistance which it provides for the elderly.

The legislation

In order to understand the issues that arise on this appeal it is necessary to refer to the relevant legislation and a recent decision of the House of Lords which was of significant importance in persuading Jowitt J to give a judgment in the court below in favour of Sefton. The convenient starting point in considering the legislation, is the National Health Service and Community Care Act 1990. Section 47 of the 1990 Act deals with the assessment of needs for community care services. Section 47(1) provides:

> 'Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority—(a) shall carry out an assessment of his needs for those services; and (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.'

I draw attention to the fact that under (b), it is having regard to the *results of the assessment,* that the decision is to be reached.

Section 46(3) states that in that section 'community care services' means services which a local authority may provide or arrange to be provided under '(a) Part III of the National Assistance Act 1948 ...' Section 47(8) of the 1990 Act provides that 'community care services' has the same meaning in that section as in s 46.

It is next necessary to refer to the two sections which are at the heart of this appeal. They are ss 21 and 22 of the 1948 Act. Section 21 of the 1948 Act (as amended) is in these terms:

> '(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State and to such extent as he may direct *shall,* make arrangements for providing—(a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them ...
>
> (2) In making any such arrangements a local authority shall have regard to welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions

suited to different descriptions of such persons as are mentioned in the last foregoing subsection ...

(4) Subject to the provisions of section 26 of this Act the accommodation provided by the local authority in the exercise of their functions under this section shall be provided in premises managed by the authority or, to such extent as may be determined in accordance with the arrangements under this section, in such premises managed by another local authority as may be agreed between the two authorities and on such terms, including terms as to reimbursement of expenditure incurred by the said other authority, as may be so agreed ...'

The wide terms of s 21(2) should be noted.

Section 22 as its heading states, deals with the charges to be made by the authority for accommodation. It does so in precise terms which enable the Secretary of State to control the amount of the charges by regulations. It reads (as amended):

'(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.

(2) Subject to the following provisions of this section, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate fixed for that accommodation by the authority managing the premises in which it is provided and that standard rate shall represent the full cost to the authority of providing that accommodation.

(3) Where a person for whom accommodation in premises managed by any local authority is provided, or proposed to be provided, under this Part of this Act satisfies the local authority that he is unable to pay therefor at the standard rate, the authority shall assess his ability to pay ... and accordingly determine at what lower rate he shall be liable to pay for the accommodation ...

(4) In assessing for the purposes of the last foregoing subsection a person's ability to pay, a local authority shall assume that he will need for his personal requirements such sum per week as may be prescribed by the Minister or such sum as in the special circumstances the authority consider appropriate.

(4A) Regulations made for the purposes of subsection (4) of this section may prescribe different sums for different circumstances.

(5) In assessing as aforesaid a person's ability to pay, a local authority shall give effect to regulations made by the Secretary of State for the purposes of this subsection except that, until the first such regulations come into force, a local authority shall give effect to Part III of Schedule 1 to the Supplementary Benefits Act 1976 as it had effect immediately before the amendments made by Schedule 2 to the Social Security Act 1980 ...'

Section 26 deals with the situation where the accommodation, instead of being provided by the local authority, is (as in this case) provided by voluntary organisations. Mr Gilbart QC did not submit on behalf of Sefton that the fact that the accommodation was provided by a voluntary organisation affected the situation. So far as relevant s 26 provides:

'(1) ... arrangements under section 21 of this Act may include arrangements with a voluntary organisation ...

(1A) ... arrangements made with any voluntary organisation or other person by virtue of this section must, if they are for the provision of residential accommodation with both board and personal care for such persons as are mentioned in section 1(1) of the Registered Homes Act 1984 (requirement of registration), be arrangements for the provision of such accommodation in a residential care home which is managed by the organisation or persons in question, being such a home in respect of which that organisation or person—(a) is registered under Part I of that Act ...

(2) Any arrangements made by virtue of ... this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and subject to subsection (3A) below the local authority shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this section

(3) Subject to subsection (3A) below a person for whom accommodation is provided under any such arrangements shall, in lieu of being liable to make payment therefor in accordance with section twenty-two of this Act, refund to the local authority any payments made in respect of him under the last foregoing subsection: Provided that where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the local authority that he is unable to make a refund at the full rate determined under that subsection, subsections (3) to (5) of section twenty-two of this Act shall, with the necessary modifications, apply as they apply where a person satisfies the local authority of his inability to pay at the standard rate as mentioned in the said subsection (3) ...'

The Registered Homes Act 1984 referred to in s 26 of the 1948 Act deals with registration of residential care homes in these terms:

'**1.**—(1) Subject to the following provisions of this section, registration under this Part of this Act is required in respect of any establishment which provides or is intended to provide, whether for reward or not, residential accommodation with both board and personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder ...'

The National Assistance (Assessment of Resources) Regulations 1992, SI 1992/2977, dealt with the assessment of the resources of a 'resident', that is (by para (1)) 'a person provided with accommodation under Part III of the Act'. Part III includes ss 21 to 26 of the 1948 Act. The relevant regulations are contained in paras 20 to 28 of the regulations. The effect of para 20 of the regulations as amended, is that no resident is to be assessed as unable to pay for his accommodation at 'the standard rate' if his capital exceeds £16,000. Paragraph 28 deals with those whose capital is between £10,000 and £16,000 and they are treated as having an equivalent weekly income of £1 for each complete £250 in excess of £10,000. Under £10,000 capital is to be ignored.

Prior to 1993, financial assistance under s 21 was provided on a national basis. The financial support of claimants was dealt with at one time in accordance with the supplementary benefit scheme and subsequently in accordance with the

income support scheme. The 1993 Act transferred the responsibility for providing financial assistance to the local authorities. For this purpose they were given resources by central government. Local authorities were obliged by s 7(1) of the Local Authority Social Services Act 1970: '... in the exercise of their social services functions ... [to] act under the general guidance of the Secretary of State.' Relevant guidance was contained in Department of Health *Community Care the Next Decade and Beyond: Policy Guidance* (1990) under the heading 'Charging for Residential Accommodation'.

Paragraph 3.31 of the guidance provides:

> 'The provision of services, whether or not the local authority is under a statutory duty to make provision, should not be related to the ability of the user or their families to meet the costs, and delegated budgeting systems should take this into account. The assessment of financial means should, therefore, follow the assessment of need and decisions about service provision.'

The introductory section of the guidance states that the charging rules 'will apply to all those for whom local authorities make arrangements under ss 21 and 26 (1948 Act)'.

Although this cannot affect the interpretation of the legislation there is no doubt that the Department of Health did not intend local authorities to take into account the limits on their financial resources when funding residential care. This is made clear in a letter written by the department to the chairman of Sefton's social services committee on 23 December 1996. The department contended that the resources made available by central government had been increased for this purpose. However Sefton are in a particularly difficult situation because part of the borough, namely Southport, attracts into the borough a large number of elderly residents and another part of the borough has a community which is disadvantaged. As a result, the calls on Sefton's resources available to meet needs in relation to accommodation are subject to greater demands than is the case with other councils.

Background facts

The approach of Sefton faced with these difficulties are set out in an affidavit of Mr Alan Lewis, director of the social services department. He states:

> 'Individuals whom the Council feel may require community care services are assessed irrespective of their means or of the Council's resources. Their needs are identified and the best way of meeting those needs is established in consultation with the potential service user and their carers. However, the Council then has no alternative other than to seek to arrive at a sensible prioritisation of persons in need against the background of its available resources.'

Sefton has prepared a document which sets out the criteria to be applied by community care panels for the purpose of assessing the elderly. This states:

> '... 2. Because the number of people being assessed as requiring nursing, residential or care packages exceeds the budget available, panels have been established to approve expenditure on community care services within a budget allocation ...

5. The consequence of this has been that older people not at immediate risk, have not been as high a priority, with the result that many older people have now been waiting for up to 12 weeks for funding. Some (A) are living in the community, some (B) are in hospital and some (C) are already placed in residential or nursing homes. The panels each week prioritise from all 3 categories based on factors including dependency levels, likelihood of deterioration, duration of proposed placement (particularly those who have a diagnosed terminal illness) as well as risk and probability of breakdown in carer support.'

Then under the heading of 'application of priority criteria' it is stated with regard to category (C).

'8.(C) Some older people are currently placed in residential or nursing homes and have been funding their own care because they had capital over £8,000 at the time they were admitted. However, those whose capital has now fallen below £8,000 are *entitled* to some funding from the local authority but as they are in a safe and appropriate environment, must be [of] lower priority than those at risk or inappropriately placed in a hospital. Nevertheless, the anxiety of reducing capital as well as the individuals having to fund their own care has to be considered.' (My emphasis.)

Then under 'proposals' it is stated:

'10. For those who are self-funding in residential or nursing care, they should be considered within the Priority Category once their capital has fallen below £1,000 and this would prevent them falling into debt.'

The figure of £1,000 has since been increased to £1,500 and the figure of £8,000 is now £10,000 under the amended regulations.

There are proposals of a different nature to give priority to categories (A) and (B) but they are of no relevance to the present application and nothing I say in this judgment should be regarded as commenting favourably or unfavourably on the lawfulness of Sefton's policy in relation to those categories.

The policy of Sefton resulted in Help the Aged, the well-known charity, making an application for judicial review. Help the Aged is closely involved with the elderly and no suggestion is made that they do not have the necessary standing to make this application for judicial review. In addition to Help the Aged there were two individual applicants, one of whom is Charlotte Blanchard. We are not concerned with the other applicant.

Mrs Blanchard is 87 years old. On 3 March 1996 she was admitted to hospital following a fall. In hospital she was very ill. In May 1996 she was well enough to leave hospital but still very far from well and required residential nursing care and she was admitted to a nursing home. At that time she had capital of approximately £17,500. In June 1996 her capital fell below £16,000 and a request was made for an assessment of her needs and the arrangements which they called for. This was conducted. It concluded that she had a number of unfortunate difficulties, including an inability to stand unaided, and that she needed supervision or help to maintain her personal safety and to participate in leisure activities and a lot of help to manage medication. Her need for 'continuing nursing care' was assessed in the highest category as were a number of her other needs. A need for nursing care involves a higher category of need, than that for care and attention.

Her case was first presented to Sefton's allocation panel on 26 June 1996 but was deferred until her capital fell below £1,500 on 14 May 1997. After this had happened, Sefton started funding her accommodation. Mr Gilbart on behalf of Sefton rightly says there was no question of Mrs Blanchard not in fact receiving the care she needed although this was provided at her expense until May 1997.

On 26 March 1997 Jowitt J gave a reserved judgment dismissing the application for judicial review.

The issues

Between the date of the hearing and the judgment being given, the House of Lords decided *R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1, [1997] 2 WLR 459. This decision was clearly highly influential in the judge reaching his decision. However he did not have the benefit of argument as to the relevance to this case of the approach of the majority of the Lordships in that case.

Ex p Barry was not concerned with s 21(2) of 1948 Act. It was primarily concerned with s 2(1) of the Chronically Sick and Disabled Persons Act 1970. Section 2(1) is a long and detached subsection but as it has to be compared with s 21 of the 1948 Act. I set out its terms in full:

> 'Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely—(a) the provision of practical assistance for that person in his home; (b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities; (c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him; (d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements; (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience; (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise; (g) the provision of meals for that person whether in his home or elsewhere; (h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone, then, notwithstanding anything in any scheme made by the authority under the said section 29, but subject to the provisions of section 35(2) of that Act (which requires local authorities to exercise their functions under Part III of that Act under the general guidance of the Secretary of State and in accordance with the provisions of any regulations made for that purpose), it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.'

There are obvious distinctions between the language of s 2(1) of the 1970 Act and ss 21 and 22 of the 1948 Act with which we are primarily concerned on this appeal. However, it will be noted the words 'necessary in order to meet the needs of that person' are not dissimilar to the words 'in need of care and attention' in s 21. The presence of the word 'necessary' in the former does however provide an emphasis which is absent from s 21 of the 1948 Act. It will be also noted that many of the matters dealt with by s 2(1), while very important to the recipient, are not of the same significance as accommodation itself which is dealt with in s 21.

The issue in *Ex p Barry* was whether a local authority can properly take into account its own financial resources when assessing the needs of a disabled person under s 2(1) of the 1970 Act. That is very much the same as the first issue which arises on this appeal. The majority of their Lordships (Lord Nicholls of Birkenhead, Lord Clyde and Lord Hoffmann, agreeing) answered the issue in the affirmative. It is important to note the reasoning by which Lord Nicholls and Lord Clyde came to this conclusion. Lord Nicholls said ([1997] 2 All ER 1 at 11–12, [1997] 2 WLR 459 at 469–470):

> 'At first sight the contentions advanced on behalf of Mr Barry are compelling. A person's needs, it was submitted, depend upon the nature and extent of his disability. They cannot be affected by, or depend upon, the local authority's ability to meet them. They cannot vary according to whether the authority has more or less money currently available. Take the case of an authority which assesses a person's needs as twice weekly help at home with laundry and cleaning. In the following year nothing changes except that the authority has less money available. If the authority's financial resources can be properly be taken into account, it would be open to the authority to reassess that person's needs in the later year as nil. That cannot be right: the person's needs have not changed. This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognise that needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's need for a particular type of level of service cannot be decided in a vacuum from which all considerations of cost have been expelled. I turn to the statute. Under s 2(1) "needs" are to be assessed in the context of, and by reference to, the provision of certain types of assistance for promoting the welfare of disabled persons: home help, meals on wheels, holidays, home adaptation and so forth. In deciding whether the disability of a particular person dictates a need for assistance and, if so , at what level, a social worker or anyone else must use some criteria. This is inevitably so. He will judge the needs for assistance against some standard, some criteria, whether spoken or unspoken. One important factor he will take into account will be what constitutes an acceptable standard of living today. Standards of living, however, vary widely. So do different people's ideas on the requirement of an acceptable standard of living. Thus something more concrete, capable of being applied uniformly, is called for when assessing the needs of a given disabled person under the statute. Some more precisely defined standard is required, a more readily identifiable yardstick, than individual notions of current standards of living. Who is to set the standard? To this there can be only one answer: the relevant local authority, acting by its social services committee. The local authority sets the standards to be applied within its area. In setting the standards, or

a "eligibility criteria" as they have been called, the local authority must take into account current standards of living, with all the latitude inherent in this concept. The authority must also take into account the nature and extent of the disability. The authority will further take into account the manner in which, and the extent to which, quality of life would be improved by the provision of this or that service or assistance, at this or that level: for b example, by home care, once a week or more frequently. The authority should also have regard to the cost of providing this or that service, at this or that level. The cost of daily home care, or of installing a ground floor lavatory for a disabled person in his home and widening the doors to take a wheelchair, may be substantial. The relative cost will be balanced against the relative benefit and the relative need for that benefit.'

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Lord Clyde said ([1997] 2 All ER 1 at 16–17, [1997] 2 WLR 459 at 475):

'The words "necessary" and "needs" are both relative expressions, admitting in each case a considerable range of meaning. They are not d defined in the Act and reference to dictionary definitions does not seem to me to advance the construction of the subsection. In deciding whether there is a necessity to meet the needs of the individual some criteria have to be provided. Such criteria are required both to determine whether there is a necessity at all or only, for example, a desirability, and also to assess the degree of necessity. Counsel for Mr Barry suggested that a criterion could be e found in the values of a civilised society. But I am not persuaded that that is sufficiently precise to be of any real assistance. It is possible to draw up categories of disabilities, reflecting the variations in the gravity of such disabilities which could be experienced. Such a classification might enable comparisons to be made between persons with differing kinds and degrees of disability. But in determining the question whether in a given case the f making of particular arrangements is necessary in order to meet the needs of a given individual it seems to me that a mere list of disabling conditions graded in order of severity will still leave unanswered the question at what level of disability is the stage of necessity reached. The determination of eligibility for the purposes of the statutory provision requires guidance not g only on the assessment of the severity of the condition or the seriousness of the need but also on the level at which there is to be satisfaction of the necessity to make arrangements. In the framing of the criteria to be applied it seems to me that the severity of a condition may have [to be] matched against the availability of resources. Such an exercise indeed accords with h everyday domestic experience in relation to things which we do not have. If my resources are limited I have to need the thing very much before I am satisfied that it is necessary to purchase it. It may also be observed that the range of the facilities which are listed as being the subject of possible arrangements, "the service list", is so extensive as to make it unlikely that Parliament intended that they might all be provided regardless of the cost j involved. It is not necessary to hold that cost and resources are always an element in determining the necessity. It is enough for the purposes of the present case to recognise that they may be a proper consideration. I have not been persuaded that they must always and necessarily be excluded from consideration. Counsel for Mr Barry founded part of his submission on the claim that on the appellants' approach there would be an unmet need, but

> once it is recognised that criteria have to be devised for assessing the necessity required by the statutory provision it will be possible to allege that in one sense that will be an unmet need. But such an unmet need will be lawfully within what is contemplated by the statute. On a more exact analysis, whereby the necessity is measured by the appropriate criteria, what is necessary to be met will in fact be met and in the strict sense of the words no unmet need will exist.'

When those passages in the speeches of Lord Nicholls and Lord Clyde are considered, it is easy to see how they could be translated to the words 'in need of care and attention' in s 21 of the 1948 Act. However, when you also consider how Sefton devised its policy it is clear they can have no application to that policy. Sefton's policy is not to use its financial position to provide a standard against which to assess 'need' but to defer consideration and payment (because of its lack of resources) where it accepts that there is a need of care and attention. Whatever context is given to the word need, their policy would still apply to Mrs Blanchard.

Lord Clyde also dealt in his speech with the question of the relationship between s 37(1) and (2) of the 1990 Act and s 2(1) of the 1970 Act. He came to the conclusion that s 47 was not inconsistent with the contention of Gloucestershire that their available resources were a relevant consideration in determining their responsibilities under s 2(1) of the 1970 Act. Lord Clyde rejected any argument in favour of Mr Barry based on s 47. I therefore, in agreement with Jowitt J, would not base an argument in favour of the applicants on this appeal on the language of s 47. I do however note that Lord Clyde was clearly influenced in coming to his conclusion by the relationship between s 2(1) of the 1970 Act and s 29 of the 1948 Act. In relation to s 29 as he points out ([1997] 2 All ER 1 at 14, [1997] 2 WLR 459 at 474) 'it was proper for a local authority to take into account the extent of the resources which were available to it'. So in approaching s 2(1) of the 1970 Act, set in the context of s 29, one would expect that the extent of available resources would remain a proper consideration, or at least, if for some reason at any stage of the operation of the provision of s 2(1) no regard was to be paid to consideration of available resources, that would be made very clear in the terms of the section. Section 29 of the 1948 Act, is in a group of sections in Pt II of the Act under the heading 'Welfare Services'. Sections 21 to 26, which we are concerned with in this case, are, on the contrary, concerned with the provision of accommodation. Caution therefore has to be exercised before applying the interpretation of 'needs' in s 29 to s 21. As Lord Clyde also stated ([1997] 2 All ER 1 at 16, [1997] 2 WLR 459 at 475): 'The words "necessary" and "needs" are both relative expressions, admitting in each case a considerable range of meaning.'

This is important because there are undoubted difficulties in adopting the general approach as to the elasticity of 'necessary' and 'needs' referred to by Lord Nicholls and Lord Clyde to the words 'in need of care and attention' which appear in s 21(1) of the 1948 Act. Under s 2(1) of the 1970 Act, the obligation of the authority only arose if the authority were satisfied that not only would the services described in the section meet the needs of the person concerned but that it was necessary for the services to be provided in order to meet those needs. In the case of s 21 once the authority has come to the conclusion that the person concerned is in need of care and attention, which is not otherwise available to them, then the residential accommodation is to be provided.

As Mr Drabble QC submits on behalf of Mrs Blanchard there cannot be any doubt that she is in need of care and attention. While I fully accept in accordance

with the decision in *Ex p Barry*, that it is possible to perform a cost benefit analysis in relation to a persons needs for services listed in s 2(1) and then decide if they are necessary, taking into account the resources of the authority. I find it very much more difficult to perform the same exercise when deciding whether a person is in need of care and attention. However, having regard to the reasoning of Lords Nicholls and Clyde, I am compelled to conclude that there is a limited subjective element in making the assessment of whether the ailments of the person concerned do or do not collectively establish a need for care and attention. I therefore determine the first issue in the affirmative. However, in this case it is clear from the evidence that Sefton accepted that Mrs Blanchard met their own threshold as a person in need of care and attention. What they were seeking to do was to say that because of their lack of resources, notwithstanding this, they were not prepared to meet the duty which was placed on them by the section. This they were not entitled to do. There is nothing in the speeches in the House of Lords in *Ex p Barry* to indicate to the contrary. Lord Clyde in fact makes this clear in relation to s 2(1) of the 1970 Act when he says ([1997] 2 All ER 1 at 16, [1997] 2 WLR 459 at 474):

> 'The right given to the person by s 2(1) of the 1970 Act was a right to have the arrangements made which the local authority was satisfied were necessary to meet his needs. The duty only arises if or when the local authority is so satisfied. But when it does arise then it is clear that a shortage of resources will not excuse a failure in the performance of the duty.'

So here, the local authority were satisfied that Mrs Blanchard was 'in need of care and attention' and that being so, unless they can rely on the words 'which is not otherwise available to them' they were under an obligation to fulfil their duty and a lack of resources was no excuse. The second issue is therefore to be determined adversely to Sefton.

Sefton cannot succeed because of the effect of their resources on the requirement of 'need'. Can they succeed because the accommodation has to be 'not otherwise available to the individual seeking to rely on s 21'? If Mrs Blanchard had had no capital, Sefton would, notwithstanding their lack of resources, have undoubtedly performed their s 21 duty. Their refusal to do so was not dependent on her condition, but her capital resources. This is demonstrated by the fact that once her capital resources were reduced below £1,500 they provided the financial assistance that she was seeking. Sefton waited until her resources fell below £1,500. The regime provided for under s 22 read with s 26 provided a different scale for judging a person's ability to pay. I am satisfied that Sefton were not entitled to provide their own scale. The approach of Sefton totally defeats the intent of s 22. Sections 22 and 26 of the 1948 Act and the 1992 regulations determine Sefton's liability once Mrs Blanchard's capital fell below £16,000, Sefton then became under an obligation to provide financial assistance. The statutory scheme rests on the assumption that care and attention is not to be regarded as 'otherwise available' if the person concerned is unable to pay for it according to the means test regime provided for in s 22. Section 22(5) requires Sefton to give effect to the regulations and this Sefton has not done. So the third issue must also be decided adversely to Sefton. Any other approach is incompatible with the language of the relevant statutory provisions.

I would therefore allow the appeal. I do so not because of any *Wednesbury* approach (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All

ER 680, [1948] 1 KB 223) (which was not relied on by Mr Drabble) but because any appropriate application of the language of the statutory provisions to the facts of this case does not allow any other result. I would welcome submissions by counsel as to what relief, if any, it is necessary for this court to grant.

ROCH LJ. I agree.

HENRY LJ. I also agree.

Appeal allowed. Leave to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

R v Powell and another
R v English

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD JAUNCEY OF TULLICHETTLE, LORD MUSTILL, LORD STEYN AND LORD HUTTON

17–19 FEBRUARY, 17 JULY, 30 OCTOBER 1997

Criminal law – Murder – Concerted action – Joint unlawful enterprise – Prior contemplation of possible incidents of common purpose – Whether sufficient to found conviction for murder if secondary party realised that primary party might kill with intent to do so or with intent to cause grievous bodily harm – Whether sufficient if lethal act carried out by primary party fundamentally different from acts foreseen or intended by secondary party.

In two separate appeals the question arose as to the intention or foresight required to found a conviction for murder of a secondary party where death occurred in the course of a joint enterprise.

In the first appeal, P and D went with another man to the house of a drug dealer for the purpose of buying drugs but the drug dealer was shot dead at the door. It was not clear who had shot the drug dealer but P and D were convicted of murder on the basis of the Crown's case that if the third man had fired the gun, they knew that he was armed with a gun and realised that he might use it to kill or cause really serious injury to the drug dealer. P and D appealed against their convictions to the Court of Appeal, which dismissed the appeals and P and D appealed to the House of Lords.

In the second appeal, E and W took part in a joint attack on a police officer in which they both caused injury with wooden posts but the police officer died from fatal stab wounds inflicted by W. E was convicted of murder, the judge having directed the jury to do so if they found that he had joined in an unlawful attack realising at the time that there was a substantial risk that W might kill the police officer during the attack or at least cause some really serious injury to him. E and W appealed to the Court of Appeal, which dismissed the appeals and E appealed to the House of Lords.

Held – (1) It was sufficient to found a conviction for murder for a secondary party to a killing in the course of a joint enterprise to have realised that the primary party might kill with intent to do so or with intent to cause grievous bodily harm. Although a lesser mens rea than that required for conviction of the primary party was therefore to be proven in the case of the secondary party, that result was required for reasons of public policy which were concerned with the practical need to control crime committed in the course of joint enterprises. Accordingly, P and D's appeals would be dismissed (see p 547 *f* to *h*, p 549 *d f g*, p 550 *b h j*, p 551 *h j*, p 552 *j*, p 554 *h j*, p 556 *j* to p 557 *a*, p 558 *a b*, p 561 *h* to p 562 *b* and p 563 *e f*, post); *R v Smith (Wesley)* [1963] 3 All ER 597 and *Chan Wing-siu v R* [1984] 3 All ER 877 applied; *R v Barr* (1986) 88 Cr App R 362 and *R v Smith* [1988] Crim LR 616 overruled.

(2) The secondary party would not be guilty of murder, however, where he intended or foresaw that the primary party would or might act with intent to

cause grievous bodily harm but the lethal act carried out by the primary party was fundamentally different from the acts foreseen or intended by the secondary party. However, if the weapon used by the principal was different to, but as dangerous as, the weapon which the secondary party had contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, where he foresaw that the primary party might use a gun to kill and the latter used a knife to kill. Since the jury in the case of E could have found on the evidence that he did not know that W had a knife, the conviction of E was unsafe. His appeal would accordingly be allowed and his conviction quashed (see p 547 *f* to *h*, p 549 *d f g*, p 552 *j*, p 564 *c* to *f* and p 565 *j* to p 566 *e f*, post); dictum of Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648 applied; *R v Gamble* [1989] NI 268 approved.

Notes

For joint enterprise in cases of homicide, see 11(1) *Halsbury's Laws* (4th edn reissue) para 435, and for cases on the subject, see 14(1) *Digest* (2nd reissue) 109–110, 134, *866, 1082*.

Cases referred to in opinions

Chan Wing-siu v R [1984] 3 All ER 877, [1985] AC 168, [1984] 3 WLR 677, PC.
DPP v Majewski [1976] 2 All ER 142, [1977] AC 443, [1976] 2 WLR 623, HL.
Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402, [1986] AC 112, [1985] 3 WLR 830, HL; *rvsg* [1985] 1 All ER 533, [1986] AC 112, [1985] 2 WLR 413, CA; *rvsg* [1984] 1 All ER 365, [1984] QB 581, [1983] 3 WLR 859.
Hui Chi-ming v R [1991] 3 All ER 897, [1992] 1 AC 34, [1991] 3 WLR 495, PC.
Johns v R (1980) 143 CLR 108, Aust HC.
McAuliffe (S P) v R, McAuliffe (D J) v R (1995) 130 ALR 26, Aust HC.
R v Anderson and Morris [1966] 2 All ER 644, [1966] 2 QB 110, [1966] 2 WLR 1195, CCA.
R v Barr (1986) 88 Cr App R 362, CA.
R v Betty (1963) 48 Cr App R 6, CCA.
R v Cunningham [1981] 2 All ER 863, [1982] AC 566, [1981] 3 WLR 223, HL.
R v Gamble [1989] NI 268, NI Crown Ct.
R v Hancock [1986] 1 All ER 641, [1986] AC 455, [1986] 2 WLR 357, HL.
R v Hyde [1990] 3 All ER 892, [1991] 1 QB 134, [1990] 3 WLR 1115, CA.
R v Moloney [1985] 1 All ER 1025, [1985] AC 905, [1985] 2 WLR 648, HL.
R v Slack [1989] 3 All ER 90, [1989] QB 775, [1989] 3 WLR 513, CA.
R v Smith (Wesley) [1963] 3 All ER 597, [1963] 1 WLR 1200, CCA.
R v Smith [1988] Crim LR 616, CA.
R v Wakely, R v Symonds, R v Holly [1990] Crim LR 119, CA.
R v Ward (1987) 85 Cr App R 71, CA.

Appeals

R v Powell and anor

Anthony Glasford Powell and Antonio Daniels appealed with leave of the Appeal Committee of the House of Lords given on 11 March 1996 against the decision of the Court of Appeal (Lord Taylor CJ, Tucker and Forbes JJ) ([1996] 1 Cr App R 14) delivered on 25 May 1995 dismissing their appeal against their conviction for murder on 28 February 1994 before the Recorder of London and a jury at the Central Criminal Court for which they were sentenced to life imprisonment.

The Court of Appeal certified that a point of law of general public importance (see p 554 *a*, post) was involved in the decision. The facts are set out in the opinion of Lord Hutton.

R v English

Philip English appealed with leave of the Appeal Committee of the House of Lords given on 18 December 1996 against the decision of the Court of Appeal (Simon Brown LJ, French and Longmore JJ) delivered on 16 July 1996 dismissing the appellant's appeal against his conviction for murder on 17 February 1995 before Owen J and a jury at the Crown Court at Teesside for which he was sentenced to be detained during Her Majesty's pleasure. The Court of Appeal certified that two points of law of general public importance (see p 554 *a b*, post) were involved in the decision. The facts are set out in the opinion of Lord Hutton.

Peter Feinberg QC and *Benjamin Squirrell* (instructed by *Thanki Novy Taube*) for Powell and Daniels.

Christopher Sallon QC and *Julian B Knowles* (instructed by *Bindman & Partners*) for English.

Anthony Scrivener QC and *William Boyce* (instructed by the *Crown Prosecution Service Headquarters*) for the Crown.

On 17 July 1997 the House of Lords announced that the appeal would be allowed in the case of English and dismissed in the case of Powell and Daniels for reasons to be given later.

30 October 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hutton and, for the reasons he has given, I too would also make the orders he proposes.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Hutton and, for the reasons which he gives, I would also make the orders he proposes.

LORD MUSTILL. My Lords, I concurred without hesitation in the orders made by the House on 17 July 1997. Even as regards the case of English, which is much the more difficult of the appeals, I felt and continue to feel that neither under the authorities nor in plain justice could it be right to sustain the conviction once it was very properly conceded on behalf of the respondent that the appellant might have been unaware that the knife ultimately used by Weddle was even in the latter's possession. So much is to my mind clear. Much less clear is the proper analysis of the law in a situation where the secondary party foresees that the principal offender may commit a more serious crime than the one which the two set out to commit, and nevertheless decides to go ahead with the plan.

My own reasoning was, in summary, as follows.

Throughout the modern history of the law on secondary criminal liability (at least of the type with which this appeal is concerned) the responsibility of the

secondary defendant has been founded on his participation in a joint enterprise of which the commission of the crime by the principal offender formed part. Any doubts on this score were set at rest by *R v Anderson and Morris* [1966] 2 All ER 644, [1966] 2 QB 110 by reference to which countless juries have been directed over the years. As it seemed to me, the House should not depart from this long-established principle without the strongest of reasons. The problem is to accommodate in the principle the foresight of the secondary party about what the main offender might do. Two aspects of this problem are simple. If S did not foresee what was actually done by P he is not liable for it, since it could not have been part of any joint enterprise. This is what the court decided in *R v Anderson and Morris* [1966] 2 All ER 644, [1966] 2 QB 110. Conversely, if S did foresee P's act this would always, as a matter of common sense, be relevant to the jury's decision on whether it formed part of a course of action to which both S and P agreed, albeit often on the basis that the action would be taken if particular circumstances should arise.

Intellectually, there are problems with the concept of a joint venture, but they do not detract from its general practical worth, which has proved itself over many years. In one particular situation there is, however, a problem which this time-honoured solution cannot solve. Namely, where S foresees that P may go too far; sincerely wishes that he will not, and makes this plain to P; and yet goes ahead, either because he hopes for the best, or because P is an overbearing character, or for some other reason. Many would say, and I agree, that the conduct of S is culpable, although usually at a lower level than the culpability of the principal who actually does the deed. Yet try as I may, I cannot accommodate this culpability within a concept of joint enterprise. How can a jury be directed at the same time that S is guilty only if he was party to an express or tacit agreement to do the act in question, and that he is guilty if he not only disagreed with it, but made his disagreement perfectly clear to P? Are not the two assertions incompatible?

At the same time the culpability of S ought to be reflected in some form of criminal liability, attracting some degree of punishment. If one rejects, for the reason just given, the idea of forcing it within the existing notion of a joint venture there remain only two alternatives. The first is to abandon that notion altogether, and employ in all cases a test of foreseeability as the direct route to a verdict. The second is to retain the concept of a joint venture in all those cases, forming the great majority, where on the facts it provides a complete test for whether S is or is not guilty of the crime which P actually committed. In the minority of cases where S ought to be guilty and yet cannot rationally be treated as party to an express or tacit agreement to commit the offence in question his culpability can be established by a different route, proposed by Sir Robin Cooke, delivering the opinion of the Privy Council in *Chan Wing-siu v R* [1984] 3 All ER 877 at 880, [1985] AC 168 at 175, namely that the culpability of S lies in his participation in the venture with foresight of the crime as a possible incident of the common unlawful enterprise.

My Lords, I had for my part preferred the second of these alternatives; for I did not favour the abandonment of a doctrine which has for years worked adequately in practice and its replacement by something which I conceived to be new, unless this step was strictly necessary; and I did not think it necessary, since the existing principles could be retained, in combination (for the exceptional cases) with the concept of wrongful participation in face of a known risk. This was indeed what

I understood the law to be, after *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168, *Hui Chi-ming v R* [1991] 3 All ER 897, [1992] 1 AC 34 and *McAuliffe (S P) v R, McAuliffe (D J) v R* (1995) 130 ALR 26.

My Lords, given the importance of the topic, I had originally prepared the draft of a speech containing a detailed historical analysis and a statement of the reasons which led me to prefer the second version of the law. Recognising, however, that the remainder of your Lordships see the matter differently, I prefer that the draft should be withdrawn. There are some instances where the delivery of a minority opinion is a duty, the performance of which is not simply a matter of record, but also makes an important contribution to the future understanding and development of the law. This is not such a case. Doctrinally the differences may be considerable, but their practical significance is likely to be small, or perhaps even non-existent. What the trial judge needs is a clear and comprehensible statement of a workable principle, which he or she will find in the speech of my noble and learned friend, Lord Hutton; and the judge's task will not be helped in any way by a long exposition of a theory which might have prevailed, but in the event has not. This being so, I am entirely willing to concur in the reasoning to which the remainder of your Lordships subscribe. This will, I suspect, require some judges to look again at the terms in which they have customarily directed juries, but the task should not be at all difficult to perform.

In conclusion, I wish to express my wholehearted support for the observations of my noble and learned friend, Lord Steyn, in the latter part of his speech. Once again, an appeal to this House has shown how badly our country needs a new law of homicide, or a new law of punishment for homicide, or preferably both. The judges can do nothing about this, being held fast by binding authorities on the one hand and a mandatory statute on the other. Only Parliament has the powers, if it will choose to exercise them. It may not be a popular choice, but surely it is justice that counts.

LORD STEYN. My Lords, for the reasons contained in the speech to be delivered by my noble and learned friend Lord Hutton, which I have read in draft, I supported the orders made by the House in the appeals under consideration on 17 July 1997. Given the importance and difficulty of the legal issues at stake I make a few additional observations.

There are two separate but complementary legal concepts at stake. The first is the mental element sufficient for murder, ie an intention to kill or to cause really serious bodily injury. Only if this element is proved in respect of the primary offender, and if the other ingredients of murder are proved, does the second concept arise for consideration, viz the criminal liability of accessories to a joint criminal enterprise. Under the accessory principle criminal liability is dependent on proof of subjective foresight on the part of a participant in the criminal enterprise that the primary offender might commit a greater offence, that being in these cases foresight that the primary offender might commit murder as defined in law.

The thrust of both appeals was to challenge the existing law and practice regarding the second concept. The appeals under consideration relate to charges of murder. But there is no special rule regarding the criminal liability of accessories in cases of murder. The principle governing the criminal liability of accessories applies across the spectrum of most criminal offences. Any alteration in the accessory principle, as presently understood, would have to apply to most

criminal offences. That does not mean that the arguments advanced on behalf of the appellants are unsound. But it underlines the sweeping impact of the changes to the existing law and practice necessarily involved in an acceptance of the submissions made on behalf of the appellants in these appeals.

The established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend. The criminal culpability lies in participating in the criminal enterprise with that foresight. Foresight and intention are not synonymous terms. But foresight is a necessary and sufficient ground of the liability of accessories. That is how the law has been stated in two carefully reasoned decisions of the Privy Council (see *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168 and *Hui Chi-ming v R* [1991] 3 All ER 897, [1992] 1 AC 34). In a valuable article Professor Sir John Smith has recently concluded that there is no doubt that this represents English law (see 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453 at 455). And Lord Hutton has demonstrated in his comprehensive review of the case law that the law is as stated in the two Privy Council decisions. That does not mean that the established principle cannot be re-examined and, if found to be flawed, reformulated. But the existing law and practice forms the starting point.

Counsel for the appellants argued that the secondary party to a criminal enterprise should only be guilty of a murder committed by the primary offender if the secondary party has the full mens rea sufficient for murder, ie an intent to kill or to cause really bodily harm. Their arguments fell into three parts, namely: (1) that there is a disharmony between two streams of authority; (2) that the accessory principle involves a form of constructive criminal liability; and (3) that it is anomalous that a lesser form of culpability is sufficient for a secondary party than for the primary offender. The first part of the argument centred on the scope of decisions of the House of Lords in *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905 and *R v Hancock* [1986] 1 All ER 641, [1986] AC 455. Those decisions distinguish between foresight and intention and require in the case of murder proof of intention to kill or cause serious bodily injury. But those decisions were intended to apply to a primary offender only. The liability of accessories was not in issue. Plainly the House did not intend in those decisions to examine or pronounce on the accessory principle. The resort to authority must therefore fail.

That brings me to the second argument. If the application of the accessory principle results in a form of constructive liability that would be contrary to principle and it would be a defect in our criminal law. But subject to a qualification about the definition of the mens rea required for murder to which I will turn later, I would reject the argument that the accessory principle *as such* imposes a form of constructive liability. The accessory principle requires proof of a subjective state of mind on the part of a participant in a criminal enterprise, viz foresight that the primary offender might commit a different and more serious offence. Professor Sir John Smith explained how the principle applies in the case of murder ((1997) 113 LQR 453 at 464):

> 'Nevertheless, as the critics point out it is enough that the accessory is reckless, whereas, in the case of the principal, intention must be proved. Recklessness whether death be caused is a sufficient *mens rea* for a principal offender in manslaughter, but not murder. The accessory to murder, however, must be proved to have been reckless, not merely whether death

might be caused, but whether murder might be committed; *he must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally, by a person whom he was assisting or encouraging to commit a crime.* Recklessness whether murder be committed is different from, and more serious than, recklessness whether death be caused by an accident.' (My emphasis.)

The foresight of the secondary party must be directed to a real possibility of the commission by the primary offender in the course of the criminal enterprise of the greater offence. The liability is imposed because the secondary party is assisting in and encouraging a criminal enterprise which he is aware might result in the commission of a greater offence. The liability of an accessory is predicated on his culpability in respect of the greater offence as defined in law. It is undoubtedly a lesser form of mens rea. But it is unrealistic to say that the accessory principle as such imposes constructive criminal liability.

At first glance, there is substance in the third argument that it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence. This general argument leads, in the present case, to the particular argument that it is anomalous that the secondary party can be guilty of murder if he foresees the possibility of such a crime being committed while the primary can only be guilty if he has an intent to kill or cause really serious injury. Recklessness may suffice in the case of the secondary party but it does not in the case of the primary offender. The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed. For these reasons, I would reject the arguments advanced in favour of the revision of the accessory principle.

That brings me to the qualification which I have foreshadowed. In English law a defendant may be convicted of murder who is in no ordinary sense a murderer. It is sufficient if it is established that the defendant had an intent to cause really serious bodily injury. This rule turns murder into a constructive crime. The fault element does not correspond to the conduct leading to the charge, i e the causing of death. A person is liable to conviction for a more serious crime than he foresaw

or contemplated (see Glanville Williams *Textbook of Criminal Law* (2nd edn, 1983) pp 250–251, Ashworth *Principles of Criminal Law* (2nd edn, 1995) pp 85, 261 and Card, Cross and Jones *Criminal Law* (13th edn, 1995) pp 63–64). This is a point of considerable importance. The Home Office records show that in the last three years for which statistics are available mandatory life sentences for murder were imposed in 192 cases in 1994; in 214 cases in 1995; and in 257 cases in 1996. Lord Windlesham, writing with great Home Office experience, has said that *a minority* of defendants convicted of murder have been convicted on the basis that they had an intent to kill (see *Responses to Crime; Legislating with the Tide* vol 3 (1996) p 342). That assessment does not surprise me. What is the justification for this position? There is an argument that, given the unpredictability whether a serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction of murder in the event of a death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murderers. It happens both in cases where only one offender is involved and in cases resulting from joint criminal enterprises. It results in the imposition of mandatory life sentences when neither justice nor the needs of society require the classification of the case as murder and the imposition of a mandatory life sentence.

The observations which I have made about the mental element required for murder were not directly in issue in the appeals under consideration. But in the context of murder the application of the accessory principle, and the definition of murder, are inextricably linked. For that reason, I have felt at liberty to mention a problem which was not addressed in argument. That counsel did not embark on such an argument is not altogether surprising. After all, in *R v Cunningham* [1981] 2 All ER 863, [1982] AC 566 the House of Lords declined to rationalise and modernise the law on this point. Only Lord Edmund-Davies ([1981] 2 All ER 863 at 872, [1982] AC 566 at 583) expressed the hope that the legislature would undertake reform. In my view, the problem ought to be addressed. There is available a precise and sensible solution, namely, that a killing should be classified as murder if there is an intention to kill or an intention to cause really serious bodily harm coupled with awareness of the risk of death (see Fourteenth Report of the Criminal Law Revision Committee *Offences against the Person* 1980 (Cmnd 7844) para 31 adopted in *The Criminal Code for England and Wales 1986* (Law Com No 177) cl 54(1)). This solution was supported by the House of Lords Select Committee on Murder and Life Imprisonment (HL Paper (1988–89) 78–1) para 68.

Having made these observations, I make clear that I am in full agreement with the judgment of Lord Hutton, which in my view accurately states the applicable law.

LORD HUTTON. My Lords, the appeals before your Lordships' House relate to the liability of a participant in a joint criminal enterprise when another participant in that enterprise is guilty of a crime, the commission of which was not the purpose of the enterprise.

In the case of Powell and Daniels the purpose of the joint enterprise was to purchase drugs from a drug dealer. Three men, including the two appellants, Powell and Daniels, went to purchase drugs from a drug dealer, but having gone to his house for that purpose, the drug dealer was shot dead when he came to the door. The Crown was unable to prove which of the three men fired the gun which killed the drug dealer, but it was the Crown case that if the third man fired the gun, the two appellants were guilty of murder because they knew that the third man was armed with a gun and realised that he might use it to kill or cause really serious injury to the drug dealer.

In the course of summing up to the jury at the trial, the Recorder of London said:

> '... if B or C realised, without agreeing to such conduct being used, that A may kill or intentionally inflict serious injury and they nevertheless continue to participate with A in the venture, that will amount to a sufficient mental element for B or C to be guilty of murder if A with the requisite intent kills in the course of the venture. In those circumstances B and C have lent themselves to the enterprise and by so doing have given assistance and encouragement to A in carrying out an enterprise which they realised may involve murder. These are general principles which must be applied to the facts of this case.'

Powell and Daniels were convicted of murder and their appeals were rejected by the Court of Appeal, and the question certified for the opinion of your Lordships' House is:

> 'Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so or must the secondary party have held such intention himself?'

In the case of English the purpose of the joint enterprise in which he and another young man, Weddle, took part was to attack and cause injury with wooden posts to a police officer, Sergeant Forth, and in the course of the attack Weddle used a knife with which he stabbed Sergeant Forth to death.

It was a reasonable possibility that English had no knowledge that Weddle was carrying a knife, and on this basis the learned trial judge, Owen J, stated in his summing up to the jury:

> 'If he did not know of the knife then you have to consider whether nevertheless he knew that there was a substantial risk that Weddle might cause some really serious injury with the wooden post which was used in the manner which you find it to have been used. So there is the question; "Has the prosecution proved"—and this is an alternative, of course—"that English joined in an unlawful attack on the sergeant realising at that time that there was a substantial risk that in that attack Weddle might kill or at least cause some really serious injury to the sergeant. If no, not guilty" ...'

The judge then, in effect, directed the jury that if they answered that question in the affirmative they should find English guilty of murder.

Weddle and English were convicted of murder and their appeals were rejected by the Court of Appeal. English now appeals to your Lordships' House and the two questions certified for the opinion of the House are as follows:

'(i) Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so or with intent to cause grievous bodily harm or must the secondary party have held such an intention himself?

(ii) Is it sufficient for murder that the secondary party intends or foresees that the primary party would or may act with intent to cause grievous bodily harm, if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by the secondary party?'

The question certified in the appeals of Powell and Daniels and the first question certified in the appeal of English raise the issue whether foresight of a criminal act which was not the purpose of the joint enterprise (in the case of Powell and Daniels the use of a gun, and in the case of English the use of a knife) is sufficient to impose criminal liability for murder on the secondary party in the event that the jury find that the primary party used the weapon with intent to kill or cause really serious harm.

In the case of Powell and Daniels, the Crown case was that the two appellants knew that the third man was armed with a gun, and the Crown accepted that if the jury did not find this knowledge the appellants would not be guilty of murder. But in the case of English the Crown case was that, even if he did not know that Weddle had a knife, English foresaw that Weddle would cause really serious injury to the police officer, and that this foresight was sufficient to impose criminal liability upon him for the murder. Accordingly the second question arises in the case of English and that question is, in essence, whether the secondary party is guilty of murder if he foresaw that the other person taking part in the enterprise would use violence that would cause really serious injury, but did not foresee the use of the weapon that was used to carry out the killing.

My Lords, the first question gives rise, in my opinion, to two issues. The first issue is whether there is a principle established in the authorities that where there is a joint enterprise to commit a crime, foresight or contemplation by one party to the enterprise that another party to the enterprise may in the course of it commit another crime, is sufficient to impose criminal liability for that crime if committed by the other party even if the first party did not intend that criminal act to be carried out. (I shall consider in a later part of this judgment whether the foresight is of a possibility or of a probability.) The second issue is whether, if there be such an established principle, it can stand as good law in the light of the decisions of this House that foresight is not sufficient to constitute the mens rea for murder in the case of the person who actually causes the death and that guilt only arises if that person intends to kill or cause really serious injury.

My Lords, I consider that there is a strong line of authority that where two parties embark on a joint enterprise to commit a crime, and one party foresees that in the course of the enterprise the other party may carry out, with the requisite mens rea, an act constituting another crime, the former is liable for that crime if committed by the latter in the course of the enterprise. This was decided by the Court of Appeal, constituted by five judges, in *R v Smith (Wesley)* [1963] 3 All ER 597, [1963] 1 WLR 1200. In that case after an argument in a public-house, where the appellant and three other men had been causing a disturbance, the appellant and one of the other men went outside where they collected and threw bricks through the glass door of the premises, in order to 'tear up the joint'. While they were so doing, one of the remaining two men, who were still inside, continued the argument which developed into a fight in the course of which one

of them, A, stabbed the barman with a knife, killing him. At the time of the stabbing the appellant was outside the premises, but he knew that the man who stabbed the barman was carrying the knife on his person. All four men were charged with murder. The trial judge directed the jury ([1963] 3 All ER 597 at 600–601, [1963] 1 WLR 1200 at 1204–1205):

> 'Assuming that one of the four knifed the barman, assuming you are satisfied that it was done unlawfully, in the course of an assault upon him, was [the appellant] taking part in a general attack on the bar directed in part at the barman, so as to make him a party to the general assault in some way upon [the deceased barman]? ... Manslaughter is unlawful killing without an intent to kill or do grievous bodily harm. Anybody who is a party to an attack which results in an unlawful killing ... is a party to the killing.'

The appellant was convicted of manslaughter.

In delivering the judgment of the Court of Appeal, Slade J referred to the direction of the trial judge that: 'Anybody who is a party to an attack which results in an unlawful killing ... is a party to the killing.' Slade J then stated ([1963] 3 All ER 597 at 601–602, [1963] 1 WLR 1200 at 1205–1206):

> 'In the view of this court, that is a wholly unexceptionable direction upon the law except, of course, where the act can be said to be wholly outside the subject-matter of the concerted agreement. The terms "agreement", "confederacy", "acting in concert", and "conspiracy", all pre-suppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, is guilty of manslaughter. That does not mean that one cannot hypothesise a case in which there is an act which is wholly outside the scope of the agreement, in which case no doubt different considerations might apply; but the judge was not dealing with that case at all ... The grounds of appeal in this case, although worded in different ways really, as I understand them, amount to the same thing; that is, that the use of a knife by Atkinson in this case was a departure, that is to say, assuming against the appellant, as must be assumed in the light of the jury's verdict, that he was a party to some concerted action being taken against the barman, he certainly was not a party to the use on the barman of a knife which resulted in the barman's death. It is significant, as I have shown by reading the appellant's own statement, that he knew that Atkinson carried a knife. Indeed, I think he knew that one of the other man carried a cut-throat razor. It must have been clearly *within the contemplation* of a man like the appellant who, to use one expression, had almost gone berserk himself, and who had left the public-house only to get bricks to tear up the joint, that if the barman did his duty to quell the disturbance and picked up the night stick, anyone who knew that he had a knife in his possession, like Atkinson, might use it on the barman, as Atkinson did. *By no stretch of imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case.* In a case of this kind it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties; but that is not this case, and I am expressing no opinion about that. The court is satisfied that anything which is within the ambit of the concerted

arrangement is the responsibility of each party who chooses to enter into the criminal purpose.' (My emphasis.)

Therefore, I consider that in *R v Smith* the Court of Appeal recognised that the secondary party will be guilty of unlawful killing committed by the primary party with a knife if he contemplates that the primary party may use such a weapon.

In *R v Anderson and Morris* [1966] 2 All ER 644, [1966] 2 QB 110 the primary party (Anderson) killed the victim with a knife. The defence of the secondary party (Morris) was that even though he may have taken part in a joint attack with Anderson to beat up the victim, he did not know that Anderson was armed with a knife. In his summing up, the trial judge told the jury that they could convict Morris of manslaughter even though he had no idea that Anderson had armed himself with a knife. The Court of Appeal held that this was a misdirection in respect of Morris and quashed his conviction for manslaughter.

In delivering the judgment of the Court of Appeal Lord Parker CJ accepted the principle formulated by Mr Geoffrey Lane QC (as he then was) on behalf of Morris:

> '... where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise.' (See [1966] 2 All ER 644 at 647, [1966] 2 QB 110 at 118–119.)

As a matter of strict analysis there is, as Professor J C Smith pointed out in his commentary on *R v Wakely, R v Symonds, R v Holly* [1990] Crim LR 119 at 120, a distinction between a party to a common enterprise contemplating that in the course of the enterprise another party may use a gun or knife and a party tacitly agreeing that in the course of the enterprise another party may use such a weapon. In many cases the distinction will in practice be of little importance because as Lord Lane CJ observed in *R v Wakely* with reference to the use of a pickaxe handle in a burglary, 'foreseeability that the pickaxe handle might be used as a weapon of violence was practically indistinguishable from tacit agreement that the weapon should be used for that purpose' (see at 120). Nevertheless, it is possible that a case might arise where a party knows that another party to the common enterprise is carrying a deadly weapon and contemplates that he may use it in the course of the enterprise, but, whilst making it clear to the other party that he is opposed to the weapon being used, nevertheless continues with the plan. In such a case, it would be unrealistic to say that, if used, the weapon would be used with his tacit agreement. However, it is clear from a number of decisions, in addition to the judgment of the Court of Appeal in *R v Smith (Wesley)* [1963] 3 All ER 597, [1963] 1 WLR 1200, that as stated by the High Court of Australia in *McAuliffe v R* (1995) 130 ALR 26 at 30 (in a judgment to which I will refer later in more detail) 'the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose'. Therefore, when two parties embark on a joint criminal enterprise one party will be liable for an

act which he contemplates may be carried out by the other party in the course of the enterprise even if he has not tacitly agreed to that act.

The principle stated in *R v Smith* was applied by the Privy Council in *Chan Wing-siu v R* [1984] 3 All ER 877 at 880–881, [1985] AC 168 at 175 in the judgment delivered by Sir Robin Cooke, who stated:

> 'The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.'

The principle stated by Sir Robin Cooke in *Chan Wing-siu v R* was followed and applied in the judgment of the Court of Appeal in *R v Hyde* [1990] 3 All ER 892, [1991] 1 QB 134 where Lord Lane CJ took account of Professor Smith's comment in *R v Wakely* that there is a distinction between tacit agreement and foresight and made it clear that the latter is the proper test.

In *Hui Chi-ming v R* [1991] 3 All ER 897 at 910–911, [1992] 1 AC 34 at 53 the Privy Council again applied the principle stated by Sir Robin Cooke in *Chan Wing-siu v R* [1984] 3 All ER 877 at 880–881, [1985] AC 168 at 175 and in delivering the judgment of the Board Lord Lowry stated:

> 'The appellant's second point relies on Sir Robin Cooke's use of the word "authorisation" as a synonym for contemplation in the passage already cited from his judgment. Their Lordships consider that Sir Robin Cooke used this word—and in that regard they do not differ from counsel—to emphasise the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit *as a possible incident of the common unlawful enterprise* and must, with such foresight, still have participated in the enterprise. The word "authorisation" explains what is meant by contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: "The criminal culpability lies in participating in the venture with that foresight." (Lord Lowry's emphasis.)

In *McAuliffe v R* (1995) 130 ALR 26 at 30 the High Court of Australia has recently stated that the test for determining whether a crime falls within the scope of a joint enterprise is now the subjective test of contemplation and the court stated:

> '... each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially, the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to

be determined by what was contemplated by the parties sharing that purpose.' a

There is therefore a strong line of authority that participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise.

I would add that, in my opinion, Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 647, [1966] 2 QB 110 at 119, having accepted the principle formulated by Mr Lane, made it clear in other parts of the judgment that he was not intending to depart from the principle in *R v Smith (Wesley)* [1963] 3 All ER 597, [1963] 1 WLR 1200 because immediately after stating Mr Lane's formulation Lord Parker CJ said: b c

'In support of that, he refers to a number of authorities to which this court finds it unnecessary to refer in detail, which in the opinion of this court shows that at any rate for the last 130 or 140 years that has been the true position. This matter was in fact considered in some detail in *R.* v. *Smith*, which was heard by a court of five judges presided over by HILBERY, J., on Nov. 6, 1961, a case in which SLADE, J., gave the judgment of the court. That case was referred to at some length in the later decision in this court in *R.* v. *Betty* (1963) 48 Cr App R 6. It is unnecessary to go into that case in any detail. It followed the judgment of SLADE, J., in *R.* v. *Smith*, and it did show the limits of the general principle which counsel for the applicant Morris invokes in the present case. In *R.* v. *Smith* the co-adventurer who in fact killed was known by the accused to have a knife, and it was clear on the facts of that case that the common design involved an attack on a man, in that case a barman, in which the use of a knife would not be outside the scope of the concerted action. Reference was there made to the fact that the case might have been different if in fact the man using the knife had used a revolver, a weapon which he had, unknown to Smith. The court in *R.* v. *Betty* approved entirely of what had been said in *R.* v. *Smith*, and in fact added to it.' d e f

I consider that Lord Parker CJ applied the test of foresight when he stated later ([1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120).

'It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.' g h

Therefore, I consider that the judgment in *R v Anderson and Morris* was not intended to constitute a departure from the principle stated in *R v Smith*, and that the acceptance of Mr Lane's test was regarded by the Court of Appeal as an alternative way of formulating the principle stated in *R v Smith*, although as Professor Smith has pointed out, as a matter of strict analysis, a distinction can be drawn between the two tests. j

The second issue which arises on these appeals is whether the line of authority exemplified by *R v Smith* and *Chan Wing-siu's* case is good law in the light of the decisions of this House in *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905 and *R v Hancock* [1986] 1 All ER 641, [1986] AC 455. In the latter case Lord Scarman,

referring to *R v Moloney*, stated ([1986] 1 All ER 641 at 649–650, [1986] AC 455 at 471–472):

> 'First, the House cleared away the confusions which had obscured the law during the last 25 years laying down authoritatively that the mental element in murder is a specific intent, the intent to kill or to inflict serious bodily harm. Nothing less suffices; and the jury must be sure that the intent existed when the act was done which resulted in death before they can return a verdict of murder. Second, the House made it absolutely clear that foresight of consequences is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention, though it may be a fact from which, when considered with all the other evidence, a jury may think it right to infer the necessary intent. Lord Hailsham LC put the point succinctly and powerfully in his speech in *R v Moloney* [1985] 1 All ER 1025 at 1027, [1985] AC 905 at 913: "I conclude with the pious hope that your Lordships will not again have to decide that foresight and foreseeability are not the same thing as intention although either may give rise to an irresistible inference of such, and that matters which are essentially to be treated as matters of inference for a jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain, what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of the substantive law." Thirdly, the House emphasised that the probability of the result of an act is an important matter for the jury to consider and can be critical in their determining whether the result was intended.'

In reliance upon *R v Moloney* and *R v Hancock* Mr Feinberg, on behalf of the appellants Powell and Daniels, submitted to this House, as he submitted to the Court of Appeal, that as a matter of principle there is an anomaly in requiring proof against a secondary party of a lesser mens rea than needs to be proved against the principal who commits the actus reus of murder. If foreseeability of risk is insufficient to found the mens rea of murder for a principal then the same test of liability should apply in the case of a secondary party to the joint enterprise. Mr Feinberg further submitted that it is wrong for the present distinction in mental culpability to operate to the disadvantage of a party who does not commit the actus reus and that there is a manifest anomaly where there is one test for a principal and a lesser test for a secondary party.

A similar argument had previously been rejected by the Court of Appeal in *R v Ward* (1987) 85 Cr App R 71 and in *R v Slack* [1989] 3 All ER 90, [1989] QB 775. In *R v Ward* (1987) 85 Cr App R 71 at 76–77 Lord Lane CJ stated:

> 'It is submitted by Mr. Steer in regard to that ground of appeal that the decisions of the House of Lords in *R.* v. *Moloney* and *R.* v. *Hancock* have had the effect of completely altering the law relating to joint enterprise. The way in which he put it was this. We asked him to dictate the submission so we could write it down. No man, he submits, can be convicted of murder unless it is specifically decided against him that he had a murderous intent and that could only be decided against him if the judge directed the jury that that was what they had to find. Each member of this Court is bound to confess that he was unable to understand the submission. It is enough to say that we do

not consider that the cases of *R.* v. *Moloney* and *R.* v. *Hancock* have had any effect at all upon the well-known and well-established principles of joint enterprise: in short, the principle set out in *Anderson and Morris* ([1966] 2 All ER 644, [1966] 2 QB 110) still holds good ... We are told that the learned judge may have been equipped with the opinion of the Judicial Committee of the Privy Council in a case called *Chan Wing-Siu and Others* v. *R.* ([1984] 3 All ER 877, [1985] AC 168). If that is so, the learned judge accurately reflected the view of their Lordships in that case in the passage which I have read. It was suggested by Mr. Steer that the decision in that case, which came from Hong Kong, is not in accordance with the decisions of the House of Lords in *R.* v. *Moloney* and *R.* v. *Hancock*. We disagree. We think that what appears in that case, if we may say so respectfully, is good law.'

In *R v Slack* [1989] 3 All ER 90 at 93, [1989] QB 775 at 780 Lord Lane CJ stated:

'*Chan Wing-siu v R* was considered and approved by this court in *R v Ward* (1987) 85 Cr App R 71. The appellant's submissions in that case were that the decisions of the House of Lords in *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905 and *R v Hancock* [1986] 1 All ER 641, [1986] AC 455 had the effect of completely altering the law relating to joint enterprise and that no man can be convicted of murder unless it is specifically decided against him that he had a murderous intent and since intent had to be read against the decisions in *R v Moloney* and *R v Hancock* the jury ought to be directed on the basis of those cases. This court in *R v Ward* reiterated the passage from *R v Anderson and Morris* ([1966] 2 All ER 644 at 647, [1966] 2 QB 110 at 118–119) cited above and went on to hold that *R v Moloney* and *R v Hancock* had had no effect on the well-known and well-established principles of joint enterprise.'

As Lord Lane CJ observed in *R v Slack*, difficulties had arisen from the judgment of the Court of Appeal in *R v Barr* (1986) 88 Cr App R 362. It appears from the facts that violent acts by all three defendants, who were burglars, caused the death of the householder. The trial judge directed the jury as though it was not necessary for a defendant charged with murder to possess himself the necessary intent either to kill or do serious bodily harm to the victim: it was enough to convict him of murder if he contemplated that one of his co-defendants had one of these intents and that he foresaw the possibility of that intent being carried into effect by that person.

The Court of Appeal held that this was a misdirection and quashed the convictions, Watkins LJ stating (at 369):

'... where it is appropriate to direct a jury upon foreseeability of consequence, the jury must be told that evidence of such foreseeability does no more than assist the jury to determine whether a defendant had at the requisite time an intention either to kill or to do serious harm to the victim. Unwittingly, the judge with regard to a time prior to the burglary, unaided by those authorities, because they were decided after he had directed the jury in the present case, seems to have directed them as though it was not necessary for a defendant charged with murder himself to possess one of the necessary intents: it was enough to convict him if he contemplated that one of his co-accused had one of those intents and that he no more than foresaw the possibility of that intent being carried into effect by that person.'

I consider that the judge's summing up contained a misdirection to the extent that it could be read to suggest that participants in a joint venture which led to a killing would all be guilty of murder, even if none of them possessed the intent to kill or do serious bodily harm. But I further consider, with respect, that the judgment of the Court of Appeal was erroneous to the extent that it suggests that if A kills with the requisite intent to kill or cause serious bodily harm, B a participant in the joint venture cannot be guilty of murder unless he also intends death or serious bodily harm to the victim.

Therefore the decision in *R v Barr* should not be followed in so far as it relates to the liability of a secondary party who is a participant in a joint enterprise.

In *R v Smith* [1988] Crim LR 616 it appears that *R v Ward* (1987) 85 Cr App R 71 was not cited to the Court of Appeal and its decision in that case, that specific intent to cause grievous bodily harm must be proved against a secondary party to convict him of that offence where the grievous bodily harm has been caused by another party to the joint enterprise to attack the victim, is also erroneous and should not be followed.

Before setting out the terms in which the Court of Appeal rejected the argument on behalf of the appellants Powell and Daniels based on *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905 and *R v Hancock* [1986] 1 All ER 641, [1986] AC 455, I would first refer to the rejection of another argument advanced on behalf of the appellants in reliance on the judgments of Woolf J at first instance in *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] 1 All ER 365, [1984] QB 581 and Lord Scarman in this House ([1985] 3 All ER 402 at 424–425, [1986] AC 112 at 190) to the effect that whether or not a doctor who gives contraceptive advice or treatment to a girl under the age of 16 years could be guilty of aiding and abetting the commission of unlawful sexual intercourse would depend on his intention. The Court of Appeal rejected this argument in this case on the grounds that *Gillick* was a case where there was a civil claim for a declaration and the situations considered were remote from a common enterprise culminating in murder. My Lords, I agree, and I consider that a doctor exercising bona fide his clinical judgment cannot be regarded as engaging in a joint criminal enterprise with the girl.

Returning to the rejection in the Court of Appeal of the appellants' argument in reliance on *R v Moloney* and *R v Hancock*, Lord Taylor of Gosforth CJ stated:

> 'We feel bound to follow and apply the *Hyde* formulation having regard to the approval which it has received in a number of decisions in this court and to the fact that it is in accordance with the House of Lords decision in *Maxwell*. If the result is an unacceptable anomaly, it must now be for the House of Lords or the legislature to say so.'

My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *DPP v Majewski* [1976] 2 All ER 142 at 157, [1977] AC 443 at 482, in rejecting criticism based on strict logic of a rule of the common law, 'this is the

view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic'.

In my opinion, there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-siu v R* and which prevail over considerations of strict logic. One consideration is that referred to by Lord Lane CJ in *R v Hyde* [1990] 3 All ER 892 at 896, [1991] 1 QB 134 at 139, where he cited with approval the observation of Professor Smith in his comment on *R v Wakely*:

> 'If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.'

A further consideration is that, unlike the principal party who carries out the killing with a deadly weapon, the secondary party will not be placed in the situation in which he suddenly has to decide whether to shoot or stab the third person with intent to kill or cause really serious harm. There is, in my opinion, an argument of considerable force that the secondary party who takes part in a criminal enterprise (for example the robbery of a bank) with foresight that a deadly weapon may be used, should not escape liability for murder because he, unlike the principal party, is not suddenly confronted by the security officer so that he has to decide whether to use the gun or knife or have the enterprise thwarted and face arrest. This point has been referred to in cases where the question has been discussed whether in order for criminal liability to attach the secondary party must foresee an act as more likely than not or whether it suffices if the secondary party foresees the act only as a possibility.

In *Chan Wing-siu v R* [1985] AC 168 at 172 counsel for the Crown submitted:

> 'Regard must be had to public policy considerations. Public policy requires that when a man lends himself to a criminal enterprise knowing it involves the possession of potentially murderous weapons which in fact are used by his partners with murderous intent, he should not escape the consequences to him of their conduct by reliance upon the nuances of prior assessment of the likelihood that such conduct will take place. In these circumstances an accomplice who knowingly takes the risk that such conduct might, or might well, take place in the course of that joint enterprise should bear the same responsibility for that conduct as those who use the weapons with the murderous intent.'

Sir Robin Cooke stated ([1984] 3 All ER 877 at 882, [1985] AC 168 at 177):

> 'What public policy requires was rightly identified in the submissions of the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment, only too likely to have been optimistic.'

A somewhat similar viewpoint was stated by Professor Glanville Williams in *Criminal Law, The General Part* (2nd edn, 1961) pp 397–398 (cited by Stephen J in his judgment in the High Court of Australia in *Johns v R* (1980) 143 CLR 108 at 119): '... it seems that a common intent to threaten violence is equivalent to a common intent to use violence, for the one so easily leads to the other.'

In *McAuliffe v R* (1995) 130 ALR 26 at 33 the High Court of Australia referred to *Johns v R* and stated:

> 'There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties. That is in accordance with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it.'

Therefore, for the reasons which I have given I would answer the certified question of law in the appeals of Powell and Daniels and the first certified question in the appeal of English by stating that (subject to the observations which I make in relation to the second certified question in the case of English) it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm. Accordingly, I would dismiss the appeals of Powell and Daniels.

The second certified question in the appeal of English arises because of the last sentence in the following passage in the trial judge's summing up to the jury to which I have previously referred:

> 'If he had the knife and English knew that Weddle had the knife, what would have been—must have been—in the mind of English, bearing in mind whatever condition you find that he was in as a result of drink? So you have to ask that question. If he did not know of the knife then you have to consider whether nevertheless he knew that there was a substantial risk that Weddle might cause some really serious injury with the wooden post which was used in the manner which you find it to have been used.'

In *R v Hyde* [1990] 3 All ER 892 at 896, [1991] 1 QB 134 at 139 as already set out, Lord Lane CJ stated:

> 'If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture.'

However, in *R v Hyde* the attack on the victim took place without weapons and the Crown case was that the fatal blow to the victim's head was a heavy kick. The problem raised by the second certified question is that, if a jury is directed in the terms stated in *R v Hyde*, without any qualification (as was the jury in English), there will be liability for murder on the part of the secondary party if he foresees the possibility that the other party in the criminal venture will cause really serious harm by kicking or striking a blow with a wooden post, but the other party suddenly produces a knife or a gun, which the secondary party did not know he was carrying, and kills the victim with it.

Mr Sallon QC, for the appellant, advanced to your Lordships' House the submission (which does not appear to have been advanced in the Court of Appeal) that in a case such as the present one where the primary party kills with a deadly weapon, which the secondary party did not know that he had and therefore did not foresee his use of it, the secondary party should not be guilty of murder. He submitted that to be guilty under the principle stated in *Chan Wing-siu v R* the secondary party must foresee an act of the type which the principal party committed, and that in the present case the use of a knife was fundamentally different to the use of a wooden post.

My Lords, I consider that this submission is correct. It finds strong support in the passage of the judgment of Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120 which I have set out earlier, but which it is convenient to set out again in this portion of the judgment:

> 'It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.'

The judgment in *Chan Wing-siu v R* [1984] 3 All ER 877 at 880, [1985] AC 168 at 175 also supports the argument advanced on behalf of the appellant because Sir Robin Cooke stated: 'The case must depend rather on the wider principle whereby a secondary party is criminally liable for *acts by the primary offender of a type* which the former foresees but does not necessarily intend.' (My emphasis.)

There is also strong support for the appellant's submission in the decision of Carswell J (as he then was), sitting without a jury in the Crown Court in Northern Ireland, in *R v Gamble* [1989] NI 268. In that case, the four accused were all members of a terrorist organisation, the Ulster Volunteer Force, who had a grievance against a man named Patton. The four accused entered upon a joint venture to inflict punishment upon him, two of them, Douglas and McKee, contemplating that Patton would be subjected to a severe beating or to 'kneecapping' (firing a bullet into his kneecap). In the course of the attack upon him Patton was brutally murdered by the other two accused. His throat was cut with a knife with great force which rapidly caused his death. In addition he was shot with four bullets, and two of the bullet wounds would have been fatal had his death not been caused by the cutting of his throat. Douglas and McKee had not foreseen killing with a knife or firing of bullets into a vital part of the body. It was argued, however, on behalf of the prosecution that the joint enterprise of committing grievous bodily harm, combined with the rule that an intent to cause such harm grounded a conviction for murder in respect of a resulting death, was

sufficient to make the two accused liable for murder notwithstanding that they had not foreseen the actions which actually caused death. After citing the relevant authorities Carswell J rejected this argument and stated (at 283–284):

> 'When an assailant "kneecaps" his victim, i e discharges a weapon into one of his limbs, most commonly into the knee joint, there must always be the risk that it will go wrong and that an artery may be severed or the limb may be so damaged that gangrene sets in, both potentially fatal complications. It has to be said, however, that such cases must be very rare among victims of what is an abhorrent and disturbingly frequent crime. Persons who take a part in inflicting injuries of this nature no doubt do not generally expect that they will endanger life, and I should be willing to believe that in most cases they believe that they are engaged in a lesser offence than murder. The infliction of grievous bodily harm came within the contemplation of Douglas and McKee, and they might therefore be regarded as having placed themselves within the ambit of life-threatening conduct. It may further be said that they must be taken to have had within their contemplation the possibility that life might be put at risk. The issue is whether it follows as a consequence that they cannot be heard to say that the murder was a different crime from the attack which they contemplated, and so cannot escape liability for the murder on the ground that it was outside the common design. To accept this type of reasoning would be to fix an accessory with consequences of his acts which he did not foresee and did not desire or intend. The modern development of the criminal law has been away from such an approach and towards a greater emphasis on subjective tests of criminal guilt, as Sir Robin Cooke pointed out in *Chan Wing-Siu*. Although the rule remains well entrenched that an intention to inflict grievous bodily harm qualifies as the mens rea of murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation. I do not think that the state of the law compels me to reach such a conclusion, and it would not in my judgment accord with the public sense of what is just and fitting.'

In my opinion, this decision was correct in that a secondary party who foresees grievous bodily harm caused by kneecapping with a gun should not be guilty of murder where, in an action unforeseen by the secondary party, another party to the criminal enterprise kills the victim by cutting his throat with a knife. The issue (which is one of fact after the tribunal of fact has directed itself, or has been directed, in accordance with the statement of Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120) whether a secondary party who foresees the use of a gun to kneecap, and death is then caused by the deliberate firing of the gun into the head or body of the victim, is guilty of murder is more debatable although, with respect, I agree with the decision of Carswell J on the facts of that case.

Accordingly, in the appeal of English, I consider that the direction of the learned trial judge was defective (although this does not constitute a criticism of the judge, who charged the jury in conformity with the principle stated in *Hyde*'s case) because in accordance with the principle stated by Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120, he did not qualify his direction on foresight of really serious injury by stating that if the jury

considered that the use of the knife by Weddle was the use of a weapon and an action on Weddle's part which English did not foresee as a possibility, then English should not be convicted of murder. As the unforeseen use of the knife would take the killing outside the scope of the joint venture the jury should also have been directed, as the Court of Appeal held in *R v Anderson and Morris*, that English should not be found guilty of manslaughter.

On the evidence, the jury could have found that English did not know that Weddle had a knife. Therefore the judge's direction made the conviction of English unsafe and in my opinion his appeal should be allowed and the conviction for murder quashed.

English was guilty of a very serious attack on Sergeant Forth, striking him a number of violent blows with a wooden post at the same time as Weddle attacked him with a wooden post. Therefore English was fully deserving of punishment for that attack, but it is unnecessary for your Lordships to give any further consideration to this point as English has already served a number of years in detention pursuant to the sentence of the trial judge.

I have already stated that the issue raised by the second certified question in the appeal of English is to be resolved by the application of the principle stated by Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120. Having so stated and having regard to the differing circumstances in which the issue may arise I think it undesirable to seek to formulate a more precise answer to the question in case such an answer might appear to prescribe too rigid a formula for use by trial judges. However, I would wish to make this observation: if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa.

In conclusion, I would wish to refer to a number of other points which arise from the submissions in these appeals. The first issue is what is the degree of foresight required to impose liability under the principle stated in *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168. On this issue, I am in respectful agreement with the judgment of the Privy Council in that case that the secondary party is subject to criminal liability if he contemplated the act causing the death as a possible incident of the joint venture, unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible.

Secondly, as the Privy Council also stated in *Chan Wing-siu v R*, in directing the jury the trial judge need not adopt a set of fixed formulae, and the form of the words used should be that best suited to the facts of the individual case. In this judgment, I have cited two passages from the judgment of Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 647, 648, [1966] 2 QB 110 at 118, 120. Trial judges have frequently based their directions to the jury in respect of the liability of a secondary party for an action carried out in a joint venture on the first passage. There is clearly no error in doing so. However in many cases there would be no difference in result between applying the test stated in that passage and the test of foresight, and if there would be a difference the test of foresight is the proper one to apply. I consider that the test of foresight is a simpler and more practicable test for a jury to apply than the test of whether the act causing the death goes beyond what had been tacitly agreed as part of the joint enterprise.

Therefore, in cases where an issue arises as to whether an action was within the scope of the joint venture, I would suggest that it might be preferable for a trial judge in charging a jury to base his direction on the test of foresight rather than on the test set out in the first passage in *R v Anderson and Morris* [1966] 2 All ER 644, [1966] 2 QB 110. But in a case where, although the secondary party may have foreseen grievous bodily harm, he may not have foreseen the use of the weapon employed by the primary party or the manner in which the primary party acted, the trial judge should qualify the test of foresight stated in *R v Hyde* [1990] 3 All ER 892, [1991] 1 QB 134 in the manner stated by Lord Parker CJ in the second passage in *R v Anderson and Morris*.

As I have already observed in referring to the decision in *R v Gamble* [1989] NI 268, in applying the second passage in *R v Anderson* there will be cases giving rise to a fine distinction as to whether or not the unforeseen use of a particular weapon or the manner in which a particular weapon is used will take a killing outside the scope of the joint venture, but this issue will be one of fact for the common sense of the jury to decide.

Powell and Daniels' appeals dismissed. English's appeal allowed.

Celia Fox Barrister.

Re Bank of Credit and Commerce International SA (No 8)

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

10, 14–17 JULY, 30 OCTOBER 1997

Company – Compulsory winding up – Debtor – Mutual credits, debts and dealings between company and debtor – Set-off – Bank advancing funds to company – Repayment of loan secured by charges over third party deposits – Construction of security documents – Bank becoming insolvent – Whether deposits should be set off against company's debt – Whether liquidators of bank entitled to claim total debt from company leaving depositors to prove in liquidation for deposits – Insolvency Rules 1986, r 4.90.

In two test cases BCCI lent money to a company (the borrower) on the security of a deposit made with BCCI by a third party (the depositor) who was the borrower's controlling shareholder. In both cases, the letter of lien/charge (the security document) purported to grant BCCI a proprietary interest in the form of a lien or charge over the deposit, entitled it to utilise the deposit to reduce the outstanding liabilities of the borrower and provided that the deposit would be repayable only if all the liabilities of the borrower had been repaid; it did not, however, contain any promise by the third party to pay what might be due from the borrower to BCCI. BCCI subsequently went into liquidation before the loan had been repaid. The liquidators applied to the court for directions as to whether BCCI could claim repayment from the borrower without resorting to the security, thereby leaving the depositor to prove in the liquidation, or whether it was obliged to set off the loan against the deposit and treat the borrower as pro tanto discharged. The judge held that the liquidators were not required to give credit for the amount of the deposits before claiming from the borrowers and were entitled to recover the whole of the debt leaving the depositors to prove in the liquidation. The borrowers appealed to the Court of Appeal, which dismissed their appeal. The borrowers appealed to the House of Lords, contending that BCCI was required to give credit for the amount of the deposit by virtue of r 4.90[a] of the Insolvency Rules 1986, which provided that where there were liabilities resulting from mutual dealings (including mutual credits/debits) between an insolvent company and any creditor of the company sums due from one party should be set off against the sums due from the other and only the balance was provable in the liquidation.

Held – For the purposes of r 4.90 of the 1986 rules, set-off was limited to mutual claims existing at the date of bankruptcy and there could be no set-off of claims by third parties, even with their consent, as to do so would be to allow parties by agreement to subvert the fundamental principle of pari passu distribution of the insolvent company's assets. Furthermore, a sum was only

a Rule 4.90, so far as material, is set out at p 573 *b* to *d*, post

'due' to a company if the company had at least a right to make a pecuniary demand. In the instant case, there was no mutuality between the depositor and BCCI because the security document did not expressly create any personal liability on the depositor's part to pay off the borrower's debt, and there was no reason to imply such liability as the document was effective to create a charge over the deposit in favour of BCCI. Moreover, notwithstanding the depositor's liability to have the deposit applied in discharge of the borrower's debt, the deposit was not 'due' to BCCI, since a right to appropriate property under one's control or to be discharged from a liability did not amount to a right to make a pecuniary demand. Accordingly, the appeal would be dismissed (see p 570 *j*, p 573 *g*, p 575 *h j*, p 578 *e j* to p 579 *b* and p 581 *b* to *d*, post).

British Eagle International Airlines Ltd v Cie Nationale Air France [1975] 2 All ER 390 applied.

MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2), *High Street Services Ltd v Bank of Credit and Commerce International SA (in liq)*, *Impexbond Ltd v Bank of Credit and Commerce International SA (in liq)* [1993] 3 All ER 769 distinguished.

Dicta of Millett J in *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 308–309 doubted.

Decision of the Court of Appeal [1996] 2 All ER 121 affirmed.

Notes

For mutual creditors and set-off, see 3(2) *Halsbury's Laws* (4th edn reissue) paras 535–537, and for cases on the subject, see 5(1) *Digest* (2nd reissue) 358–361, *10751–10761*.

For the Insolvency Rules 1986, r 4.90, see 3 *Halsbury's Statutory Instruments* (1995 reissue) 346.

Cases referred to in opinions

Bank of Credit and Commerce International SA, Re (No 10) [1996] 4 All ER 796, [1997] Ch 213, [1997] 2 WLR 172.

British Eagle International Airlines Ltd v Cie Nationale Air France [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

Charge Card Services Ltd, Re [1986] 3 All ER 289, [1987] Ch 150, [1986] 3 WLR 697; *affd* [1988] 3 All ER 702, [1989] Ch 497, [1988] 3 WLR 723, CA.

China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, [1990] 1 AC 536, [1990] 2 WLR 56, PC.

Debtor, Re a (No 627 of 1936) [1937] 1 All ER 1, [1937] Ch 156, CA.

Eberle's Hotels and Restaurant Co Ltd v E Jonas & Bros (1887) 18 QBD 459, CA.

Ellis & Co's Trustee v Dixon-Johnson [1925] AC 489, [1925] All ER Rep 715, HL.

Foley v Hill (1848) 2 HL Cas 28, [1843–60] All ER Rep 16, 9 ER 1002.

Ford, Ex p, re Chappell (1885) 16 QBD 305, CA.

Gye v McIntyre (1991) 171 CLR 609, Aust HC.

Hiley v Peoples Prudential Assurance Co Ltd (1938) 60 CLR 468, Aust HC.

Mersey Steel and Iron Co Ltd v Naylor Benzon & Co (1882) 9 QBD 648, CA; *affd* (1884) 9 App Cas 434; [1881–5] All ER Rep 365, HL.

MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2), *High Street Services Ltd v Bank of Credit and Commerce International SA (in liq)*, *Impexbond Ltd v Bank of Credit and Commerce International SA (in liq)* [1993] 3 All ER 769, [1993] Ch 425, [1993] 3 WLR 220, Ch D and CA.

National Provincial and Union Bank of England v Charnley [1924] 1 KB 431, CA.

National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] 1 All ER 641, [1972] AC 785, [1972] 2 WLR 455, HL; *rvsg* [1970] 3 All ER 473, [1971] 1 QB 1, [1970] 3 WLR 625, CA.

Northern Bank Ltd v Ross [1990] BCC 883, CA.

Rye v Rye [1962] 1 All ER 146, [1962] AC 496, [1962] 2 WLR 361, HL.

Stein v Blake [1995] 2 All ER 961, [1996] AC 243, [1995] 2 WLR 710, HL.

Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd [1996] BCC 388, PC.

Appeals

In two test cases the appellants, (1) Rayners Enterprises Inc (Rayners), a borrower, and Mohammed Jessa, a depositor who purported to charge deposits with the bank to secure loans to Rayners, and (2) a group of borrowers, the Solai Group (comprising Agrichemicals Ltd, Bishopswood Estates Ltd, Eurofert Ltd, Solai Holdings Ltd, Solai Services Ltd and Tradeworth Ltd) and Société Générale de Gestion et Services SA (SGGS), a depositor who purported to charge deposits with the bank to secure loans to the Solai Group, appealed with leave of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Rose, Saville and Millett LJJ) ([1996] 2 All ER 121, [1996] Ch 245) on 20 December 1995 dismissing their appeal from the decision of Rattee J ([1994] 3 All ER 565, [1995] Ch 46) on 9 March 1994, whereby he held in favour of the respondent liquidators of the Bank of Credit and Commerce International SA, Christopher Morris, John Parry Richards, Stephen John Akers and Nicholas Roger Lyle, on their application for directions, that they were not required to give credit for the amount of the deposits made by the depositors before claiming to recover the amount of the indebtedness of the borrowers. The facts are set out in the opinion of Lord Hoffmann.

John McDonnell QC (instructed by *Haring Ross Gagrat & Gardi*) for Rayners and Mr Jessa.

Christopher Carr QC and *Michael Todd QC* (instructed by *Charles Russell*) for the Solai Group and SGGS.

Michael Crystal QC and *Robin Dicker* (instructed by *Lovell White Durrant*) for the liquidators.

Their Lordships took time for consideration.

30 October 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives I would dismiss these appeals.

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, and with which I agree, I would dismiss these appeals.

LORD HOFFMANN. My Lords,

(1) THE ISSUE

These appeals arise out of an application for directions by the joint liquidators of Bank of Credit and Commerce International SA (BCCI). It concerns cases in which BCCI lent money on the security of a deposit which had been made with BCCI by a third party. The question on which the liquidators seek the directions of the court is whether BCCI can claim repayment from the borrower without resorting to the security or whether it is obliged to set off the loan against the deposit and treat the borrower as pro tanto discharged. If the first answer is correct, BCCI will be able to recover the loan in full and leave the third party depositor to prove in the liquidation. If the second answer is correct, BCCI will be able to recover only the excess, if any, of the loan over the deposit.

(2) THE FACTS

To put flesh on the abstract bones of this question, BCCI have selected two test cases. In the first, BCCI lent about $US3·5m to a Panamanian company called Rayners Enterprises Inc (Rayners) for the purpose of investing in property in England. Rayners granted legal charges over the properties to BCCI to secure repayment of the loan. In addition, Mr Mohammed Jessa, who is the beneficial owner of Rayners, gave BCCI additional security for part of the indebtedness in the form of charges over certain deposits with BCCI to which he was beneficially entitled. These secured repayment of about £1·4m. On 15 September 1992 the liquidators sent a letter to Rayners demanding repayment. There is no dispute that, apart from the questions arising out of the existence of the security over the deposits, the loans are due and payable.

In the second case, BCCI advanced about £4·4m and $US4·2m to companies in what was called the Solai Group. A Panamanian company called Société Générale de Gestion et Services SA (SGGS) made deposits with BCCI in the sums of £3,037,741 and $US8,018,000 respectively and executed documents charging the deposits to BCCI to secure the repayment of the advances to the Solai Group. SGGS is beneficially owned by the controlling shareholders of the Solai Group. On 10 September 1991 the liquidators demanded repayment by the Solai Group companies and again it is accepted that the loans are due and payable.

There is one difference between the two cases on which some reliance was placed in argument. In the first case, Mr Jessa's deposits were already in existence for some time before he charged them to BCCI to secure the indebtedness of Rayners. He says that he was (wrongly) advised by BCCI that he would save tax if he borrowed money on the security of the deposit rather than simply using the deposited money to pay for the properties. In the second case, SGGS made the deposits as a condition of the grant of facilities to the Solai Group and in fact executed the letter of charge before the deposits had even been made. So it is said that in the second case the security involved the deposit of 'new money' with the bank. I shall come back later to the way in which this distinction is said to be relevant.

(3) THE SECURITY DOCUMENTS

The security documents executed by Mr Jessa and SGGS were not in precisely the same form but the differences are immaterial. The material

provisions of the 'letter of Lien/Charge' signed on behalf of Mr Jessa on 3 February 1989 (which I give by way of example) were:

> 'In consideration of [BCCI] at our request providing from time to time banking facilities to [Rayners] ("the borrower") from time to time, I ... hereby give a lien/charge on the balances maintained by me in my accounts with you for all of the outstanding liabilities of the borrower in respect of the banking facilities and so that you shall have the power to withdraw and utilise the proceeds thereof ... for the reduction or adjustment of the outstanding liabilities of the borrower with the bank without reference to me. I undertake to execute such deeds and instruments as the bank may require hereafter further to secure my accounts and I shall bear the cost thereof.
>
> I hereby declare that I have not encumbered, assigned or otherwise dealt with the accounts in any way and that they are free from all encumbrances and that I will not encumber, assign or deal with them or any renewal thereof.
>
> It is understood that the balances held in the accounts under the lien/charge are not to be released to me, my heirs or assignees unless or until the entire outstanding liabilities of the borrower whether actual or contingent are fully repaid with interest, fees, commission etc. and the bank is under no obligation to provide or make available banking facilities to the borrower.'

The effect of the document may be summarised as follows. The first paragraph purports to grant the bank a proprietary interest, in the form of a lien or charge, over Mr Jessa's deposit. The second paragraph is a warranty that he has not previously encumbered his interest in the deposit and a covenant that he will not do so in the future. And the third paragraph is a contractual agreement that the deposit will be repayable only if all the liabilities of Rayners have been repaid. The document does not contain any promise by Mr Jessa to pay what may be due from Rayners to the bank.

(4) RIGHTS OF A SECURED CREDITOR

The general rule is that a secured creditor is not obliged to resort to his security. He can claim repayment by the debtor personally and leave the security alone. In *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at 842, [1990] 1 AC 536 at 545, where the creditor's security consisted of a mortgage over shares and a personal guarantee from a surety, Lord Templeman said:

> 'The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.'

If the creditor recovers judgment against the debtor and the debt is paid, the security is released. But BCCI accepts that this will be the consequence of payment. The security created by the letter of lien/charge will be discharged and the deposit left unencumbered. Of course the depositor will only be entitled to a dividend in the winding up. But this would have been his position even if he had never granted the charge in the first place.

In the present case, however, Mr McDonnell QC, for Rayners, and Mr Carr QC, for the Solai Group, have advanced a number of arguments as to why

BCCI should not be entitled to sue them for money lent without first giving credit for the full amount of the sums deposited as security. I shall consider each in turn.

(5) BANKRUPTCY SET-OFF

Rule 4.90 of the Insolvency Rules 1986, SI 1986/1925 (reproducing earlier legislation), is headed 'Mutual credit and set-off' and provides:

> '(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.
>
> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other ...
>
> (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets.'

When the conditions of the rule are satisfied, a set-off is treated as having taken place automatically on the bankruptcy date. The original claims are extinguished and only the net balance remains owing one way or the other: *Stein v Blake* [1995] 2 All ER 961, [1996] AC 243. The effect is to allow the debt which the insolvent company owes to the creditor to be used as security for its debt to him. The creditor is exposed to insolvency risk only for the net balance.

Not all jurisdictions recognise this kind of security in bankruptcy. The recent judgment of Sir Richard Scott V-C in *Re Bank of Credit and Commerce International SA (No 10)* [1996] 4 All ER 796, [1997] Ch 213 illustrates the problems caused by the fact that English law, as the law of the ancillary liquidation, recognises such a set-off but the law of the principal liquidation (Luxembourg) does not. In English law, it is strictly limited to mutual claims existing at the bankruptcy date. There can be no set-off of claims by third parties, even with their consent. To do so would be to allow parties by agreement to subvert the fundamental principle of pari passu distribution of the insolvent company's assets: see *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758.

The sense of injustice which is undoubtedly felt by the depositors in this case arises, I think, not so much from the operation of r 4.90 of the 1986 rules but from the principle that a company is a person separate from its controlling shareholders. If the depositors had been third parties in economic reality as well as in law, I imagine that it would not have been thought particularly unfair that the liquidators had chosen to exercise their undoubted choice of remedies and to proceed against the primary borrowers rather than resort to the third party security which they held. But the separate personality of depositor and borrower was an essential element in the structure which the parties chose to adopt for their borrowings and it cannot be ignored now that BCCI has become insolvent.

The appellants nevertheless say that on the facts of this case there was mutuality between the depositor and BCCI and that automatic set-off under r 4.90 therefore took place; the sum owed by BCCI to the depositor (ie the amount of the deposit and interest) being set off against the amount owed by

the depositor to BCCI. The result was to extinguish the dept pro tanto for the benefit of both Mr Jessa and Rayners, both being liable for the same obligation.

(6) CONSTRUCTION OF THE SECURITY DOCUMENTS

The difficulty about this argument is that the depositor did not owe anything to BCCI. The only contract between him and BCCI, contained in the letter of lien/charge, created no personal liability on his part. In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] BCC 388 the Privy Council had to construe a very similar document and held that no personal liability could be implied. Lord Mustill said (at 393):

> 'One thing is clear, that nowhere in these clauses does the instrument actually say that the depositor is to have a liability equal to the amount of the deposit, or, for that matter, equal to the indebtedness of the company. Thus, if the depositor is to succeed he must show that the transaction as formulated cannot be given any meaning unless he is personally liable ...'

Mr McDonnell said that in the present case, the only way in which the transaction as formulated could be given a meaning would be if it were construed as creating a personal liability on the part of the depositor to pay the borrower's indebtedness. Although it did not expressly do so, but instead purported to create a charge over the deposit, it was, he submitted, legally ineffective for this purpose. A charge in favour of BCCI over a debt owed by BCCI to the depositor was, as the Court of Appeal held, conceptually impossible and created no proprietary interest in BCCI. (In this respect, the present case was distinguishable from *Tam Wing Chuen*'s case because in Hong Kong such charges had been legitimated by statute: see s 15A of the Law Amendment and Reform (Consolidation) Ordinance, Cap 23.) The only way in which the letter in this case could operate as an effective security was contractually. Mr McDonnell submitted that to give effect to this intention, it should therefore be construed as imposing a personal obligation upon the depositor which BCCI would be entitled to set off against his claim for the return of the deposit. On the winding up of BCCI, the effect of r 4.90 of the 1986 rules was to make such a set-off mandatory.

(a) *MS Fashions Ltd*

Mr McDonnell relied upon *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2), High Street Services Ltd v Bank of Credit and Commerce International SA (in liq), Impexbond Ltd v Bank of Credit and Commerce International SA (in liq)* [1993] 3 All ER 769, [1993] Ch 425 as a case in which this kind of reasoning had been approved. I do not think that this is right. The case involved a very unusual security document in which, although no personal obligation was expressly created, references were made to the liability of the depositor being that of principal debtor. It was only to give effect to these words that the document was construed as creating a personal liability limited to the amount of the deposit. This was held to result in a set-off between depositor and BCCI which, since depositor and principal debtor were jointly and severally and unconditionally liable for the same debt, discharged the principal debtor.

There is no doubt that the decision in the *MS Fashions* case produces a rather anomalous result to which the Court of Appeal ([1996] 2 All ER 121 at 139 and 143, [1996] Ch 245, at 269 and 273) drew attention. If the documents in that

case had, as in this case, merely created a charge over the deposit or a contractual limitation on the right to withdraw the deposit (such as that in the third paragraph of the lien/charge letter which I have quoted), there would have been no cross-claim for the purposes of set-off. If the depositor had given a personal guarantee in the usual form and no demand had been made upon him before the bankruptcy date, his liability would have been merely contingent and would likewise have been incapable of set-off. But because the depositor was also personally liable jointly and severally with the borrower, an automatic set-off took place which discharged the borrower. The distinction is artificial because in no case would the bank wish to rely upon the depositor's personal liability, whether as principal or guarantor. It will simply keep his money in accordance with the letter of charge. It could be said that, for a bank which is thinking of becoming insolvent, the *MS Fashions* case is a trap for the unwary.

The difficulty, as the Court of Appeal recognised, is to find a way of coming to a different answer which recognises the automatic and self-executing nature of set-off under r 4.90 and the principle that joint and several debtors are liable for the same debt so that payment or deemed payment by the one discharges the other. In the case of a charged deposit, one possible answer is that the existence of the charge destroys mutuality: the bank's claim against the depositor is in its own right but the depositor's claim is subject to the equitable interest of the bank. This argument was somewhat cursorily rejected in the *MS Fashions* case at first instance and (advanced in a different form) at rather greater length in the Court of Appeal. In this case, the Court of Appeal suggested that reliance might be placed upon the retrospective effect of the collection and distribution of assets by the liquidator, so that the recovery of the debt from the principal debtor could be deemed to take place immediately before the operation of r 4.90 and, by discharging the debt, prevent set-off from taking place. I record the debate without comment; it is something which may have to be decided in the unlikely event of documentation such as that in the *MS Fashions* case appearing in another liquidation. (The BCCI liquidators say that they have settled all their cases in which such documents were used.) But the point does not arise in this case because the letter of lien/charge simply cannot be construed as creating a personal joint and several obligation.

(b) *Re Charge Card Services Ltd*

The Court of Appeal rejected the argument that the letter was ineffective unless construed as imposing personal liability. They accepted Mr McDonnell's submission that, by reason of conceptual impossibility, it could not operate as a charge over the deposit. But they said that it could provide perfectly good security by virtue of the contractual provisions in the third paragraph which limited the right to repayment of the deposit and made it what is sometimes called a 'flawed asset'. I agree and could stop there without commenting on the question of whether a charge is conceptually impossible or not. But the point has been very fully argued and should, I think, be dealt with.

The doctrine of conceptual impossibility was first propounded by Millett J in *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 308–309, [1987] Ch 150, at 175–176 and affirmed, after more extensive discussion, by the Court of Appeal

in this case. It has excited a good deal of heat and controversy in banking circles; the Legal Risk Review Committee, set up in 1991 by the Bank of England to identify areas of obscurity and uncertainty in the law affecting financial markets and propose solutions, said that a very large number of submissions from interested parties expressed disquiet about this ruling. It seems clear that documents purporting to create such charges have been used by banks for many years. The point does not previously appear to have been expressly addressed by any court in this country. Supporters of the doctrine rely on the judgments in of Buckley LJ (in the Court of Appeal) and Viscount Dilhorne and Lord Cross of Chelsea (in the House of Lords) in *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1970] 3 All ER 473, [1971] 1 QB 1; [1972] 1 All ER 641, [1972] AC 785. The passages in question certainly say that it is a misuse of language to speak of a bank having a lien over its own indebtedness to a customer. But I think that these observations were directed to the use of the word 'lien,' which is a right to retain possession, rather than to the question of whether the bank could have any kind of proprietary interest. Opponents of the doctrine rely upon some nineteenth century cases, of which it can at least be said that the possibility of a charge over a debt owed by the chargee caused no judicial surprise.

The reason given by the Court of Appeal was that 'a man cannot have a proprietary interest in a debt or other obligation which he owes another' (see [1996] 2 All ER 121 at 130, [1996] Ch 245 at 258). In order to test this proposition, I think one needs to identify the normal characteristics of an equitable charge and then ask to what extent they would be inconsistent with a situation in which the property charged consisted of a debt owed by the beneficiary of the charge. There are several well-known descriptions of an equitable charge (see eg that of Atkin LJ in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 449–450) but none of them purports to be exhaustive. Nor do I intend to provide one. An equitable charge is a species of charge, which is a proprietary interest granted by way of security. Proprietary interests confer rights in rem which, subject to questions of registration and the equitable doctrine of purchaser for value without notice, will be binding upon third parties and unaffected by the insolvency of the owner of the property charged. A proprietary interest provided by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party) and, whatever the form of the transaction, the owner of the property retains an equity of redemption to have the property restored to him when the liability has been discharged. The method by which the holder of the security will resort to the property will ordinarily involve its sale or, more rarely, the extinction of the equity of redemption by foreclosure. A charge is a security interest created without any transfer of title or possession to the beneficiary. An equitable charge can be created by an informal transaction for value (legal charges may require a deed or registration or both) and over any kind of property (equitable as well as legal) but is subject to the doctrine of purchaser for value without notice applicable to all equitable interests.

The depositor's right to claim payment of his deposit is a *chose in action* which the law has always recognised as property. There is no dispute that a charge over such a chose in action can validly be granted to a third party. In

which respects would the fact that the beneficiary of the charge was the debtor himself be inconsistent with the transaction having some or all of the various features which I have enumerated? The method by which the property would be realised would differ slightly: instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry. In no other respect, as it seems to me, would the transaction have any consequences different from those which would attach to a charge given to a third party. It would be a proprietary interest in the sense that, subject to questions of registration and purchaser for value without notice, it would be binding upon assignees and a liquidator or trustee in bankruptcy. The depositor would retain an equity of redemption and all the rights which that implies. There would be no merger of interests because the depositor would retain title to the deposit subject only to the bank's charge. The creation of the charge would be consensual and not require any formal assignment or vesting of title in the bank. If all these features can exist despite the fact that the beneficiary of the charge is the debtor, I cannot see why it cannot properly be said that the debtor has a proprietary interest by way of charge over the debt.

The Court of Appeal said that the bank could obtain effective security in other ways. If the deposit was made by the principal debtor, it could rely upon contractual rights of set-off or combining accounts or rules of bankruptcy set-off under provisions such as r 4.90. If the deposit was made by a third party, it could enter into contractual arrangements such as the limitation on the right to withdraw the deposit in this case, thereby making the deposit a 'flawed asset'. All this is true. It may well be that the security provided in these ways will in most cases be just as good as that provided by a proprietary interest. But that seems to me no reason for preventing banks and their customers from creating charges over deposits if, for reasons of their own, they want to do so. The submissions to the Legal Risk Review Committee made it clear that they do.

If such charges are granted by companies over their 'book debts' they will be registrable under ss 395 and 396(1)(e) of the Companies Act 1985. There is a suggestion in the judgment of the Court of Appeal ([1996] 2 All ER 121, [1996] Ch 245) that the banking community has been insufficiently grateful for being spared the necessity of registering such charges. In my view, this is a matter on which banks are entitled to make up their own minds and take their own advice on whether the deposit charged is a 'book debt' or not. I express no view on the point, but the judgment of my noble and learned friend Lord Hutton in *Northern Bank Ltd v Ross* [1990] BCC 883 suggests that, in the case of deposits with banks, an obligation to register is unlikely to arise.

Since the decision in *Re Charge Card Services Ltd* [1986] 3 All ER 289, [1987] Ch 150, statutes have been passed in several offshore banking jurisdictions to reverse its effect. A typical example is s 15A of the Hong Kong Law Amendment and Reform (Consolidation) Ordinance (Cap 23), which I have already mentioned. It reads:

> 'For the avoidance of doubt, it is hereby declared that a person ("the first person") is able to create, and always has been able to create, in favour of another person ("the second person") a legal or equitable charge or mortgage over all or any of the first person's interest in a chose in action enforceable by the first person against the second person, and any charge

or mortgage so created shall operate neither to merge the interest thereby created with, nor to extinguish or release, that chose in action.' a

There is similar legislation in Singapore (s 9A of the Civil Law Act (Cap 43)); Bermuda (the Charge and Security (Special Provisions) Act 1990) and the Cayman Islands (the Property (Miscellaneous Provisions) Law 1994). The striking feature about all these provisions is that none of them amend or repeal any rule of common law which would be inconsistent with the existence of a charge over a debt owed by the chargee. They simply say that such a charge can be granted. If the trick can be done as easily as this, it is hard to see where the conceptual impossibility is to be found. b

In a case in which there is no threat to the consistency of the law or objection of public policy, I think that the courts should be very slow to declare a practice of the commercial community to be conceptually impossible. Rules of law must obviously be consistent and not self-contradictory; thus in *Rye v Rye* [1962] 1 All ER 146 at 149–150, [1962] AC 496 at 505 Viscount Simonds demonstrated that the notion of a person granting a lease to himself was inconsistent with every feature of a lease, both as a contract and as an estate in land. But the law is fashioned to suit the practicalities of life and legal concepts like 'proprietary interest' and 'charge' are no more than labels given to clusters of related and self-consistent rules of law. Such concepts do not have a life of their own from which the rules are inexorably derived. It follows that in my view the letter was effective to do what it purported to do, namely to create a charge over the deposit in favour of BCCI. This means that the foundation for Mr McDonnell's argument for implying a personal obligation disappears. c d e

(7) 'DUE ... IN RESPECT OF ... MUTUAL DEALINGS'

In the alternative, Mr McDonnell submitted that even if the depositor was under no personal obligation to pay, being liable to have the deposit applied in discharge of the principal's debt was for the purpose of r 4.90 just as good. Indeed, from BCCI's point of view, it was even better, since the bank was relieved from having to enforce the obligation and could repay itself by entries in its own books. Therefore the amount of the deposit should be treated as 'due' to BCCI for the purposes of r 4.90(2). It is clear that for the purposes of the rule, the claim by the creditor against the insolvent company must be a provable debt. It speaks of a 'creditor of the company proving or claiming to prove for a debt in the liquidation'. It has long been held that this does not mean that the creditor must actually have lodged a proof (*Mersey Steel and Iron Co v Naylor Benzon & Co* (1882) 9 QBD 648) but the debt must be one which would have been provable if he had. The Court of Appeal held ([1996] 2 All ER 121, [1996] Ch 245) that the same was true of the claim by the company against the creditor: the debt must be one which would have been provable against Mr Jessa if he had been bankrupt. I am not sure that this is right and, as Mr McDonnell pointed out, the contrary was decided by the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609, a case which does not appear to have been cited to the Court of Appeal. In England, the extension of the definition of a provable debt by the Insolvency Rules 1986 probably means that the point is unlikely to arise in practice. It is not however necessary to decide it because in my view r 4.90 of the 1986 rules requires at least the existence of a right to make a pecuniary demand: see *Eberle's Hotels and* f g h j

Restaurant Co Ltd v E Jonas & Bros (1887) 18 QBD 459 and Dixon J in *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497. A right to appropriate property under one's control or to be discharged from a liability is not the same thing as a right to make a pecuniary demand upon the other party to mutual dealings. If there is any anomaly, it is that which I have discussed in connection with the *MS Fashions* case [1993] 3 All ER 769, [1993] Ch 425 and consists in the fact that there is a set-off when the depositor has undertaken personal liability. There is no anomaly in there being no set-off when he has not.

(8) PAYMENT BY THE SURETY

Next the appellants say that the depositor, as surety, is entitled to pay off the debt himself and then claim indemnity from the principal debtor. This proposition is not disputed. But then the appellants say that the mode of payment they propose to employ is to appropriate their deposits for the purpose. In my view this cannot be done. For the reasons which I have already stated, there was no set-off between depositor and BCCI at the bankruptcy date. Accordingly, all that the depositor can do is to prove in the liquidation. It cannot manufacture a set-off by directing that the deposit be applied to discharge someone else's debt, even though it may, as between itself and the debtor, have a right to do so. This is the very type of arrangement which the House declared ineffective in *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758.

(9) RIGHT TO INDEMNITY

Mr McDonnell next advanced an elaborate argument which he said produced a debt owing from BCCI to Rayners which could be set off against its liability under r 4.90 of the 1986 rules. It proceeded as follows. First, Rayners' request to Mr Jessa to charge his deposits to secure its liability to BCCI gave rise to an implied promise to indemnify him against any loss which he might suffer thereby: see *Ex p Ford, re Chappell* (1885) 16 QBD 305 and *Re a debtor (No 627 of 1936)* [1937] 1 All ER 1, [1937] Ch 156. Secondly, the bankruptcy of BCCI resulted in Mr Jessa suffering loss as a result of making the deposit for which he had a claim against Rayners. Thirdly, Rayners has a claim against BCCI to be indemnified against Mr Jessa's claim because its obligation to pay Mr Jessa was a result of the breach by BCCI of its obligation as a mortgagee to take proper care of the security and restore it unimpaired. BCCI's bankruptcy converted the security from a claim to the deposit to a mere right to prove in the liquidation, with a fraction of the value of the original deposit. Fourthly, because Mr Jessa's claim arises out of the implied promise given when the deposit was made, Rayners' claim against BCCI derives from a right which existed before the bankruptcy date and can be set off under r 4.90 of the 1986 rules.

The first stage in the argument is indisputable. I make no comment on the second; Mr Crystal, for the liquidators, said that a principal debtor who requested a surety to charge a deposit as security for his debt did not warrant the solvency of the institution with which the deposit was made. I will, however, assume in favour of the appellants that Mr Jessa would have been entitled, as against Rayners, to be indemnified for his loss. It is at the third stage that the argument breaks down. BCCI's charge was not over the money which Mr Jessa deposited. That became the property of BCCI: see *Foley v Hill*

(1848) 2 HL Cas 28, [1843–60] All ER 16. The charge was over Mr Jessa's chose in action, the debt owed to him by BCCI. The insolvency involved no breach of duty by BCCI in its capacity as chargee and did not change the nature of the debt which it owed. The reason why Mr Jessa lost his money was because the debt became subject to the statutory scheme of payment by pari passu distribution of the assets of BCCI. But this had no connection with the fact that he had given a charge. Rayners therefore had no claim against BCCI which it could set off against its indebtedness.

The appellants said that to regard the giving of security as merely the creation of a charge over an existing debt was too narrow a view. The depositing of the money was an integral part of the creation of the security. Mr Carr, for the Solai Group, pointed out that SGGS had made the deposit purely for the purpose of providing security; as I mentioned in above, the letter of lien/charge was actually executed before the money was deposited. The deposit was not an asset already in existence; it was new money provided as security. Mr McDonnell said that he was in a similar position because although Mr Jessa had made the deposits earlier, he had been advised by BCCI to use them as security when he would otherwise have withdrawn them. But however one describes what was done to create the security, the fact is that the charge was over the debt and not over the money. The choses in action belonged to Mr Jessa and SGGS; the money belonged to the bank. The appellants may have been badly advised to create an asset for the purpose of giving a charge by depositing money with BCCI, but they are not making a claim on the grounds of bad advice. There would be no point in doing so because it would not put them in a better position in the liquidation.

(10) DUTY TO RESTORE THE SECURITY

The appellants' next argument suffers from much the same defect as the last one. They say that BCCI is not entitled to judgment against the debtor companies unless it is able to restore the security which has been provided. The principle is undisputed, having been affirmed by this House in *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489, [1925] All ER Rep 715, although Mr Crystal for the liquidators said that it was limited to restoration of security given by the debtor and did not apply to third parties. There seems to be no authority on this point but I am content to assume in favour of the appellants that it applies equally to security provided by a third party. Nevertheless, BCCI is in a position to restore the security simply by releasing the charge over the deposit. The fact that it cannot restore the money in full is not relevant; the charge was not over the money and the winding up affects only BCCI's role as a debtor, not its role as a chargee. In fact, in the case of an equitable charge, there is no formal act of release required. The charge simply ceases to exist when the debt it secured has been repaid.

(11) MARSHALLING

Finally the appellants rely upon the equitable doctrine of marshalling. This is a principle for doing equity between two or more creditors, each of whom are owed debts by the same debtor, but one of whom can enforce his claim against more than one security or fund and the other can resort to only one. It gives the latter an equity to require that the first creditor satisfy himself (or be treated as having satisfied himself) so far as possible out of the security or fund to which the latter has no claim. I am at a loss to understand how this

principle can have any application in the present case. There is only one debt and that is owed to BCCI by the principal borrower. BCCI has security to which it can resort as it chooses: see the citation from *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, [1990] 1 AC 536 above. There is no basis upon which the depositors can assert an equity to require BCCI to proceed against their deposits before claiming against the principal debtors.

For these reasons I would dismiss both appeals.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the benefit of reading in draft the speech which has been prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I also would dismiss these appeals.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives I, too, would dismiss these appeals.

Appeals dismissed.

Celia Fox Barrister.

Bristol and West Building Society v Fancy & Jackson (a firm) and other actions

CHANCERY DIVISION AT BRISTOL

CHADWICK J

17–21, 24–28 FEBRUARY, 3–7, 10–13, 18–21, 24–26 MARCH, 9–11, 14, 15, 22–25 APRIL, 4, 22 JULY 1997

Solicitor – Duty – Breach of duty – Solicitors acting for both building society and lender in mortgage transactions – Solicitors failing to communicate information to society – Borrowers defaulting and proceeds of sale of repossessed property insufficient to clear mortgage debt – Society bringing actions for damages against solicitors claiming damages for breach of duty at common law – Whether solicitors in breach of duty to society – Damages recoverable by society.

In a number of separate cases, the defendant solicitors acted for both the plaintiff building society and the borrower in relation to a mortgage transaction. The solicitors were retained on the basis of the society's standard-form documentation and were required to notify the society of any matters which might prejudice its security or which were at variance with the offer of advance. The report on title and request for advance cheque included a warranty that the details of the transaction in respect of which the solicitor sought authority to proceed accorded exactly with the particulars in the offer of advance. In each case, the borrower defaulted and the proceeds of sale of the repossessed property were insufficient to clear the mortgage debt. Thereafter the society commenced proceedings against the defendants, claiming damages for, inter alia, breach of duty at common law, in respect of those losses. The allegations fell under four main heads, namely: failure to report circumstances which suggested that the true purchase price was lower that that stated in the offer of advance; failure to report that the transaction was proceeding by way of a sub-sale in relation to which there was a price differential; failure to report circumstances which suggested that on completion the borrower would be in breach of a special condition in the offer of advance; and failure to obtain proper security on completion. The issues arose (i) whether the solicitors' failure to report amounted to a breach of duty, and (ii) what damages were recoverable from the solicitors in respect of those breaches.

Held – (1) A solicitor who returned an unqualified report and request form warranted to the society that he had made those inquiries which a competent solicitor, acting reasonably, would have made in order to satisfy himself that the purchase price stated in the offer of advance was the true price paid by the purchaser/borrower to the vendor, and that he knew of no reason why he could not give the unqualified confirmation to which he had put his signature. Accordingly, a solicitor who was not in a position to satisfy himself that the purchase was to be effected at the price stated in the offer of advance but who nevertheless returned an unqualified report would be in breach of duty (see p 605 *e f*, post).

(2) In failing to inform the society that the transaction was proceeding by way of sub-sale a solicitor could be in breach of his duty to inform the society of facts

which a reasonably competent solicitor would have realised might have a material bearing on the valuation of the lender's security or some other ingredient of the lending decision, notwithstanding the fact that the instructions given by the society did not impose a specific requirement that any such transaction had to be reported (see p 602 *j* to p 603 *h* and p 608 *f* to p 609 *a*, post); *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836 applied.

(3) Where a solicitor returned an unqualified report he thereby warranted to the society that he knew of no reason why he could not give a confirmation that the mortgage transaction in respect of which he was seeking authority to proceed would be completed in accordance with the terms in the society's special conditions. Furthermore, the solicitor was under an obligation to inform the society if he subsequently became aware that the confirmation could no longer be relied upon and would therefore be in breach of duty if he failed to do so (see p 610 *g h*, post).

(4) A solicitor who acted for both lender and borrowers warranted to the lender that he was acting for the borrowers in the transaction with their authority. Although he did not warrant that the signature on the mortgage deed was authentic, but merely that the mortgage deed which he delivered on completion was delivered with their authority, it had much the same effect. Accordingly, if the signature was not authentic he would be liable for breach of warranty of authority (see p 612 *j* to p 613 *e*, post); *Penn v Bristol and West Building Society* [1997] 3 All ER 470 applied.

(5) Where a solicitor who was under a duty to take reasonable care to provide information on which someone else would decide upon a course of action was negligent in the provision of that information, he was not responsible for all the consequences of that course of action; he was only responsible for the consequences of that information being wrong. Accordingly, in order to determine the consequences to the society of the solicitors' breach of duty in providing information which was wrong or incomplete, the correct approach was to compare the position as it was represented to be with the position as it actually was (see p 620 *a* to *c f* to p 621 *j*, post); *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 applied.

Notes

For a solicitor's obligations towards his client and liability for negligence, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 152–155, and for cases on the subject in respect of mortgages, see 44 *Digest* (Reissue) 153–155, *1546–1570*.

Cases referred to in judgment

Bristol and West Building Society v Baden Barnes & Groves (unreported, 22 November 1996), Ch D.

Bristol and West Building Society v Berger Oliver (unreported, 30 April 1996), Ch D.

Bristol and West Building Society v May May & Merrimans (a firm) [1996] 2 All ER 801.

Bristol and West Building Society v May May & Merrimans (a firm) (No 2) [1997] 3 All ER 206.

Bristol and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698, [1997] 2 WLR 436, CA.

Downs v Chappell [1996] 3 All ER 344, [1997] 1 WLR 426, CA.

Mortgage Express Ltd v Bowerman & Partners (a firm) [1996] 2 All ER 836, CA.

Penn v Bristol and West Building Society [1997] 3 All ER 470, [1997] 1 WLR 1356, CA.

South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.

Swindle v Harrison (1997) Times, 17 April, [1997] CA Transcript 463.

Actions

The plaintiff, Bristol and West Building Society (the society) commenced actions against the defendants, Fancy & Jackson, Read & Rogers, Steggles & Palmer, Baileys Shaw & Gillett, Clearys, Cooke & Borsay, Moroneys and Colin Bishop, firms of solicitors which had acted for the society in eight separate mortgage transactions, for damages for breach of duty at common law and breach of fiduciary duty. The actions were heard and judgment was delivered in Bristol. The facts are set out in the judgment.

Nicholas Patten QC, Hugh Jackson and *Paul Lowenstein* (instructed by *Osborne Clarke* and *Veale Wasbrough*, Bristol and *Eversheds*) for the society.

Nicholas Davidson QC, Elizabeth Weaver and *Patrick Lawrence* (instructed by *Pinsent Curtis*) for the defendant solicitors.

Cur adv vult

4 July 1997. The following judgment was delivered.

CHADWICK J. In a judgment delivered on 16 April 1996, *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801, I described the circumstances in which the plaintiff building society (the society) had commenced numerous actions in the Bristol District Registry of the High Court against solicitor defendants who had previously acted for the society in taking security by way of mortgage over domestic property. On 30 April 1996 I delivered a further judgment in two actions brought by the society, as the successor to the Cheshunt Building Society (the Cheshunt society) under a transfer of engagements, against solicitor defendants who had acted for the Cheshunt society in similar circumstances. Following those judgments, I gave directions which led to some 87 of the actions brought by the society against solicitor defendants being listed together for trial. On 16 February 1997 I commenced the trial of 27 of the cases in that managed list. Of the remaining 60 cases, a few had been transferred out of the list for reasons of convenience; but, in most, the parties had come to terms. During the course of the trial agreed orders have been made in 19 of the 27 cases. The remaining eight cases are the subject of this judgment.

The first question, in seven of the cases which I have to decide, is whether the solicitor defendants were in breach of duty as alleged by the society. In the eighth case, *Bristol and West Building Society v Moroneys*, breach of duty is admitted. If a breach of duty is established, or admitted, then the second question is: for what loss (if any) are the defendants liable? That second question raises a number of issues: among them are causation, contributory negligence and the alleged failure of the society to mitigate its loss. It is, I think, convenient to examine each of the cases to identify what (if any) breach of duty is established, or admitted, before going on to consider issues relating to loss. It is necessary, first, to set out the primary facts.

THE PRIMARY FACTS

The standard documentation

In seven of the cases with which I am now concerned the defendants had been retained by the Bristol and West society at the time of the loan transaction. They were so retained on the basis of the society's standard documentation described in my judgment in *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801 at 806–809. It is unnecessary to set out again, in this judgment, a detailed analysis of the text of that standard documentation. But it will assist an understanding of the facts which I am about to describe if I refer to three matters.

First, special condition 1(c) of the society's offer of advance required that, except with the prior consent of the society, the borrower was to provide from his own resources (without further borrowing) the whole of the balance of the purchase money.

Secondly, para 2 of the solicitor's instructions required the solicitor to report to the society any matters which might prejudice the society's security or which were at variance with the offer of advance.

Thirdly, the report on title and request for advance cheque, to be signed by the solicitor and returned to the society before the advance was made, contained the warranty or representation that the details of the transaction did accord exactly with the particulars in the offer of advance and the requirements of the solicitors' instructions.

In one of the cases now before me, *Bristol and West Building Society v Colin Bishop & Co*, the defendants were retained by the Cheshunt society at the time of the relevant transaction. The standard Cheshunt documentation, on the basis of which the defendants acted, is described in my judgment in *Bristol and West Building Society v Berger Oliver* (unreported, 30 April 1996). The Cheshunt society's standing instructions to solicitors were much fuller than those of the society. For the purpose of this judgment, it is sufficient to note the following requirement: '29. Matters to be reported to the Society prior to completion: ... (vii) Any transaction which is proceeding by way of sub-sale. Details must be given to the Society of the parties and the prices paid or payable.'

Bristol and West Building Society v Fancy & Jackson

In September 1989 the defendants, a firm of solicitors practising at Ashford, Middlesex, were retained by the society to act in connection with the mortgage on purchase of freehold property known as 7 Riverfield Road, Staines. They acted also for the prospective borrower, Michael Anthony Beasley.

The mortgage application had been submitted to the society's Weybridge branch by brokers on behalf of Mr Beasley on or about 5 August 1989. The application sought a loan of £171,000 to assist in the purchase of the property, 7 Riverfield Road, at a stated price of £175,000. The defendants were named as the applicant's solicitors.

The society obtained a valuation of the property from valuers in Windsor. They valued the property 'as at present' at £168,000; and gave a projected value of £190,000 when certain essential repairs (which they identified) had been completed. The valuers drew attention in their report to 'the present residential market conditions prevailing whereby extended sale periods are being experienced'. They also reported that:

> 'We are aware of a Planning Permission for the erection of a 4 Bedroom house and a double garage and separate double garage for the subject property on the land on the left hand side of No. 7 ...'

The society's offer of advance was issued on 15 September 1989. A copy of the offer of advance, together with the solicitors' letter of instruction and the other standard documents, was sent to the defendants. The property was described in the offer of advance as a 'freehold linked semi detached property with two garages'. That was an error. As appears from the valuers' report the property had no garage; there was planning permission for a separate double garage on the adjoining plot. The purchase price specified in the offer of advance was £175,000. The notes to the offer of advance included:

> '6. The Society would normally only lend only £142,500 on the security of the property but is prepared to lend £171,000 subject to a guarantee for the difference being given by the Sun Alliance Insurance Company, the premium for which is shown above.'

The total advance specified in the offer was £172,283 (including the MIG premium of £1282·50). The advance was subject to a retention of £10,000 against the building works which had been identified by the valuers as essential.

Contracts were treated, as between the defendants and the vendor's solicitors, as if exchanged on the day, 15 September 1989, on which the offer of advance was issued; although it seems clear that physical exchange of contracts did not take place on that day or at all. The defendants did not, themselves, have any part in the payment of a deposit on exchange of contracts.

On 25 September 1989 Peter David Bodger, the partner in the defendant firm having conduct of the matter, signed and returned to the society a report on title and request for advance cheque. The report was in the society's standard form and was unqualified. The defendants did not pick up the error in the description of the property to which I have referred. On the same day the defendants sent to the Durham Land Registry a Form 94B under the Land Registration (Official Searches) Rules 1986, SI 1986/1536.

On the following day, 26 September 1989, Mr Bodger wrote to Mr Beasley:

> 'Would you please also arrange to forward to me your cheque in the sum of £16,593·60, less any deposit monies you paid to the vendor so that I can arrange completion as soon as possible.'

Mr Bodger's file contains a note of a telephone message from Mr Beasley, received on 27 September 1989, to the effect that he, Mr Beasley, had paid £25,000 direct to the vendor. On 29 September 1989 Mr Bodger wrote to Mr Beasley:

> 'Further to my letter of 26 September, I understand that you have paid £25,000 direct to the Vendor. On receipted confirmation from his solicitors I will forward you a detailed account showing the balance available after completion.'

The advance cheque, in the sum of £160,947·95 (after making the retention of £10,000 and after deducting the amount of the MIG premium and a comprehensive insurance premium), was sent to the defendants on 28 September 1989.

Completion took place on 6 October 1989. At the time of completion the defendants did not have the official search which they had sought from the

Durham Land Registry. The position, as known to the defendants immediately prior to completion, appears from a note of a telephone conversation on Mr Bodger's file: 'They [Durham Land Registry] can't give us a result as there is a pending application which they cannot trace.' A further note on the file, dated 11 October 1989, records that the defendants were then told by the Durham Land Registry that there were no adverse entries against the property; but that there was a pending application to register the transfer to Mr Beasley's vendor, Berkshire Estates (Southern) Ltd.

On completion the defendants transferred £150,000 to the vendor's solicitors. After deducting stamp duty, land registry and local search fees and their own professional charges from the amount of the advance, they transferred the balance (£8,329·40) to Mr Beasley. They did that on the basis that £25,000 had been paid by Mr Beasley direct to the vendor at or about the time of exchange of contracts.

The borrower made no payments under the mortgage. In the circumstances that he had been convicted on 21 July 1989 of offences involving the obtaining of credit while an undischarged bankrupt that was, perhaps, not surprising. The society issued a summons for possession of the property on or about 20 June 1990; and obtained an order for possession on 5 October 1990. A warrant for possession was executed on 5 April 1991. On 12 March 1992 the property was sold by the society as mortgagees in possession at a price of £101,000. After deducting the society's costs and expenses (£4,725·57) the net proceeds of sale were £96,274·43.

In its statement of claim the society contends that the defendants were in breach of their retainer in the following respects: (i) failure to report that the property did not, as described in the offer of advance, include two garages; (ii) failure to inform the society that they did not know whether the 10% deposit payable under the contract had been paid by the borrower from his own resources or at all; (iii) failure to inform the society that completion was to take place on the basis that £25,000 had been paid by the purchaser direct to the vendor; (iv) failure to satisfy themselves that £25,000 had been paid by the borrower direct to the vendor—and, if so, that it had been paid by the borrower out of his own resources; (v) failure to inform the society that, on completion, £8,329·40 was paid out of the advance to the borrower; (vi) failure to obtain a land registry search prior to completion; and (vii) failure to ensure that a life policy which was required under the terms of the offer of advance was in effect prior to completion and had been deposited. In the course of his final submissions, counsel for the society identified the two principal allegations of breach of duty as (a) failure to advise of the alleged direct payment of £25,000 and (b) failure to obtain an official Land Registry search prior to completion.

Bristol and West Building Society v Read & Rogers

In July 1988 the defendants, a firm of solicitors practising at Thornton Heath, Surrey, were retained to act for the society in connection with the mortgage on purchase of a freehold terraced house known as 55 Wilmington Gardens, Barking. They acted, also, for the prospective purchasers, Iozeph Okosieme and his sister, Regina Okosieme.

The mortgage application had been submitted to the society's Weymouth branch by the applicants on or about 18 June 1988. The defendants were named in the mortgage application as the applicants' solicitors. The application sought a loan of £74,700 to assist in the purchase of the property, 55 Wilmington Gardens, at

the stated price of £83,000. In answer to the printed question on the application form: '23. Are you obtaining any other loan or assistance towards the purchase?' there has been written in manuscript the words: 'Please refer to covering memo.' Following an interview with Mr Okosieme, the manager of the Weymouth branch, Mr Curtis, requested authority from his regional manager, Mr Macey, for a loan of £79,560 (being 95% of the assumed value of the property—£83,750). In support of that request Mr Curtis wrote, on 24 June 1988: 'Applicants savings are tied up in Shares which he does not wish to sell at present time.' The authority sought was not forthcoming. On 29 June 1988 Mr Macey returned the branch's request, indorsed 'Maximum 90%'.

It is common ground that the memorandum referred to in the answer to question 23 of the mortgage application is a memorandum dated 18 July 1988 sent with the application by the manager of the Weymouth branch to the advances department at the society's head office. That memorandum contained the following observation:

> 'With regard to question 23 of the application I have advised the applicant by letter dated 4 July that the Society's maximum loan is 90%, therefore unless the applicants find adequate funds from their own resources it may well be that the Society will be advised before completion that additional borrowing may be taken from another lender to cover the difference of their deposit ie 5% and the balance of the purchase price.'

On 8 July 1988 the society obtained a valuation of the property from local valuers in Theydon Bois. They valued the property at £83,000. On the basis of that valuation and the regional manager's decision, the maximum loan which the society was prepared to make was £74,700.

The society's offer of advance was sent to the defendants on or about 18 July 1988. The purchase price specified in the offer of advance was £83,000. The total advance was £74,700. The offer of advance contained a notice, said to have been given under s 28 of the Building Societies Act 1962, that:

> '(1) the maximum amount which the Society would consider proper to advance upon the security of the property if no other security were taken by the Society is £62,250 (2) the amount by which the advance exceeds the said maximum amount is £12,450 (3) the Society proposes to take security for the advance from a third party, particulars of which are: A guarantee given by the Sun Alliance & London Insurance Company Limited, 1 Bartholomew Lane, London, EC2N 2AB.'

Contracts were exchanged on 29 July 1988. On 1 August 1988 the defendants signed and returned the report on title and the request for advance cheque. The report and request was in the standard form and was unqualified. On 3 August 1988 the defendants sent to the vendor's solicitors their cheque for £4,200 by way of deposit.

Mr Curtis' prediction that the applicants might seek additional funds from another lender proved correct. On 22 August 1988 Lloyds Bank plc wrote to the defendants in the following terms:

> 'I OKOSIEME
>
> We have been advised by our customer that Contracts have been exchanged on the purchase of a property in Barking Essex for £83,000 where a Building Society mortgage has been arranged with the Bristol & West

a Building Society over 25 years for £74,700 and in addition a Top Up loan has been arranged with Premier Port Folio for £8,300. However our customer is concerned that the monies may not be available in time for completion on 30 August 1988 and has requested that we temporarily help with a Bridging loan of £6,000 covering some of the shortfall for maximum period of one month following completion. The Bank is agreeable to our customer's b request upon receiving from yourselves a suitable undertaking that when advance monies have been received you will forward to us sufficient funds to clear our borrowing.'

The defendants replied to the bank on 23 August 1988:

c 'We understand our clients have made application for a top-up Loan but we have no particulars thereof and certainly at the time of writing have not received instructions therewith. In the circumstances we can only undertake to you as we now do, that in the event our clients receive a top-up Loan from Premier Portfolio as mentioned in your letter and the money is received by d us, we will forward the same to you or such lesser amount as may be required to redeem our clients borrowing as the case may be.'

There is no evidence that either the defendants or the applicants informed the society of, or sought the consent of the society to, the further borrowing.

The advance cheque, in the sum of £74,117·19 after deduction of a MIG e premium and a comprehensive insurance premium was sent to the defendants by the society on 25 August 1988. The purchase was completed on 30 August 1988. On completion the defendants sent the whole of the balance of the purchase money (£78,737·51, after deductions) to the vendor's solicitors.

The monthly payments due under the society's mortgage were £467·65. The f borrowers maintained payments with reasonable regularity until 1 August 1990; but made no payments after that date. The society issued a summons for possession on 10 September 1991. An order for possession was obtained on 16 December 1991. The warrant for possession was executed on 28 September 1992. On 25 November 1993 the society sold the property as mortgagee in possession at a price of £55,800. After deduction of the costs and expenses of sale (£3,877·76) g the net proceeds of sale were £51,922·24.

In its statement of claim the society contends that the defendants were in breach of the duties owed under their retainer in the following respects: (i) failure to inquire or satisfy themselves, before signing the report on title, whether the deposit of £4,000 was to be found by the borrowers from their own resources and h (ii) failure, subsequently, to inform the society that the balance of the purchase money payable on completion was funded, at least prima facie, by a bridging loan from Lloyds Bank plc. In particular, the society alleges:

j '2.14 By reason of the matters stated in the aforesaid letters of 22nd and 23 August [1988] the defendant knew or must be taken to have that the borrowers were not providing the balance of purchase price from their own resources without further borrowing, and that the same would be borrowed in the first instance from Lloyds Bank, and thereafter from Premier Portfolio. Accordingly the defendant knew or must be taken to have known that the terms of the Report on Title which it had given were incorrect (in that it had failed to report these relevant matters) but the defendant did not

> communicate this fact, or the contents of the said letters of 22nd and 23 August, to the plaintiff or seek its consent thereto.'

It is alleged that, in failing to inform the society that, as the defendants knew or must be taken to have known, the applicants' purchase was to be funded out of further borrowing—which, prima facie, would be a breach by the applicants of special condition 1(c) in the offer of advance—the defendants were in breach of fiduciary duty. Alternatively, it is alleged that, in paying over the advance on completion without having obtained the society's consent to the further borrowing, the defendants acted in breach of trust.

Bristol and West Building Society v Steggles Palmer

In August 1989 the defendants, a firm of solicitors practising at 2 Bedford Row, London WC1, were retained by the society in connection with the mortgage on purchase of a leasehold flat known as Flat 9, Chelsea Cloisters, Sloane Avenue, London SW3. They acted also for the borrower, Adam Clive Whittaker.

The mortgage application had been submitted by the applicant to the society's Ashford branch on or about 24 July 1989. The applicant, who disclosed in his application that he was employed as a property manager with Orwell Estates Ltd of Dover Street, London W1, sought a loan of £73,500 to assist him in the purchase of Flat 9, Chelsea Cloisters, at a stated price of £75,000. He named the defendants as his solicitors.

On 10 August 1989 the society obtained a valuation from valuers in London SW6. They valued the property at £75,000. They added the following comment:

> 'The property consists of a small studio flat in a very substantial building providing excellent porterage and communal facilities including central heating and hot water. The size of the property gives it limited appeal but it nevertheless provides good security for a mortgage advance.'

The loan sought represented 98% of the value of the property. The applicant was interviewed by the manager of the Ashford branch, Mr Rowley. Mr Rowley noted on the approval certificate, which he signed on 24 August 1989, that the applicant was '... fully conversant with commitments and has made provision for incidental costs of purchase'.

The offer of advance was issued on the same day, 24 August 1989. A copy was sent, with the solicitors' letter and other documents, to the defendants. The purchase price was specified as £75,000. The notes to the offer of advance contained the following paragraph:

> '6. The Society would normally lend £56,250 on the security of the property but is prepared to lend £73,500 subject to a guarantee for the difference being given by the Eagle Star Insurance Company, the premium for which is shown above.'

The total advance was stated in the offer of advance to be £74,708. That included a MIG premium of £1,207·50.

It was not disclosed that the applicant was purchasing the property from his employer, Orwell Estates Ltd. On 21 September 1988 that company, under its former name Skyblue Properties Ltd, had entered into a contract to take a lease of the property from Chelsea Cloisters Developments Ltd for a term of 125 years from 24 June 1985 at a premium of £68,000. That contract provided for completion on whichever was the later of 31 July 1989 and the expiration of 14

days from receipt by the purchaser of notice from the vendor's solicitors that the property was complete and ready for occupation. The defendants were retained by, and acted for, Orwell Estates Ltd, the purchasing company in that transaction.

Completion of the contract of 21 September 1988 did not take place on 31 July 1989. It was not until 17 October 1989 that the solicitors for the vendor, Realreed Ltd (to whom the interest of Chelsea Cloisters Developments Ltd had been transferred) informed the defendants, as solicitors for Orwell Estates Ltd, that the property was ready for occupation. On 18 October 1989 Gareth Williams, a partner in the defendant firm, wrote an internal note to his colleague Arthur Harman:

> 'Re 19 Chelsea Cloisters I am acting on behalf of Orwell Estates Ltd in connection with the acquisition of this property. We will be completing the transaction on the 31 October. At the same time we will be transferring the property to Adam Whitaker and I should be grateful if you will act on behalf of Adam in connection with the transaction. He is purchasing for £75,000. I have already effected pre-completion searches and arranged for a local search to be effected against the London Borough of Kensington and Chelsea. I attach the mortgage offer which has been received.'

The reference in that note to 19 Chelsea Cloisters is clearly an error: the property with which both Mr Williams and Mr Harman were concerned was 9 Chelsea Cloisters.

On 26 October 1989 the defendants signed and returned a report on title and request for advance cheque. The report and request was in the society's standard form and was unqualified. The defendants did not disclose to the society that they were also acting for its applicant's vendor in the composite transaction.

On 27 October 1989 the society sent to the defendants the advance cheque in the sum of £73,500·50 (after deduction of the MIG premium). The defendants placed that sum to the credit of a client account in the name of Mr Whittaker.

The contract of 21 September 1988 was completed on 1 November 1989 by the grant of a lease by Realreed Ltd to Orwell Estates Ltd. On the same day, Orwell Estates Ltd assigned the lease to Mr Whittaker and the mortgage was completed in favour of the society. The defendants sent the sum of £61,200 (being the premium of £68,000 payable on the grant of the lease after deduction of a 10% deposit paid under the contract of 21 September 1988) to the solicitors for Realreed Ltd by telegraphic transfer and debited that sum against the client account in the name of Mr Whittaker. In addition to stamp duty, land registry fees and costs the following items were also debited to that client account.

1 November 1989	completion money	£213·92
2 November 1989	balance money	£8364·33
15 December 1989	transfer to a/c 126211	£1674·00

It can be seen from a completion statement prepared by the defendants in respect of the transaction between Chelsea Cloisters Developments Ltd to Orwell Estates Ltd that £213·92 was the balance payable by Orwell Estates Ltd on the grant of the lease. Account 126211 was the defendants' client account in the name of Orwell Estates Ltd. The sum of £1,674 transferred to that account was used to pay a further land registry fee (£120) and the defendants' costs (£1,554). There is no evidence as to the recipient of the 'balance money' (£8,364·33). Nor is there any evidence that the balance of the moneys payable by Mr Whitaker to Orwell Estates Ltd on his purchase of the leasehold interest were ever paid.

The borrower made no payments under the mortgage. The society issued a summons for possession in or about May 1990. On 24 September 1990 the society took possession of the property on the ground that it had been abandoned. On 20 December 1993 the society sold the property as mortgagee in possession at the price of £35,000. In the interim the society had paid ground rent and service charges amounting to £5,505·78. After deducting the costs and expenses of sale (£2,208·64) the net proceeds of sale amounted to £32,791·36.

The society contends that the defendants were in breach of the duties owed under their retainer in the following respects: (i) failure to report that the transaction was proceeding by way of a sub-sale under which the price differential, to which the intermediate vendor would become entitled on completion, was £7,000; (ii) failure to inform the society that they were acting not only for the society and the borrower but also for the intermediate vendor; (iii) failure to inform the society that the balance of the purchase price had been paid (if at all) by the borrower direct to the vendor; and (iv) failure to make any inquiry whether the borrower had provided the balance of the purchase money (if paid) out of further borrowing.

Bristol and West Building Society v Baileys Shaw & Gillett

In September 1989 the defendants, a firm of solicitors practising from offices at Queens Square, London WC1, were retained to act for the society in connection with an advance to be made to Derek Lewis on the security of property known as Flat 1, 8 Montague Street, London WC1.

Mr Lewis was a director of, and through his family interests controlled, a property development company, Thornmere Ltd. Thornmere had purchased the leasehold flat at 8, Upper Montague Street in August 1988. On 19 May 1989 Thornmere had made application to the society for a loan of £200,000 to be secured on that property. The application form was signed by Mr Lewis. The purpose of the loan was expressed to be 'refinance'. The defendants were named as Thornmere's solicitors in the application form. The application was referred by the manager of the society's Baker Street branch, Mr Arthur Hicks, to the society's head office for consideration. The application was not approved. Mr Hicks informed Mr John Joseph, a director of John Joseph Financial Services Ltd, the brokers acting in the transaction, that the application would not proceed. On 7 July 1989 Mr Joseph wrote to Mr Hicks, enclosing further financial information supplied by Mr Lewis, and asking that the matter be reconsidered. That letter concluded:

> 'I now await your approval of this case or alternatively, your further advice as to whether the case, if unacceptable in its present form to the Society should be resubmitted in the name of Derek Lewis as an individual.'

Following that letter it was decided that Mr Lewis should apply for the loan in his own name. His application for an advance was made on 10 August 1989. The expressed purpose of the loan sought was to purchase the leasehold flat at a price of £270,000. The advance sought was £216,000. Mr Lewis disclosed in his application form that he was employed by Thornmere Ltd, whose address he gave as 'Flat 1, Upper Montague Street'.

The society obtained a valuation of the property from local valuers, whose address, 14 Beaumont Mews, London W1, was the same as that of Mr Joseph. They valued the property 'as at present' at £270,000; but attributed a higher value of £275,000 after completion of certain essential works which they identified.

On the basis of a valuation of £270,000 the amount of the society's normal advance in a self certification case would have been £180,000. The offer of advance is dated 6 September 1989, but was issued a few days later following approval by Mr Hicks on 12 September 1989. Mr Hicks indorsed the approval certificate, which he signed, 'Applicant is purchasing for his own use as main residence. Satisfactory valuation report and previous lender's reference on file'.

The society's files have been retained on microfiche. No previous lender's reference can now be found on that microfiche. It is unclear how Mr Hicks satisfied himself (if he did) that Mr Lewis was proposing to use the flat as his main residence. Mr Hicks was unable to attend court to give evidence. His evidence was admitted under the Civil Evidence Act 1968 in the form of a statement signed by him on 14 November 1996. He accepted in that statement that he was aware of the connection between Thornmere Ltd and Mr Lewis. He said:

> 'I was happy for the advance to proceed as an arm's length transaction between Thornmere Limited and the borrower. The fact that they were connected parties was not material so long as the transaction was at arm's length.'

The total amount of the advance offered in the offer of advance was £217,385. This included an amount of £1,260 in respect of a MIG premium. The notes on the first page of the offer of advance included the following:

> '6. The Society would normally only lend £180,000 on the security of the property but is prepared to lend £216,000 subject to a guarantee for the difference being given by the Sun Alliance and the London Insurance Company Ltd, the premium for which is shown above.'

The offer of advance was accepted by Mr Lewis on 18 September 1989. On the following day, 19 September 1989, the defendants wrote to Mr Hicks. The letter included the following paragraph:

> 'We are instructed that our client cannot comply with Special Condition 3 of the Offer of Advance but that the Society has accepted the position here. Please confirm. Our client already has an existing mortgage which he does not propose to redeem, the details of which we believe you have.'

The position as it then appeared to the defendants is set out in a letter which they sent to the borrower on 20 September 1989:

> 'This of course is a completely arms length transaction. The Building Society have valued the property at £270,000 and are prepared to offer you approximately 80% of that valuation by way of Mortgage Advance, as per the Offer of Advance. The balance, approximately 20%, you are providing out of your own resources so on completion, after receipt of the net Advance from the Bristol and West, we shall require the full balance from you. You are of course connected with Thornmere Limited as, I believe, a current Shareholder and Director (hence our previous instructions of course) but I gather the Building Society are aware of that connection, as they must be.'

Thornmere Ltd instructed separate solicitors, Beller Needleman, to act in the transaction. The defendants' file contains a file note of a telephone conversation on 5 October 1989 with Mr Beller of Beller Needleman: 'Is a deposit actually going to be paid? It does not matter either way or in what capacity this would be held.' A letter of the following day, 6 October 1989, from the defendants to Beller

Needleman records that it had been agreed that the deposit be waived. On 6 October 1989 the defendants sent to the society their report on title and request for advance cheque. The report and request was in the usual form and was unqualified.

On 11 October 1989 the defendants wrote to Mr Lewis:

> 'Further to our telephone conversations ... as soon as I receive a Building Society Advance Cheque and our searches are clear, then we will immediately complete. The advance cheque should be £217,385 so that leaves a balance due from you (at the purchase price of £270,000) of £52,615 and perhaps you could let me have your cheque in that amount as agreed.'

The advance cheque, in the amount of £216,000 (after deduction of MIG and insurance premiums) was sent by the society to the defendants on 12 October 1989. Completion took place on 16 October 1989, immediately following exchange of contracts. The amount paid by the defendants to the vendor's solicitors on completion was £216,000. No other funds passed between the solicitors. Nevertheless, Beller Needleman were able, in a letter addressed to the defendants and dated 16 October 1989, to acknowledge 'receipt of the balance required to complete this transaction'. In the contract, dated 16 October 1989 and signed by Mr Lewis on behalf of Thornmere Ltd, Thornmere acknowledged payment by Mr Lewis to Beller Needleman 'as stakeholders' of a 10% deposit of £27,000.

Documents disclosed from Beller Needleman's file show that those solicitors, as solicitors for Thornmere Ltd, received no direct payment from Mr Lewis. There is, however, an undated manuscript letter on that file, addressed to Beller Needleman and signed by Mr Lewis on behalf of Thornmere Ltd (but not on the headed paper of that company) which is in these terms: 'Re: FLAT 1, 8 UPPER MONTAGUE STREET W.1. I acknowledge receipt of cheque in the sum of £54,000 by way of deposit/part payment of the purchase of the above property.'

The loan was made on an interest only basis. The monthly payments due under the terms of the mortgage were £2361·21. The borrower made payments of interest amounting together to £17,168·12 and fell into default. The last payment under the mortgage was made on 27 June 1990. The society issued a summons for possession on 13 August 1991 and obtained an order for possession on 21 November 1991. The warrant for possession was executed on 12 February 1992. The property was sold by the society as mortgagee in possession on 11 June 1993 at a price of £87,000. The costs and disbursements of sale amounted to £7686·03.

The society contends that the defendants were in breach of their retainer in failing to ensure (or in failing to report to the society that they had not ensured) that the difference between the advance moneys and the purchase price was in fact paid on completion by Mr Lewis from his own resources without further borrowing (or at all).

Bristol and West Building Society v Clearys

In July 1989 the defendant, who was then a solicitor in sole practice (under the name Clearys) from offices at Station Road, Aldershot, was retained by the society in connection with the remortgage of a freehold detached farmhouse and land known as Judds Farm, Pyeworthy, Holdsworthy, Devon. The owners of the property, for whom the defendant also acted, were John Brown Cruikshank and his wife, Mary Cruikshank.

Mr and Mrs Cruikshank had submitted an application for a mortgage advance to the Farnham branch of the society on or about 31 May 1989. The advance sought was £150,000. The purpose of the loan was expressed to be 'restructure finance'. The applicants described themselves respectively as 'farmer' and 'cheese producer'. They gave their address as Judds Farm, Pyeworthy. The property offered as security for the loan comprised a farmhouse and garden but not the adjoining agricultural land. They estimated the value of that property at £215,000.

The society obtained a valuation, dated 18 July 1989 from valuers in Okehampton, in the amount of £220,000. On the basis of that valuation the amount of the society's normal advance (at a loan to value ratio of two-thirds) was £146,666. The application was approved by the manager of the society's Farnham branch, Paul Chandler, on 27 July 1989.

The offer of advance is dated 25 July 1989. A copy was sent, with the solicitor's letter and other documents, to the defendants. The total advance was stated to be £150,117. That included £116·90 in respect of a MIG premium. Note 6 to the offer of advance was in the familiar form:

> 'The Society would normally only lend £146660 on the security of the property but is prepared to lend £150117 subject to a guarantee for the difference being given by the Sun Alliance Insurance Company, the premium for which is shown above.'

The whole of the property owned by Mr and Mrs Cruikshank at Judds Farm (including the adjoining farmland) was subject to an existing mortgage in favour of Lloyds Bank plc. The position is described in a letter from the defendant to Lloyds Bank dated 31 July 1989:

> '... we are pleased to confirm that our mutual clients [Mr and Mrs Cruikshank] have now received a mortgage offer from the Bristol & West Building Society in respect of the farmhouse and garden only of the property known as Judds Farm. We are aiming to complete the mortgage arrangements on Friday 11 August next. The remainder of the land is, of course, still to remain charged to your bank and the title deeds will be returned to you shortly after completion. Please let us know how you wish to deal with the discharge of the house and garden. The area of the property to be charged to the Bristol & West Building Society is shown coloured pink on the enclosed plan.'

On the same day, 31 July 1989, the defendant signed and returned the report on title and request for advance cheque. The report and request was in the usual form and was unqualified.

The bank's response to the defendant's letter of 31 July 1989 appears from a letter dated 4 August 1989:

> 'With reference to our telephone conversation at 2 August we should be grateful if you would act on our behalf and confirm that you will be agreeable to the following: Arrange for the enclosed legal documents to be completed in full and signed by Mr and Mrs Cruikshank confirming that the bank will hold a good first charge over the remaining land, and a good second charge over the house and garden ... With reference to your last paragraph, we shall be grateful if you will ensure that the C1 entries are discharged and that you will obtain new certificates to cover the fresh legal

charges as before confirming that we hold good first and second charges. No doubt you will arrange for the usual consent forms to be signed by the Bristol & West Building Society and arrange to forward them to us on completion of the security.'

There is no indication that this arrangement was ever disclosed to the society prior to completion on 11 August 1989.

On 8 August 1989 the society sent to the defendant the advance cheque in the sum of £149,946·25 (after deducting the MIG premium and a further £23·85 in respect of comprehensive insurance premium). The mortgage was completed on 11 August 1989. On completion the bank's first charge over the house and garden was discharged; but, in its place, the bank took a second charge over the house and garden, as it had proposed in its letter of 4 August 1989. By a notice dated 11 August 1989 the defendant informed the society of the bank's second charge.

On completion, the balance of the advance, after payment of the defendant's costs, was sent to Lloyds Bank for the credit of the borrowers' farm trading account.

The borrowers made payments under the mortgage until March 1991. The society issued a summons for possession of the property on 19 October 1992. An order for possession was obtained on 23 December 1992. The warrant for possession was executed on 12 March 1993. The property was sold on 30 June 1993 at a price of £65,000.

The society's complaint in relation to this transaction is (a) that the defendant failed to inform it that the existing mortgage over the adjacent farmland was not being redeemed prior to completion of the remortgage of the farmhouse and garden and (b) that, although the existing mortgage over the farmhouse and garden was redeemed prior to completion, the defendant failed to inform the society before completion that it was proposed that Lloyds Bank should take a second charge over the same property—that is to say, the property that was to be mortgaged to the society. In the light of my decision in *Bristol and West Building Society v Baden Barnes & Groves* (unreported, 22 November 1996) the society did not pursue the first of those points before me; but indicated its intention to revive that point on any appeal against this judgment.

Bristol and West Building Society v Cooke & Borsay

On or about 7 December 1990 the defendants, a firm of solicitors practising in Moreton-in-Marsh, Gloucestershire, were retained to act for the society in connection with the remortgage of a freehold house known as The Old Bank, Dovedale, Blockley, Moreton-in-Marsh. They acted also for Patrick Terence de Witt Barton who, with his wife Carolyn Mary Barton, was the owner of that property. Mr Michael Borsay is now the sole principal in the defendant firm.

The application for advance, which is dated 7 November 1990, was made in the names of Mr and Mrs Barton. On 15 November 1990 the society obtained a valuation in the amount of £175,000 from valuers practising in Cheltenham. On the basis of that valuation the society issued two Offers of Advance, each dated 7 December 1990 and each addressed to Mr and Mrs Barton. The amount of the two offers, in aggregate, was £100,125.

On 11 December 1990 Mr Borsay wrote to Mr Barton. He confirmed that he had received mortgage instructions from the society. He enclosed the society's mortgage deed for execution. He explained what was required:

'Will you and Carolyn both please sign your names in the presence of an independent adult witness, who should sign his/her name and insert his/her address and occupation, in the spaces indicated. Please do not date the Deed. When this has been done, would you kindly return it to me.'

Mr Borsay's conveyancing file contains a note of a telephone conversation with Mr Barton on 14 December 1990. The note records that Mr Barton would let him, Mr Borsay, know 'next week' to what account the mortgage moneys were to be paid. On the same day, 14 December 1990, Mr Borsay signed and returned the report on title and request for advance cheque. The date for completion specified in the report and request—and in his covering letter to the society—was 20 December 1990.

On 18 December 1990 Mr Barton telephoned again. Mr Borsay's file note records that he was instructed to pay over all moneys on completion to National Westminster Bank. Mr Barton went on to say that he would, himself, call to collect the cheque on 20 December 1990.

The society's two advance cheques (£80,000 and £19,960) were sent to the defendants on 19 December 1990 and were received on the following day. The remortgage was completed on 20 December 1990. Mr Borsay's recollection—although there is no file note to support it—is that Mr Barton called at his office on 20 December 1990 with the society's mortgage deed and collected a cheque drawn by Mr Borsay on the defendants' client account in favour of the bank. The mortgage deed appeared to have been duly executed by both Mr and Mrs Barton and to have been witnessed by a Mrs Turner.

Repayments under the mortgage were made between December 1990 and 11 June 1991. A further advance, in the amount of £7,625, was made by the society on 22 May 1991. Thereafter, the borrowers appear to have made no repayments until October 1992. On 14 June 1993 the society issued a summons for possession. The possession order was obtained on 28 July 1993; but was suspended. Further repayments were made intermittently during July, August and September 1993 and between April and June 1994. No repayments were made after June 1994.

Before the order for possession could be enforced Mrs Barton applied for a stay of proceedings on the ground that she had not signed the mortgage deed. In these proceedings against the defendants it has been common ground, at least at the trial, that the signature which appears on the mortgage deed as that of Mrs Barton is not, in fact, her signature.

The society's complaint against Mr Borsay is that he failed to ensure that the society obtained a properly executed mortgage deed before releasing the amount of the advance.

Mr Borsay gave evidence at the trial. He told me that he knew Mr and Mrs Barton socially. Mrs Barton was a friend of Mrs Borsay. He knew that the property which was offered to the society as security for the advance was their matrimonial home. He accepted that he never spoke to Mrs Barton about the remortgage, either in person or on the telephone, and that he never received any written communication from her. All his instructions came through Mr Barton. He, Mr Borsay, simply assumed that he was acting for both husband and wife.

Bristol and West Building Society v Moroneys

In November 1989 the defendant, a solicitor in sole practice (under the name Moroneys) at Wymondham, Norfolk, was retained to act for the society in

connection with the mortgage on purchase of a freehold property known as Unit 5, Grange Farm Barns, Fritton, Norfolk. He acted also for the prospective purchaser Joanne Paling and for her fiancé Jeffrey Jacobs, who was to stand as guarantor of her obligations under the proposed mortgage.

The mortgage application had been submitted to the society's Harlow branch by brokers on behalf of Miss Paling on or about 30 October 1989. The amount of the loan sought was £95,000 on the basis of a purchase price of the property of £128,000. She named the defendant as her solicitor on the application form. The application included particulars of the proposed guarantor, Mr Jacobs. He was shown to be a self-employed optician, in receipt of a total income of £37,000 per annum.

The vendor of the property, which was a barn conversion, was Mr Edward Gowing. On 30 October 1989 the vendor's solicitors wrote to the defendant enclosing, amongst other documents, a draft mortgage to secure a loan of £28,000 to be made by the vendor to Mr Jacobs, as purchaser. The defendant appears to have written in his hand on that letter '£28K 1 year'. On 7 November 1989 the defendant acknowledged receipt of the draft mortgage deed and wrote:

> 'I have as yet to determine whether the legal charge is to be a first charge or second charge but this will become apparent as soon as my client's mortgage offer is issued. Incidentally although Mr Jacobs did negotiate the purchase the property will be purchased in the name of Joanne Paling whose address is the same as Mr Jacob's.'

On 3 November 1989 the plaintiff obtained a valuation of the property in the amount of £128,000 from valuers practising in Norwich. The approval certificate was signed on 20 November 1989 by Mr D J Gibbs, the manager of the society's Harlow branch, who confirmed that he had checked the previous lender's reference by examining statements from the Alliance & Leicester Building Society. He noted that 'guarantor runs a "chain" of opticians' shops'. The offer of advance was issued on the same day and a copy, with the usual supporting documents, was sent to the defendant. The amount of the total advance specified in the offer was £95,000. There was no MIG in this case. The offer was subject to Mr Jacob's joining in the mortgage as guarantor.

Contracts were exchanged with the vendor on 21 November 1989. A deposit of £5,000 was payable on exchange of contracts. This was, in fact, paid on the following day, 22 November 1989. Also on 22 November 1989 the defendant signed and returned to the society the report on title and request for advance cheque. The report and request was in the usual form and was unqualified. The defendant did not disclose that £28,000 of the purchase price was to be funded by further secured borrowing, contrary to condition 1(c) of the offer of advance. Completion was fixed for 30 November 1989.

On 27 November 1989 the society sent to the defendant the advance cheque in the amount of £94,982·34 (after deduction of £17·66 in respect of comprehensive insurance premium). On the same day the defendant wrote to the vendor's solicitors: 'Would you confirm that the Legal Charge made between my client and yours will be a Second Charge, as the First Charge will be in favour of the Bristol and West Building Society.' Completion took place on 30 November 1989. The defendant sent to the vendor's solicitors £95,000 and a completed charge, executed by Miss Paling, to secure the balance of the purchase price (£28,000).

On 5 December 1989 the vendor's solicitors wrote to point out that it had (as they understood) been agreed between the clients that Mr Jacobs would stand as surety in respect of the outstanding purchase price. They sent a re-engrossed second charge for execution. The defendant sought instructions from Mr Jacobs. There is no evidence on the conveyancing file that any response was received to that request—and no evidence that the re-engrossed second charge was ever executed—but it may be that it was the possibility that the existing second charge would be replaced which led to delay in notifying the society that completion had taken place. Be that as it may, the defendant sent the notification of completion to the society under cover of a letter dated 29 December 1989. On 25 January 1990 the vendor's solicitors gave notice to the society of the second charge which had been executed by Miss Paling on 30 November 1989. There is no evidence that the society saw a copy of that second charge; or that the society was ever told, in terms, that the purpose of the second charge was to secure the balance of the purchase price.

Some repayments under the society's mortgage were made during 1990 and in January and March 1991. No payment was made after 1 March 1991. The society issued a possession summons on 28 May 1991 and obtained an order for possession on 20 August 1991. Voluntary possession was given at or about that time. The property was sold on 15 October 1993 at a sale price of £86,000. From that sum the society seeks to deduct sale costs and miscellaneous expenses amounting together to £5,161·28.

The society's complaint in this case is that the defendant failed to inform it that there was to be a second charge over the property contrary to special condition 1(c). Whatever might have appeared to be the position as pleaded in the statement of claim, it was made clear by counsel for the society in his closing submissions that no allegation of dishonesty is made against Mr Moroney. It is not said that he knew or must be taken to have known, either when he signed and returned the report on title or at the time of completion, that he was required to disclose what he undoubtedly did know—namely, that the balance of the purchase price was to be left outstanding on the security of a further mortgage. I am asked to treat this case on the basis that the only relevant allegation is failure, negligently, to carry out the retainer. On that basis, the defendant's breach of duty is not in issue.

Bristol and West Building Society v Colin Bishop

In March 1988 the defendant, who was in practice as a solicitor with offices in Dollis Park, London N3, under the name Colin Bishop & Co, was retained by the Cheshunt Building Society in connection with the mortgage of a leasehold flat, Flat 16, 165 Cromwell Road, London SW5. They acted also for the proposed purchasers of the property, Seamus Moran and Maria Ging.

The mortgage application had been submitted by Mr Moran and Miss Ging to the Potters Bar branch of the Cheshunt society on or about 25 February 1988. They sought a loan in the amount of £103,500 to assist them in the purchase of the flat from the vendor, Mr James Slater, at a price stated to be £115,000. Mr Moran's basic salary was stated to be £24,000 (with an additional regular bonus or commission of £4,200). Miss Ging was said to earn £12,500 as an office administrator. References were taken up by the society which confirmed those figures.

The Cheshunt society obtained a valuation report, dated 29 February 1988, from a firm of valuers in Ealing. They valued the property for mortgage purposes

at £110,000. The loan sought in the application was revised down to £99,000 (being 90% of the valuation). The application was referred by the manager of the Potters Bar branch, Mr Nick Calvert, to his deputy general manager for approval on the basis that the top slice of the loan (£16,500) would be covered by additional security in the form of a MIG. The loan was approved on 26 March 1988 and the offer of advance was issued a few days later, on 30 March 1988. Copies of the offer of advance, the valuation and the Cheshunt society's standard instructions were sent to the defendant.

Matters proceeded slowly. It was not until 21 June 1988 that the applicants accepted the offer of advance. In the meantime interest rates had fallen. The Cheshunt society issued a revised offer on 14 July 1988, showing the new rates. The particulars were otherwise the same. That offer was accepted on 28 August 1988.

There was further delay while the Cheshunt society awaited the return of the applicants' Miras 70 forms. These were received on or about 3 February 1989. On that day Mr Calvert wrote to the applicants:

> 'It appears that Miss Ging's circumstances have changed and she is now a student. If this is the case Mr Moran's income is not sufficient to cover the advance unless this has changed since the reference was received last March. It may also be necessary to have a re-inspection of the property carried out as the original was carried out some time ago.'

The need for a further inspection was confirmed by the valuer. The applicants were asked for a valuation fee of £110. On 27 February 1989 Mr Moran sent to the society a cheque for that sum. The cheque was returned by the bank unpaid. The society's records do not now disclose the reason for non-payment; although it is clear that it was known at the time. The Cheshunt society was content to proceed.

The new valuation was obtained, from the same firm of valuers. This valued the property at the same figure, £110,000. A third offer of advance was issued, dated 30 March 1989. The new figures for instalments and interest reflected a change in interest rates since July 1988; but the particulars remained the same in other respects. The special conditions contained the following:

> '2. Avon Insurance PLC Wellingborough guaranteeing £16,500 premium £577·50 cheque payable to Cheshunt Building Society to be collected by the Solicitor on or before completion.'

The new revised offer of advance, and the new valuation, were sent to the defendant. The revised offer was accepted by the applicants on 6 April 1989.

Contracts for the purchase of the property, at the price of £111,000, were exchanged on 2 August 1989. A deposit of £11,000 was paid on exchange. The date fixed for completion was 29 August 1989. The defendant solicitors signed a report on title and request for advance cheque on 7 August 1989 and returned this to the Cheshunt society under cover of a letter dated 15 August 1989. The report, which was in the Cheshunt's standard form, disclosed that there had been a variation from the purchase price stated in the offer of advance and contained express confirmation that (to the best of the defendant's knowledge and belief) the balance of the purchase money was being provided by the applicants personally without recourse to further borrowing. The report did not disclose, as required by the Cheshunt society's standard instructions to solicitors, that the transaction was proceeding by way of sub-sale.

The advance cheque, in the sum of £99,000, was sent to the defendants on 21 August 1989. Completion did not take place as anticipated. On 30 August 1989 the defendant wrote to the society: *'Re: Flat 16, 165 Cromwell Road SW5* ... we regret that we have not as yet been able to complete our clients purchase of the above property as we are short of funds from our clients.' The advance was returned to the society on 4 September 1989. It was reissued on the following day, for completion on 8 September 1989.

Completion appears to have taken place on 7 September 1989. At the time of completion the registered proprietors were Manzoor Hussein and Dawn Hussein. Completion took place by way of 'back to back' transfers. On 7 September 1989 the defendant made telegraphic transfers of £76,000 to the solicitors acting for the registered proprietors, as the head vendors, and £24,000 to the solicitors for Mr Slater. The defendant does not appear to have received any documents of transfer on that day. The transfer from Mr Slater (which shows a consideration, in accordance with the contract, of £111,000) was sent by his solicitors under cover of a letter dated 11 September 1989. The transfer from Mr and Mrs Hussein to Mr Slater (which shows a stated consideration of £86,000) was sent on by Mr Slater's solicitors under cover of a letter dated 18 September 1989.

The monthly instalment payable under the mortgage was £1257·20. The first payment was due on 5 October 1989. The borrowers made no payments under the mortgage. The Cheshunt society issued a summons for possession on 15 October 1990 and obtained an order for possession on 19 June 1991. A warrant was executed on 29 October 1991. The property was sold by the society, which had succeeded to the undertaking of the Cheshunt on 6 December 1991, as mortgagee in possession on 27 June 1994 at a price of £58,500. In the interim, the society paid £7,116·22 by way of ground rent and service charges. After deducting £3,443·59 in respect of the costs of sale, the net proceeds of sale were £55,056·41.

The society alleges in its statement of claim that the defendants were in breach of their retainer, under the instructions given by the Cheshunt society, in the following respects: (i) failure to report that the transaction was proceeding by simultaneous, or 'back to back', completion by transfers to and from the vendor on the same day, with an uplift in consideration of £25,000; (ii) failure to ensure that the balance of the purchase price (£11,000) had been paid from the borrowers' own resources; and (iii) failure to undertake appropriate land registry searches. In his closing submissions, counsel did not pursue points (ii) and (iii) with any enthusiasm. I think that he was right not to do so. In relation to point (i), there is no allegation of improper conduct. The case is put solely on the basis of negligent failure to carry out the instructions in the solicitor's retainer.

BREACH OF DUTY

The breaches of duty alleged, in so far as they are pursued in the proceedings before me, may be summarised as follows.

First, breaches of duty at common law, under the terms of the retainer in each case or in tort, in the following respects.

(1) *Fancy & Jackson*: (a) failure to advise of the alleged direct payment of £25,000 and (b) failure to obtain an official Land Registry search prior to completion.

(2) *Read & Rogers*: failure to inform the society that the balance of the purchase money payable on completion was funded by a bridging loan from Lloyds Bank plc.

(3) *Steggles Palmer*: (a) failure to report that the transaction was proceeding by way of a sub-sale under which the price differential, to which the intermediate vendor would become entitled on completion, was £7,000, and (b) failure to inform the society that they had seen no evidence—and had made no inquiry to satisfy themselves—that the balance of the purchase price had been paid by the borrower to the vendor.

(4) *Baileys Shaw & Gillett*: failure to inform the society that they had seen no evidence that the difference between the amount of the advance and the purchase price was paid on completion by Mr Lewis from his own resources without further borrowing (or at all).

(5) *Clearys*: failure to inform the society before completion that it was proposed that Lloyds Bank should take a second charge over the same property—that is to say, the property that was to be mortgaged to the society—contrary to special condition 3.

(6) *Cooke & Borsay*: failure to take reasonable steps (in particular, by obtaining any instructions from Mrs Borsay) to ensure that the society obtained a properly executed mortgage deed before releasing the amount of the advance.

(7) *Moroneys*: failure to inform the society that part of the purchase price was to be left outstanding on completion secured by a second charge over the property, contrary to special condition 1(c).

(8) *Colin Bishop*: failure to report that the transaction was proceeding by simultaneous, or 'back to back', completion by transfers to and from the vendor on the same day, with an uplift in consideration of £25,000, contrary to requirement 29(vii) in the Cheshunt society's standing instructions.

Secondly, breaches of fiduciary duty in the following respects.

(1) *Read & Rogers*: failure to inform the society that the balance of the purchase money payable on completion was funded by a bridging loan from Lloyds Bank plc when Mr Read—the partner having conduct of the matter—knew or must be taken to have known that he was under an obligation to do so.

(2) *Steggles Palmer*: failure to inform the society that they were acting not only for the society and the borrower (Mr Whittaker) but also for the intermediate vendor (Orwell Estates Ltd).

The allegations of breach of duty at common law fall under four main heads. First, failure to inform the society of circumstances which suggested that the true purchase price to be paid by the purchaser/borrower to the vendor was not the purchase price stated in the offer of advance. Allegations under this head are made, expressly or by necessary implication, in *Fancy & Jackson*, *Steggles Palmer* and *Baileys Shaw & Gillett*. Secondly, failure to inform the society of the fact that the transaction was proceeding by way of a sub-sale in relation to which there was a price differential. Allegations under this head are made in *Steggles Palmer* and *Colin Bishop*. Thirdly, failure to inform the society of circumstances which suggested that, at completion, the borrower would be in breach of a requirement placed upon him by the special conditions in the offer of advance. Allegations under this head are made in *Read & Rogers*, *Baileys Shaw & Gillett*, and *Moroneys*—funding the purchase by borrowing from other sources in breach of special condition 1(c)—and in *Clearys*—failure to comply with special condition 3. Fourthly, failure to obtain a proper security on completion. *Cooke & Borsay* falls under this head; as does the failure, in *Fancy & Jackson*, to obtain an official Land Registry search prior to completion.

It was argued before me that the defendants were in breach of duty in the cases under the first and second heads in that they had failed to inform the society of

facts which a reasonably competent solicitor would have realised might have a material bearing on the valuation of the lenders' security or some other ingredient of the lending decision—see *Mortgage Express Ltd v Bowerman & Partners (a firm)* [1996] 2 All ER 836 at 843.

I accept, of course, that there are circumstances in which it would be right to hold that a reasonably competent solicitor would have appreciated that an unverified direct payment of part of the stated purchase price would raise a question whether the purchase was, in fact, proceeding at the stated price; and would appreciate that, if the true purchase price was lower than the stated price, that might affect the basis on which the property had been valued as mortgage security. Further, the fact that the transaction was proceeding at a price which differed from that stated might throw doubt upon the integrity of the borrower; and that could be expected to have a material bearing on the lending decision. I accept, also, that a price differential on a sub-sale, if substantial, might call in question the valuation of the security—*Mortgage Express Ltd v Bowerman* was itself such a case. But, in the cases which I have to consider under the first head, it seems to me that the duty to inform the society of circumstances which suggest that the true purchase price is not the price stated in the offer of advance arises directly under the terms of the instructions given by the society to the solicitors whom it retained. In *Colin Bishop*—a case under the second head—the duty to inform the Cheshunt society that the transaction was proceeding under a sub-sale was imposed by the specific terms of that society's standard instructions to solicitors. Further, in cases under the third head, the duty to inform the society of circumstances which suggest that, at completion, the borrower would be in breach of a condition placed upon him by the special conditions in the offer of advance—and, in cases under the fourth head, the duty to obtain a proper security on completion—arise directly under the terms of the instructions. In circumstances where the lender's instructions impose specific duties in relation to these matters it seems to me inappropriate to have resort, at least initially, to some more general duty based on the appreciation of a reasonably competent solicitor as to materiality; particularly in circumstances which would, now, be seen with all the potential unfairness of hindsight. Where instructions given by an experienced lender require specific information in relation to a particular matter the solicitor should be entitled to act on the basis that that is the information, in relation to that matter, which the lender considers material. It is, I think, only in two of the cases which I have to consider—*Steggles Palmer* and *Clearys*—that liability for failure to inform has to be examined by reference to the *Bowerman* test alone.

The society's instructions to solicitors retained in mortgage transactions

The starting point from which to consider whether or not a solicitor retained by a lender in relation to a domestic mortgage transaction has failed to carry out the duties imposed by that retainer is, of course, a proper analysis of the instructions which he has been given. Where those instructions are contained in standard documentation, this requires an examination of that documentation. It is on the basis of the documents sent to him by the building society that the solicitor accepts instructions to act as its solicitor in the transaction.

In each of the cases which are before me the defendant firm was sent a copy of the society's standard solicitor's letter. That letter invited the defendant firm to investigate title and prepare the mortgage deed 'in accordance with the terms of

the enclosed offer of advance and Solicitors Instructions'. A copy of the offer of advance made to the applicant was sent to the defendants with that letter.

The solicitor's copy of the offer of advance contained a notice in the following terms:

> 'SOLICITORS INSTRUCTIONS This sheet forms part of the Offer of Advance Please advise the Society immediately of any discrepancy or variation in the above details or those shown on the Offer of Advance. Notification of material changes must not be left until Report on Title stage as completion may well be delayed.'

The solicitor's instructions were set out on a separate sheet, sent with the letter and the offer of advance. Those instructions commenced with the notice:

> 'IMPORTANT: The Society's offer of advance forms an integral part of these instructions.'

In each of the cases which are before me the society's offer of advance incorporated special condition 1. Special condition 1(a) was in these terms:

> 'All information on the application form being correct, acceptance of the terms and conditions set out in the Society's form of mortgage and the title of the proposed security being acceptable to the Society's solicitors. If the offer of advance is not accepted within 21 days of the date hereof or the mortgage is not completed within three months from such date or any question arises or any event happens which in the view of the Society renders it undesirable for an advance to be made the Society reserves the right to withdraw the offer.'

I have referred earlier in this judgment to the terms of special condition 1(c):

> 'The Applicant providing from his own resources (without further borrowing) the whole of the balance of purchase money except with the prior consent of the Society.'

Special condition 3 was in these terms:

> 'Any existing mortgage(s) in the name of the Applicant(s) being redeemed prior to completion.'

Paragraph 2 of the solicitor's instructions contained the requirement to which I have also referred earlier:

> 'MATTERS WHICH MUST BE REPORTED TO THE SOCIETY Any matters which might prejudice the Society's security or which are at variance with the Offer of Advance should be notified to the Society in writing immediately they become known. Completion should not be arranged until the Society has indicated its willingness to proceed.'

The solicitor confirmed that he had complied with those instructions by completing the 'report on title and request for advance cheque':

> 'I/We hereby confirm that the details of the transaction accord exactly with the particulars in the Offer of Advance and the requirements of the Solicitors Instructions (If not, please give full details). I/We have investigated the title of this property and report that I/We consider the title to be good and marketable and that it may be safely accepted by the Society.'

In my earlier judgment in *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801 at 810, I said:

> 'By returning the report and request the solicitor (a) confirms that he has fulfilled one of his contractual obligations—to investigate and report on title—and (b) invites the society to authorise him to proceed to completion of the mortgage transaction by putting him in funds for that purpose. The request for authority to proceed to completion is founded not only upon the report on title but also upon the warranty or representation that the transaction which is to be completed does accord exactly with the particulars in the offer of advance and the requirements of the solicitor's instructions.'

The warranty in the report and request is supplemented by the continuing obligation, imposed by para 2 of the solicitor's instructions, to report 'any matters which ... are at variance with the offer of advance'. That obligation requires a solicitor who has given an unqualified confirmation in the report and request to notify the society if, before completion, he becomes aware of matters which indicate, or suggest, that that confirmation can no longer be relied upon. In those circumstances he must not complete without further authority.

Failure to notify the society of a possible discrepancy in the purchase price

The 'particulars in the offer of advance' include, inter alia, a statement of the purchase price. It is, I think, beyond argument that a solicitor who knew that the true purchase price payable by the purchaser/borrower to the vendor was not the purchase price stated in the offer of advance could not, properly, sign and return the report and request without qualification. Further, as it seems to me, a solicitor who signs and returns the report and request without qualification is, at the least, warranting to the society that he has made those inquiries (if any) which a competent solicitor, acting reasonably, would make in order to satisfy himself that the purchase price stated in the offer of advance is the true purchase price to be paid by the purchaser/borrower to the vendor; and that (in the light of those inquiries) he knows of no reason why he cannot give the unqualified confirmation to which he has put his signature.

It is clear from the evidence given by experienced solicitors called as expert witnesses that, during the period that I have to consider, in the vast majority of cases the whole of the price payable on the purchase of domestic property passed through the hands of the purchaser's solicitor. The purchaser's solicitor paid the deposit to the vendor's solicitor at the time of exchange of contracts—after having been put in funds by his client for that purpose—and he paid the balance on completion—from funds provided by the building society and (as to any balance) by the purchaser. In those circumstances, it seems to me that a competent solicitor, acting reasonably, would have no hesitation in confirming that the true purchase price payable was the price stated in the contract and the transfer. He would not be concerned to investigate the possibility of some side arrangement between vendor and purchaser. The problem arises where there is a departure from that norm; in particular, where the purchaser is said to have made a payment direct to the vendor which has not passed through the hands of either solicitor. In such a case, the question arises what further inquiries (if any) would a competent solicitor, acting reasonably, have made in order to satisfy himself that the direct payment had, in fact, been made.

The solicitor acting for both purchaser and lender is, of course, concerned to ensure that, on completion, he will obtain a transfer executed by the vendor

which contains an acknowledgment that the price stated in the transfer has been paid. With that in mind, it seems to me that a competent solicitor, who had been told by his client of a direct payment, would normally obtain confirmation from the vendor's solicitor in advance of completion that the vendor will give a full receipt in the transfer. But failure to seek such a confirmation in advance of completion should not, of itself, be treated as a failure to act reasonably in the interests of the lender if the receipt is, in fact, given in the transfer.

Prima facie, a vendor who executes a transfer in which he gives a full receipt for the purchase price must, if acting honestly, be taken to have received the stated price. A vendor who is willing to give a receipt for a purchase price which he has not, in fact, received is likely to be acting, in collusion with the purchaser, in some dishonest scheme which involves the deception of the lender. The question, therefore, as it seems to me, is whether a competent solicitor, acting reasonably, who was told by his client (the purchaser) and by the vendor (either in advance of completion in response to an inquiry made of the vendor's solicitor or, indirectly, through the receipt in the transfer) that the full purchase price had been paid, albeit in part by a direct payment, ought to have taken the view, during the period with which I am concerned, that the risk that vendor and purchaser were colluding in a dishonest scheme to deceive the lender was such that he could not rely on that information for the purpose of giving the confirmation which the lender required. A solicitor who reaches the conclusion that he cannot safely rely on what he is being told by the vendor and the purchaser in those circumstances must, I think, also conclude that he may be acting for a dishonest client in a fraudulent transaction. In my view, the solicitor would be obliged to withdraw.

The view that a solicitor who becomes aware that his client may be attempting to perpetrate a fraud in any form should immediately cease acting was expressed in a statement published in the Law Society's Gazette on 21 November 1990. The statement drew attention to the danger that a solicitor acting for both borrower and lender might, inadvertently, become involved in a mortgage fraud; and emphasised the need for solicitors to consider their position carefully if they became aware of a change in the purchase price. The statement did not, in terms, refer to any danger associated with direct payments. The statement was republished, in substantially identical form, in the Law Society's Gazette on 12 December 1990. In March 1991 the Law Society published a 'Green Card' warning to solicitors, under the heading 'Mortgage Fraud'. That warning identified, as a sign to watch for in seeking to avoid unwitting assistance in a mortgage fraud: '(4) *A deposit paid direct*—a deposit, perhaps exceeding a normal deposit, paid direct or said to be paid direct, to the seller.' I have seen no publication from the Law Society, earlier than March 1991, which identifies direct payments as a potential badge of mortgage fraud.

In the three cases which I have to consider under this first head—*Fancy & Jackson, Steggles Palmer* and *Baileys Shaw & Gillett*—the relevant facts occurred in 1989. I am not satisfied, on the evidence that I have heard, that there was any general perception amongst solicitors at that time that direct payments were a potential badge of mortgage fraud. It is clear that the danger had begun to be appreciated by the beginning of 1991; but these defendants are not to be held liable on the basis of hindsight. I must consider whether there is anything in the facts of these individual cases which ought to have alerted the defendant solicitors to the possibility that they could not rely on what they were being told by both vendor and purchaser.

In *Fancy & Jackson* the solicitor, Mr Bodger, signed and returned the report and request on 25 September 1989. At that date, he appears to have thought that contracts had been exchanged on terms which required the payment of a deposit of £17,500, being 10% of the purchase price; but he had no reason to think that that sum, or any other sum, had, in fact, been paid on exchange. He wrote to the purchaser/borrower on the following day with the request that he be put in funds for completion. In response to that letter he was told by his client that there had been a direct payment of £25,000. It is clear from his letter of 29 September 1989 that Mr Bodger intended to confirm that with the vendor's solicitors. There is nothing on his file to indicate that he did so. Nevertheless, the vendor's solicitors were content to complete on the basis that the £25,000 had been paid. The transfer contained a receipt for the full amount of the purchase price (£175,000) and was stamped accordingly. Although there were a number of respects in which Mr Bodger's conduct of the transaction fell short of that which might have been expected of a competent and diligent solicitor, I am not satisfied that he ought to have reached the conclusion that he could not safely rely on what he had been told by his client (the purchaser) in circumstances where that was confirmed by the vendor's willingness to give a full receipt. I can identify nothing—other than the fact of the direct payment itself—which ought to have led him to the conclusion that the vendor and the purchaser were colluding in a dishonest scheme to deceive the society. I should add that, although matters which are now known suggest that this was a case of mortgage fraud, I have seen no direct evidence that they were. I do not hold that Mr Bodger was in breach of his retainer in giving the confirmation which he did give in the report and request; or that he ought, subsequently, to have informed the society of the direct payment.

In *Steggles Palmer* the report and request was signed on 26 October 1989. It appears to have been signed on the basis of the internal note dated 18 October 1989 from Mr Williams to Mr Harman. The contract under which the society's applicant, Mr Whittaker, purported to purchase the property is dated 1 November 1989. That was also the date on which the transaction was completed by an assignment of the lease to Mr Whittaker. The contract itself provided for the payment of a deposit on exchange; but, in the circumstances that completion was fixed for the same day, this was otiose. There is no evidence that a separate payment in respect of the deposit was made. Further, there is no evidence that the defendant solicitors sought or received any funds from their borrower client in connection with the transaction; or that they made any inquiry to satisfy themselves that any payment had been made by him to his vendor, Orwell Estates Ltd. Their own client account in respect of Orwell Estates Ltd (for whom they were also acting) does not show the receipt of any balance, after payment to the landlord of the premium payable by Orwell Estates Ltd on the grant of the lease, other than the sum of £1,674 in respect of Land Registry fees and costs. On the evidence which I have seen the defendants were never in a position to satisfy themselves that the purchase of the lease by their client, Mr Whittaker, from their client, Orwell Estates Ltd, was, in fact, effected at the stated purchase price of £75,000. Their own records suggest strongly that they knew that it was not. Neither Mr Harman nor Mr Williams has given evidence to the contrary. I am satisfied that these defendants were in breach of their obligation to inform the society that they were not able to confirm that the purchase was to be effected at the price stated in the offer of advance.

In *Baileys Shaw & Gillett* the report and request was signed on 6 October 1989. At that date the defendants were expecting that the whole balance of the purchase money—representing the difference between the society's advance and the purchase price—would be sent to them by their borrower client, Mr Lewis. This appears from their letters to Mr Lewis of 20 September and 11 October 1989. Contracts were exchanged and completion took place on 16 October 1989 without the defendants having received the funds which they were expecting from Mr Lewis. There is no evidence that the defendants made any inquiry of the solicitors acting for the vendor, Thornmere Ltd, as to the receipt of the balance. If they had done, those solicitors would have had to disclose that they had received no funds from Mr Lewis; and that the only evidence of direct payment (if, indeed, that evidence was in existence at the time of completion) was a letter signed by Mr Lewis on behalf of Thornmere Ltd. I keep in mind that, as the defendants knew, the true purpose of the transaction was to provide funds for Thornmere Ltd through the remortgage of its property; and that, in the circumstances it was most unlikely that Mr Lewis would be introducing his own moneys into Thornmere Ltd unless that was unavoidable. Neither of the solicitors having conduct of the matter on behalf of the defendants, Mr Mitchell and Mr Melling, have given evidence. So I do not have the benefit of any explanation from them of the basis upon which they might have thought (if they did) that the full purchase price of £275,000 had been paid by Mr Lewis. In the circumstances that the defendants knew of the background to the transaction, including the connection between their borrower client and Thornmere Ltd, I am satisfied they could not overlook the very real possibility that the full purchase price would not be paid; and that, having taken no steps to satisfy themselves that it had been, they ought to have informed the society that they could not confirm that the purchase was to be effected at the price stated in the offer of advance.

Failure to inform the lender that transaction was a sub-sale

The transfer of the lease to Mr Whittaker in *Steggles Palmer* was, in effect, by way of sub-sale; in that the lease was granted to Orwell Estates Ltd on the day of the transfer. The differential on the sub-sale—being the difference between the premium payable on the grant of the lease (£68,000) and the transfer price (£75,000)—was £7,000. There is no evidence that the defendants had seen the valuation obtained by the society; but they must have been aware that it was equal to, or in excess of the amount of the advance (£73,500). The question is whether the defendants ought to have appreciated that the differential on sub-sale might call in question the valuation on which the society had based its decision to lend. It is necessary to keep in mind that the premium for the lease had been agreed in September 1988; that is to say more than one year before the sub-sale. The society has not sought to persuade me, by evidence, that a price differential of some 10% over the period September 1988 to October 1989 in relation to this property was so remarkable that a competent solicitor, acting reasonably, would have realised that knowledge of the September 1988 price might cause the society to doubt the correctness of the valuation which it had obtained in August 1989.

For the reasons which I have already given, I have held that the defendants ought to have informed the society that they could not confirm that the stated purchase price had been paid. If they had done that, and if they had informed the society that they were also acting for the vendor, Orwell Estates Ltd (as they should have done), they would have been obliged to inform the society of all the

other aspects of the transaction, including the sub-sale and the price differential. In these circumstances, I have no doubt that failure to inform the society as to the sub-sale was an element in the wider breach of duty. Had it stood alone, I would not have held the defendants liable in this case.

Colin Bishop is the case in which the Cheshunt society was lender. I have already indicated that the Cheshunt society's instructions to solicitors imposed the specific requirement that any transaction proceeding by way of sub-sale had to be reported, with particulars of the parties and the prices. The licensed conveyancer having conduct of the transaction on behalf of the defendants, Mr Hyman, knew that his borrower clients were purchasing under an arrangement which he described as 'back to back'. This appears from a letter which he wrote to the vendor's solicitors on 15 May 1989. That was not disclosed in the report and request signed on 7 August 1989. That report contains the statement: 'We have satisfied ourselves upon all matters mentioned in our instructions and in the society's standing instructions to solicitors, and have nothing adverse to report'. In his evidence Mr Hyman sought to explain the apparent failure to report. For convenience, I can take the relevant passages from his witness statement dated 6 February 1997:

> '... 5. Upon receipt of instructions from the Plaintiff I would have familiarised myself with their standard form of instructions. In particular, I would have noted that I was required to report the existence of a sub-sale in accordance with condition 29(vii) of my instructions ... 9. I was aware that this matter was proceeding by way of a back to back sale to the Borrowers. By a 'back to back' sale I mean the Borrowers were purchasing the Property from a Mr James Slater who was himself also purchasing the Property from a Manzoor and Dawn Hussein in the sum of £86,000. I have always distinguished such transactions from sub-sales. A sub-sale is a transaction where all three parties execute the same Deed of Transfer with payment of stamp duty and Land Registry fees once only. I did not look on this transaction as a sub-sale ... 10. I made no report of the facts of the back to back nature of this transaction as I was not required to in my instructions. I did not consider it necessary when reporting on title to do so either. In my experience, back to back transactions were not matters which the Plaintiff or other lenders considered material or would affect its decision to lend ...'

I reject that explanation. I accept that there is a distinction, in conveyancing form, between transactions in which there is a single transfer from original vendor to ultimate purchaser and transactions in which there is a chain of transfers; and that that distinction gives rise to different consequences in relation to stamp duty and Land Registry fees. But I am satisfied that it would have been perfectly obvious to someone in the position of Mr Hyman, even in 1989, that that was not a distinction which would be of interest to a lender who had been sufficiently acute to include a requirement as to the reporting of sub-sales in its standard instructions to solicitors. It would have been obvious that the lender was concerned to know whether the intermediate vendor was selling on to an associate at a profit; because that was a circumstance which would call into question the validity of the purchase price as a guide to value and might throw doubt on the integrity of the borrower. In my view, no competent solicitor (or licensed conveyancer) acting reasonably could reach the conclusion that the Cheshunt society only required that information where there was to be a single transfer by way of sub-sale; and did not require it where there were to be

successive transfers 'back to back'—that is to say all executed at or about the same time.

Mr Hyman went on to tell me that, although he did not accept the need to report the 'back to back' transaction to the Cheshunt society, he did, in fact mention it in the course of a telephone conversation on 14 July 1989. The defendant's file contains an attendance note of that date on 'Manager, Cheshunt BS Head Office' in these terms: 'He said that the insurance was OK. Discussed the back to back situation and he said it was OK.' Mr Hyman thought that the person to whom he spoke was Mr Calvert. Mr Calvert had no knowledge of the conversation. He thought it unlikely that he would have telephoned to discuss insurance. Be that as it may, I do not think that the telephone conversation assists the defendant. Mr Hyman does not suggest that he gave the information—as to parties and prices—which was required by the standard instructions.

In those circumstances, I hold that the defendant, Colin Bishop, was in breach of his retainer in failing to report the particulars of the linked transactions, either in the report and request signed on 7 August 1989 or at all, prior to completion.

Failure to report the borrower's intention to act in breach of a special condition

The solicitor's confirmation as to the details of the mortgage transaction in respect of which he is seeking authority to proceed includes confirmation that those details accord exactly with 'the requirements of the solicitor's instructions'. The solicitors instructions include a requirement that the solicitor report to the society immediately they become known any matters which ... are at variance with the offer of advance ...' The offer of advance includes special conditions 1(c) and 3, to which I have already referred.

Again, it appears to me beyond argument that a solicitor who knew that, in breach of special condition 1(c), the borrower was intending to fund the balance of the purchase money from further borrowing—for example by borrowing upon the security of a second mortgage on the property to be purchased—or that the balance of the purchase money was to be left outstanding by way of loan from the vendor could not, properly, sign and return the report and request without qualification. Again, as it seems to me, a solicitor who signs and returns the report and request without qualification is, at the least, warranting to the society that he knows of no reason why he cannot give a confirmation in absolute terms to the effect that the mortgage transaction in respect of which he is seeking authority to proceed will be completed in accordance with the terms in the special conditions. Again, the warranty in the report and request is supplemented by the continuing obligation imposed by para 3 of the solicitor's instructions. A solicitor who has given an unqualified confirmation in the report and request must notify the society if he becomes aware that the confirmation can no longer be relied upon.

In *Read & Rogers* the purchase was funded on completion, in part, by a bridging loan from Lloyds Bank plc. That was provided against the defendants' undertaking, in their letter of 23 August 1988, that they would forward to the bank moneys (if any) received by way of 'top-up' loan from Premier Portfolio. There is no evidence that the defendants informed the society of the bridging loan, or of the proposal for a top-up loan. It is not in dispute that they ought to have done so; or that the failure to do so was a breach of duty at common law. The dispute, in this case, is whether that failure was dishonest so as to give rise to a claim for breach of fiduciary duty. I consider that question later in this judgment.

a The breach of duty of which the society complains in *Baileys Shaw & Gillett* includes failure by the defendants to report to the society that they could not confirm that the balance of the purchase price was being provided by Mr Lewis out of his own resources and without recourse to further borrowing. In the circumstances that, for the reasons which I have set out, the defendants were in no position to confirm that the balance of the purchase price was to be paid at all, b this further complaint adds nothing to the society's cause of action in this case.

I have already indicated that, in *Moroneys*, the defendant accepts that the failure to report the proposal that the balance of the purchase price should be left outstanding secured by a second charge in favour of the vendor—in contravention of special condition 1(c) of the offer of advance—was a breach of c his duty at common law.

The remaining case under this head is *Clearys*. For the reason already explained, I need only consider in this judgment the allegation that the defendant was in breach of duty in failing to inform the society that, although the existing mortgage over the farmhouse and garden in favour of Lloyds Bank plc would be d redeemed on completion, it was proposed that a second charge over the same property should be granted to the bank immediately following completion.

It is clear from the bank's letter of 4 August 1989—to which I have already referred—that the bank wished to retain security over the farmhouse and garden as well as over the remainder of the land at Judds Farm; but was content that, in e relation to the farmhouse and garden, its security should rank behind that of the society. There were, as a matter of conveyancing, two methods by which that objective could be achieved. One was to leave in place the bank's existing charge over the whole, but for the bank to execute a deed postponing its security over the farmhouse and garden to the new charge in favour of the society. The other f was to discharge the bank's existing charge in so far as it extended to the farmhouse and garden; grant a new first charge over that property in favour of the society; and then grant a second charge over the farmhouse and garden in favour of the bank. Special condition 3 of the offer of advance required that any existing mortgage in the name of the applicant should be redeemed prior to completion. On a strict interpretation, this made it necessary to adopt the second g method of achieving the bank's objective rather than the first (which would otherwise have been the simpler course). Neither special condition 3 of the offer of advance (in terms) nor, surprisingly, the society's mortgage conditions prevented the grant of a second charge. In my view, the defendant is correct in his contention that, strictly, the borrowers were not proposing a course which h would put them in breach of special condition 3. But I do not accept that that is an answer to the society's complaint. It seems to me that a competent solicitor, acting reasonably, would have appreciated that the society would or might regard the proposal for a second charge over the property as material to its lending decision. I do not think it is open to a solicitor who chooses to act for the j borrower, the society and an existing bank lender to say that he can avoid his obligation to disclose to the society information which he does or should appreciate it might wish to have by arranging the transaction between the borrower and the bank in such a way as to avoid the requirement in special condition 3 of the offer of advance. I am satisfied that the defendant was in breach of duty in failing to inform the society that the bank would continue to have a security over the farmhouse and garden.

Failure to obtain a proper security on completion

The report on title contains the solicitor's confirmation that he has investigated the title to the property to be taken as security for the advance and that he considers it to be good and marketable and such as may be safely accepted by the society. It is not clear to me how a solicitor who has not obtained a current search certificate in respect of property which is registered at HM Land Registry can, properly, sign an unqualified report to the effect that he has investigated title and that the title may safely be accepted; but it appears to have been not uncommon at the time for the report on title to be returned to the society before an official search certificate had been obtained, or even sought. In practice, solicitors appear to have treated reports on title as subject to the implied qualification 'subject to satisfactory searches'. But, whether or not the report is to be construed in that way, what is beyond argument is that a solicitor who has signed an unqualified report cannot properly proceed to completion, without further authority from the society, unless he does have an official search certificate which discloses no adverse entries and completion takes place within the period of priority provided under that certificate.

In *Fancy & Jackson* completion took place on 6 October 1989. At the time of completion Mr Bodger did not have the official search certificate which he had sought from the Durham Land Registry. On the basis of a telephone conversation with an employee at the registry—in the course of which he was not given any assurance that there were no adverse entries—he decided to take the risk that the title would be acceptable. He did not, as he was required to do under his instructions from the society, defer completion or seek authority. It was not until 11 October 1989—some five days after completion—that he received oral confirmation from the registry that there were, in fact, no adverse entries. In my view, there can be no doubt that, by allowing completion to take place on 6 October 1989, the defendants were in breach of their duty to the society. It does not, of course, follow that that breach gave rise to anything other than a claim for nominal damages.

The society's complaint against *Cooke & Borsay* is that Mr Borsay failed to ensure that it obtained a properly executed mortgage deed before releasing the amount of the advance. It is common ground—for the purposes of these proceedings—that Mrs Barton did not execute the deed which appears to bear her signature.

It was not suggested in argument that the effect of the society's instructions to solicitors was to shift onto those who accepted its retainer in relation to domestic mortgage transactions the whole risk of an undetected forgery—in effect, to make them insurers in respect of that risk. I do not doubt that that could be done by an appropriate provision in a solicitor's retainer; but I would expect to see such a provision spelt out in clear words if that was indeed the intention. Nor do I doubt that it would be possible to include in the instructions under which a solicitor was retained to act for a lender a provision which required him to ensure that the mortgage deed was executed in his presence by mortgagors who provided some proof of their identity. But the society's instructions contain no provision which could have that effect. In my view, the obligation on Mr Borsay, as the solicitor instructed by the society, was to take such care as a competent solicitor, acting reasonably, would take in the circumstances.

In circumstances where the lender and the borrower instruct separate solicitors, I am not persuaded that a competent solicitor, acting for the lender, would be acting unreasonably if he accepted from the borrowers' solicitor a

mortgage deed which appeared on its face to have been executed by the mortgagors and witnessed. If there were nothing irregular on the face of the document the lender's solicitor would be entitled to accept it without question. He would not be required to inquire into the circumstances in which it was executed. But—and this is, of course, an important safeguard—the lender would have the benefit of the implied warranty of authority given by the borrowers' solicitor that he has the authority of the borrowers to complete the mortgage by delivering the mortgage deed—see the judgments in the Court of Appeal in *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356.

I can see no reason why the position should be different in the circumstances that the same solicitor acts for both lender and borrowers. I do not hold that the duty of the solicitor, as solicitor for the lender, is increased by the fact that he acts also for the borrowers; but, equally, I can see no reason why, as solicitor for the borrowers, he should not be taken to warrant to the lender that he is acting for them in the transaction with their authority. That does not, necessarily, mean that he is warranting that the signature on the mortgage deed is authentic; but it has much the same effect. Mr Borsay must be taken to have warranted to the society that the mortgage deed which he delivered on completion as solicitor for the borrowers was delivered with the authority of both Mr and Mrs Barton. If the deed had been delivered with the authority of Mrs Barton as security for the advance which was made by the society, the fact that it did not, in fact, bear her signature would be relatively unimportant. She would clearly be bound by its terms.

For these reasons, I am satisfied that this defendant is liable to the society for breach of his implied warranty of authority.

Breach of fiduciary duty

The two cases in which allegations of breach of fiduciary duty are pursued are *Read & Rogers* and *Steggles Palmer*.

The allegation in *Read & Rogers* is that Mr Read, the partner having conduct of the matter, knew or must be taken to have known that he was under an obligation to inform the society that the balance of the purchase money payable on completion was funded by a bridging loan. I have already indicated that it is not in dispute either that (i) he was under that obligation and (ii) that he did not inform the society of the loan. The issue is whether his failure to do so was simply the result of carelessness or incompetence (as the defendants contend); or was the consequence of a deliberate choice to prefer the interests of his borrower clients to those of the society.

There can be no doubt that, on receipt of the letter from Lloyds Bank plc on or about 22 August 1988, Mr Read knew that the borrowers intended to fund the balance of the purchase price (some £6,000) by means of a bridging loan. On the following day he sought authority from the borrowers to give the undertaking which the bank required. He received that authority in a letter from the borrowers dated 24 August 1988. Nor can there be any doubt that, if he had read the special conditions which formed part of the offer of advance, a copy of which was sent to him on or about 18 July 1988 (as the defendants admit in their pleaded defence), he would have seen, from special condition 1(c), that the bridging loan would give rise to a situation in which the proposed purchase was at variance with the offer of advance. If he had read and understood para 2 in the solicitor's instructions which were sent to him he would have appreciated that that was a matter which he was obliged to report. But, as Millett LJ pointed out in *Bristol*

and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698 at 709, [1997] 2 WLR 436 at 447, it is a mistake to confuse knowledge with the means of knowledge. I must take account of the possibility that Mr Read did not read the special conditions; that he did not appreciate the duty which para 2 of the solicitor's instructions imposed upon him; and that (even if he had read the special conditions and understood the effect of the solicitor's instructions at some time prior to 22 August 1988) they were not present to his mind when he learnt of the proposal for a bridging loan.

Mr Read did not give evidence before me. The effect is that I do not have direct evidence on these matters. I have no evidence that he did or did not read the special conditions; that he did or did not understand the effect of para 2 of the solicitor's instructions; or that he had or had not forgotten, by 22 August 1988, whatever he might have read or understood on some occasion before that date. I cannot assume that whatever evidence he might have given on these matters would have been unfavourable to the defence. The most that I can infer is that he is not able to give evidence which would assist the defence. But that may well be because he has no memory about the transaction. He may simply be in no better position than I am to reconstruct the events of some nine years ago from the documents on the file.

In these circumstances, I have to decide the question on the basis of whatever inferences I can properly draw from the documents. I should not draw an inference of dishonesty against a solicitor without cogent evidence; evidence which, in effect, compels me to reach that conclusion. In my judgment I should not reach that conclusion on the documents in the present case. Those documents are consistent with an honest oversight. I cannot be satisfied that that is not the true explanation for what occurred.

The allegation of breach of fiduciary duty made in *Steggles Palmer* is put on a different basis. It is said that the defendants ought to have disclosed to the society the fact that they were acting not only for the borrower, Mr Whittaker, but also for his vendor, Orwell Estates Ltd. By failing to do so, the defendants put themselves in breach of the 'double employment rule' to which Millett LJ referred in *Mothew* [1996] 4 All ER 698 at 712, [1997] 2 WLR 436 at 450. They put themselves in the position where their duty to the vendor might conflict with their duty to the society. As Millett LJ pointed out 'Breach of the rule automatically constitutes a breach of fiduciary duty'. But it does not follow that the potentiality of conflict leads inevitably to an actual conflict. In practice it may not do so.

In the present case, there is no reason to think that the defendants' breach of the double employment rule put them in breach of what Millett LJ described as 'the actual conflict rule' ([1996] 4 All ER 698 at 713, [1997] 2 WLR 436 at 451). They failed to disclose to the society the fact that, as it appeared from the documents available to them, the vendor was making a profit of £7,000 on the resale of the property; but there is nothing to suggest that that failure was the result of any belief that the information was confidential to the vendor or the result of any desire to benefit the vendor at the expense of the lender. They failed to disclose to the society the fact that they did not know whether (or how) the borrower was to pay the balance of the purchase price; but, again, there is nothing to suggest that they knew that he had not, or was not intending, to do so. In particular, there is nothing to suggest that that failure was the result of any duty which they thought they might owe to the vendor.

In the circumstances presented in *Steggles Palmer*, the defendants would not, as it seems to me, be in breach of the actual conflict rule unless it were shown that they had deliberately suppressed information which they ought to have disclosed to the society—in particular, the information (i) that the vendor was Orwell Estate Ltd, Mr Whittaker's employer, and that, accordingly, the vendor and the purchaser were connected persons; (ii) that they, the defendants, were acting for both vendor and purchaser; (iii) that the vendor was to make a profit on the sub-sale; and (iv) that they had no means of knowing whether the purchaser would pay, or would be required to pay, the balance of the purchase price—with the intention of enabling the vendor to raise the balance of the premium payable on the grant of the lease by means of an advance obtained from the society on an application made ostensibly for the benefit of Mr Whittaker but really for the benefit of Orwell Estates Ltd. Allegations of that nature would have to be pleaded with particularity; and established by evidence to the standard required for a civil case in fraud or conspiracy. There has been no attempt by the society to make a case of that nature against these solicitors.

I accept that the defendants in *Steggles Palmer* were in breach of the double employment rule—and so in breach of fiduciary duty—but I am not persuaded that that assists the society in the circumstances which I have to consider.

Summary of conclusions as to breach of duty

It is convenient to summarise the conclusions which I have reached as to breach of duty.

(1) *Fancy & Jackson*: I hold that the defendants were not in breach of duty in failing to notify the society of the £25,000 direct payment; but that they were in breach of duty in completing on 6 October 1989 without having first obtained an official search certificate.

(2) *Read & Rogers*: I hold the defendants were not in breach of fiduciary duty in failing to notify the society of the proposed bridging loan. It is not in dispute that they were in breach of their duty at common law.

(3) *Steggles Palmer*: I hold that the defendants were in breach of duty at common law both (i) in failing to notify the society that the transaction was by way of sub-sale under which the intermediate vendor was to profit in the sum of £7,000 and (ii) in failing to notify the society that they could not confirm that the borrower was to pay the balance of the purchase moneys from his own resources or at all. I hold also that the defendants were in breach of fiduciary duty in that, by failing to notify the society that they were acting also for the vendor in the transaction, they breached the double employment rule.

(4) *Baileys Shaw & Gillett*: I hold that the defendants were in breach of duty in failing to notify the society that they had seen no evidence that the borrower was to pay the balance of the purchase money from his own resources (or at all).

(5) *Clearys*: I hold that the defendants were in breach of duty in failing to notify the society that the bank was to have a second charge over the farmhouse and garden.

(6) *Cooke & Borsay*: I hold that the defendant was in breach of his implied warranty of authority in delivering the mortgage deed on behalf of the borrowers without having obtained instructions from each of his borrower clients.

(7) *Moroneys*: It is not in dispute that the defendant was in breach of duty in failing to notify the society that the balance of the purchase price was to be left outstanding secured by a second charge in favour of the vendor.

(8) *Colin Bishop*: I hold that the defendant was in breach of duty in failing to notify the society that the transaction was proceeding by 'back to back' or simultaneous transfers with an uplift in price of £25,000.

LOSS

The society cannot recover more than nominal damages in respect of the breach of retainer unless it can establish that it has suffered loss which it would not have suffered but for that breach. If the society can establish that it has suffered loss which it would not have suffered but for the breach then (subject to its own contributory negligence) it can recover such part of that loss as has been caused by the breach. It cannot recover any part of that loss which has not been caused by the breach. Those propositions are not, I think, in dispute in these proceedings.

The first question to consider is whether the society has established, in each case, that it has suffered loss which it would not have suffered but for the breach. If so, then it is necessary to consider what part of that loss has been caused by the breach. That will require consideration of the question how far the loss is attributable to factors other than the breach, including, inter alia, the society's failure to mitigate its loss. Thirdly, it will be necessary to consider whether the amount (if any) which the society can recover in respect of the loss caused by the breach ought to be reduced by its own contributory negligence.

The society contends that, in each of the cases which I have to consider, it would not have made the advance which it did make if the defendant(s) had not been in breach of duty. In each case the society suffered a loss which it would not have suffered if the advance had not been made. The society quantifies that loss by adding to the principal sum lent the interest which would have been earned on an equivalent sum invested on the money market at London Inter-Bank Offered Rates (LIBOR) and deducting from the aggregate the interest and capital repayments (if any) actually made by the borrowers and the net recoveries (if any) from the realisation of the mortgaged property on sale. The society contends that, because that loss would not have been suffered if the advance had not been made, the defendant(s) are liable for the whole amount. The defendants contend that that is the wrong approach. It fails to address the question what part of that loss has been caused by the breach of duty. It fails, also, to take account of loss suffered by failure to realise the mortgaged property at a proper price or within a reasonable time; and it fails to take account of what the defendants allege were imprudent lending decisions taken on the basis of the facts which were known to the society at the relevant time.

Would the advances have been made but for the defendants' breach of duty?

I consider, first, the question whether the advances would have been made if the defendants had notified the society (or the Cheshunt society, as the case may be) of the matters which I have held should have been notified prior to completion. There are, I think, three cases where the answer is obvious. The advance would not have been made if the society had known the true position. These are *Fancy & Jackson*, *Steggles Palmer* and *Cooke & Borsay*. I have heard evidence from the advances officers to whom the requests for authorisation to proceed would have been referred. They left me in no doubt that they are, and were at the material time, cautious by nature. I am satisfied that, if any of those officers had been asked to authorise completion of a mortgage in circumstances in which the retained solicitor was not able to confirm that he had an official

search certificate on which the society could rely for its title, he or she would have refused to do so. So too, if the solicitor had told them that he was also acting for the vendor, who was the borrowers' employer and who stood to make a profit on payment of the advance moneys in circumstances in which the solicitor could not confirm that the borrower was paying anything. I think it beyond argument that no advances officer would authorise completion if he were told that the solicitor could not himself verify the signature of one of the borrowers for whom he was acting; and could not warrant that he had any instructions from that borrower.

In three of the cases the society has not satisfied me that it would have refused to authorise completion, or withdrawn the offer, if it had been told what, as I have held, it ought to have been told. These cases are *Read & Rogers, Baileys Shaw & Gillett* and *Clearys*.

In *Read & Rogers* it had been apparent to the manager of the society's Weymouth branch, Mr Curtis, from an early stage that the borrowers were likely to seek bridging finance or a top-up loan. The explanation given, and apparently accepted, was that Mr Okosieme had capital invested which he did not wish to realise at that time. Although the regional manager would not sanction an advance equal to 95% of the valuation, this refusal does not appear to have been the result of any concern as to the borrowers' ability to service the loan. The income ratio was sufficient for a loan equal to the full amount of the purchase price. The prohibition in special condition 1(c) was not absolute; further borrowing could be permitted with consent. If the society had been asked for consent to a short-term bridging loan, pending the disposal of shares, I can see no commercial reason why that would, necessarily, have been refused. I take account of the evidence of the lending officers to whom the request would have been made. They were unanimous in their view that no loan would have been sanctioned unless the borrower was contributing some of his own funds. That was not a position which appeared to me to be founded on any commercial premise or logic; nor could I identify any instruction to that effect in the society's lending manuals; but the position was doggedly adhered to throughout the society's evidence. But, so far as the society knew, Mr Okiosieme had provided the deposit of £4,200 from his own funds. In my view, in the conditions prevailing in August 1988, the probability is that the society would have been content with the proposed secondary borrowing in this case; and would not have withdrawn the offer of advance. I am not satisfied that, if Mr Read had told the society of the bridging loan (as he ought to have done) the advance would not have been made.

In *Baileys Shaw & Gillett* the society had known, through Mr Hicks (the manager of the Baker Street branch) that the original purpose for which mortgage funds were sought was to refinance Thornmere Ltd. The society was restricted in the proportion of its funds which could be lent to corporate borrowers. That, as it seems to me, is likely to be the reason why Mr Hicks was asked, in July 1989, whether the application should be 'resubmitted' in the name of Mr Lewis as an individual. The society was happy for the application to proceed, knowing (as it did) of the connection between Mr Lewis and Thornmere Ltd. I give no weight to the suggestion that the society regarded this as an 'arm's length' transaction. I am satisfied that the decision to lend was based on the valuation obtained, not on any supposed 'arm's length' bargain between Mr Lewis and his company. In these circumstances it was, as it seems to me, commercially immaterial whether Mr Lewis would pay the balance of the

purchase price. If the defendants had sought evidence that he was intending to do so, I have little doubt that it would have been provided in the form of a receipt from Thornmere Ltd. There was no reason, that I can see, why Mr Lewis should not have set off the balance of the purchase price against a credit balance on a loan account with his company; and no reason to think that this was not what lay behind the manuscript receipt which was provided to Beller Needleman. In my view, if the defendants had recognised (as they should have done) that it was their duty either to satisfy themselves that the full purchase price had been paid or to notify the society that they were unable to do so, the probability is that they would have been provided with material on which they would have been able to inform the society that they were satisfied. I do not think that this is a case in which the advance would not have been made if the defendants had done what they ought to have done.

Clearys is a remortgage case. The borrowers were farmers. It must have been appreciated by the society that it was very likely that they would be trading with the benefit of bank facilities secured on the farm. There was no reason for the society to think that position would not continue, following the remortgage of the farmhouse. The society did not suggest any reason why it should be concerned whether the continuing bank facilities were secured on the farmland alone or on the whole of the farm—provided, of course, that the bank's security over the farmhouse and garden ranked after that of the society; and I can see none. The society did not see any need to protect itself against a second charge by a restriction in its own first charge. When, immediately following completion, the defendant gave notice to the society of the bank's second charge, the society expressed no concern. I am not satisfied that, if the defendant had informed the society in advance of completion of the proposal that the bank would take a second charge (as I have held he ought to have done), the society would have withdrawn the offer of advance. This, also, is a case in which I think the advance would have been made even if the defendant had done what he ought to have done.

The two cases which appear to me to present more difficulty in this respect are *Moroneys* and *Colin Bishop*. On balance, I think that the advance in *Moroneys* probably would have been made even if the society had known of the secondary borrowing; but that the advance to Mr Moran and Miss Ging, which is the subject of the claim against *Colin Bishop* would not have been made if the Cheshunt society had known of the sub-sale and (in particular) of the price differential.

The real applicant in *Moroneys* was the guarantor, Mr Jacobs. It was on his status that the society was placing reliance. He enjoyed strong support from the branch manager, Mr Gibbs. He was thought to be a man of substance who was undergoing temporary matrimonial difficulties. A deposit had been paid on exchange of contracts. The society was lending less than 75% of the valuation which it had obtained. The combined income of Miss Paling and Mr Jacobs, who were to live in the property as man and wife, was more than sufficient to satisfy the society's lending criteria. The secondary borrowing was to be short-term. I can see no reason why a lending officer, giving proper consideration to all these factors, should not have given consent under special condition 1(c). Notwithstanding the society's evidence to the contrary, I think it more probable than not that consent would have been given.

Colin Bishop is a Cheshunt case. The Cheshunt society was alive to the potential dangers of linked transactions—as appears from the specific requirement in its instructions to solicitors. Mr Penlington, who was a senior

officer of the society at the relevant time and who gave evidence before me, was adamant that it was only in the most exceptional circumstances that the Cheshunt society would proceed with an advance where the proposed purchase was linked to a prior transaction. He did not persuade me that this, apparently almost inflexible, policy was founded on any commercial consideration which I could identify; but he did satisfy me that it was a real factor in the society's approach to lending. The advance was 90% of the valuation. Miss Ging had become a student since the offer of advance was first made. There had been a dishonoured cheque for the valuation fee of £110. The profit on the sub-sale was considerable—some 33% of the original purchase price. This was a fairly clear case in which the sensible decision would have been not to go ahead. There is certainly nothing which would suggest that the facts this case would justify a departure from the policy which Mr Penlington identified. I am satisfied that the probability is that the offer of advance would have been withdrawn if the defendant had notified the Cheshunt society (as I have held he should have done) of the 'back to back' nature of the transaction.

In summary, therefore, in four of the cases before me—*Fancy & Jackson, Steggles Palmer, Cooke & Borsay* and *Colin Bishop*—the society has satisfied me that, but for the defendants' breach of duty (or, in the case of *Cooke & Borsay*, breach of warranty of authority), it would not have made the advance; and so would not have suffered the loss which it did suffer. I am not satisfied that the advance would not have been made in the other four cases: *Read & Rogers, Baileys Shaw & Gillett, Clearys* and *Moroneys*. It follows that, in those four cases, the society has not established that it has suffered loss which it would not have suffered but for the breach; and it can recover no more than nominal damages.

What part of the loss has been caused by the breach?

I have, of course, been taken carefully through the recent authorities on the correct approach to this question. I need mention only the decisions of the Court of Appeal in *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, [1997] 2 WLR 436 (to which I have already referred in another context) and *Swindle v Harrison* [1997] CA Transcript 463 and the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191 (to which I will refer as '*SAAMCO*'). I hope I will be forgiven if I confess that I do not find all the observations in each of the judgments in these cases easy to reconcile. *Downs v Chappell* was decided before *SAAMCO*. In *SAAMCO* Lord Hoffmann treated the decision as authority for the proposition that the damages recoverable for misrepresentation should not be greater than the loss which would have been suffered 'had the represented, or supposed, state of affairs actually existed' (see [1996] 3 All ER 365 at 374, [1997] AC 191 at 216). In *Mothew* Millett LJ accepted that:

> 'They [the damages at common law] will have to be assessed in conformity with the decision of the House of Lords in the *South Australia* case and not with any gloss which, in the absence of argument, we may inadvertently have put upon that decision.' (See [1996] 4 All ER 698 at 704, [1997] 2 WLR 436 at 442.)

Staughton LJ expressed the same view ([1996] 4 All ER 698 at 720, [1997] 2 WLR 436 at 458). *Swindle v Harrison* was concerned with damages arising from breach of fiduciary duty.

In these circumstances, I am satisfied that the test which I should seek to apply is that found in the speech of Lord Hoffmann in *SAAMCO* [1996] 3 All ER 365 at 372, [1997] AC 191 at 214:

> 'It [the principle] is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong.'

It is important to keep in mind that in each of the three appeals considered in the *SAAMCO* judgment the lender would not have lent if he had received proper advice as to the true value of the property (see [1996] 3 All ER 365 at 368, [1997] AC 191 at 210). So, on the facts to which Lord Hoffmann was addressing his judgment, the plaintiff lender had suffered loss which he would not have suffered but for the negligent valuation. The Court of Appeal had held that, in such a case, the lender was entitled to recover the difference between the sum which he lent, together with a reasonable rate of interest, and the net sum which he actually got back ([1996] 3 All ER 365 at 369, [1997] AC 191 at 210). That was, of course, the loss which the lender suffered by making the advance; loss which he would not have suffered if he had not made the advance. The House of Lords rejected that conclusion. The plaintiff was not entitled to recover the loss which he suffered by making the advance; but only the loss which was the consequence of the valuation being wrong.

The *SAAMCO* test is illustrated by its application to the facts of the three appeals. In the first (the South Australia case), the lenders advanced £11m in 1990 on the security of property valued at £15m. The trial judge found the true value to be £5m. The proceeds of realisation in 1994 were £2·47m. The loss on the transaction was found to be £9·75m. On those figures, the amount of the debt outstanding immediately prior to realisation must have been approximately £11·22m. Lord Hoffmann held that the whole loss was within the scope of the defendant's duty ([1996] 3 All ER 365 at 379, [1997] AC 191 at 222):

> 'The consequence of the valuation being wrong was that the plaintiff had £10m less security than they thought. If they had had this margin they would have suffered no loss. The whole loss was therefore within the scope of the defendant's duty.'

As I understand that passage, Lord Hoffmann is pointing out that, on the facts in that case, the whole loss suffered on the transaction was suffered as a consequence of the valuation being wrong. But I do not think that he can be saying that if the valuation had been correct the lender would have suffered no loss. That would require the assumption that a property whose true value was £15m in 1990 would have sold for more than £11·22m in 1994. I do not think that he is making that that assumption. Rather, he is comparing the position as it was represented to be with the position as it was. If the position had been as it was represented to be, the lender would have had security which was worth £10m more than it was actually worth. The loss which can properly be regarded as a consequence of the valuation being wrong is loss which can be attributed to the difference between the position as it was represented to be, and the position as it

was. Since the actual loss suffered was less than that difference, the lender can recover the whole of the actual loss.

In the second appeal (United Bank of Kuwait) the lenders had lent £1·75m in 1990 on the security of property valued at £2·5m. The trial judge found the true value to be between £1·8m and £1·85m. The property was sold in 1992 for £0·95m. The loss was quantified at £1·4m. On the basis of those figures, the outstanding debt immediately prior to realisation would have been approximately £2·35m. Lord Hoffmann stated the position in these terms:

> 'In my view damages should have been limited to the consequences of the valuation being wrong, which were that the lender had £700,000 or £650,000 less security than he thought ... I would therefore allow the appeal and reduce the damages to the difference between the valuation and the correct value.' (See [1996] 3 All ER 365 at 380, [1997] AC 191 at 222.)

He is not equating the loss which the lender would have suffered with the difference between the outstanding debt (£2·35m) and the amount which would have been realised, in 1992, on the realisation of property which, in 1990, had a true value of £2·5m. He is comparing the position as it was represented to be with the position as it actually was, and is treating the loss caused by the negligent valuation as limited to the difference between the two.

Much the same result was reached in the third appeal—Nyekredit Mortgage Bank plc. The appeal was allowed and there was substituted for the judge's award of damages a figure equal to the difference between £3·5m (the figure at which the defendant valuers had valued the property in 1990) and the true value of the property at the date of valuation.

Where a loan is made on the basis of an incorrect and negligent valuation it is not difficult to find an answer to the question 'what are the consequences of the valuation being wrong' by comparing the position as it was represented to be with the position as it actually was; and subtracting one valuation from the other. The position is, I think, potentially more complex where the negligence is that of a solicitor. The information provided (or which ought to be provided) by a solicitor carrying out his retainer in a domestic mortgage transaction goes beyond questions of value; although it may well be relevant to value. The information may go simply to title; in which case it may affect value directly, or it may affect the marketability of the property. The information may go to price; in which case it may affect value. The information may go to the borrower's intentions in relation to conditions in the offer of advance; in which case it may have no effect at all on the loss actually suffered by the lender (see the analysis in *Mothew* [1996] 4 All ER 698 at 707, [1997] 2 WLR 436 at 444–445 per Millett LJ). But, although the test may be more difficult to apply in cases against solicitors, it is necessary to attempt to do so; that is to say, to answer the question 'what are the consequences of the information provided by the solicitor being wrong or incomplete' by comparing the position as it was represented to be with the position as it actually was.

If that test is applied to the facts in *Fancy & Jackson* it leads, I think, to the conclusion that the defendants are not only not responsible for the whole of the loss suffered by the society; they are not responsible for any part of it. The defendants ought to have informed the society that they did not have an official search certificate. If they had done so, the society would not have authorised the advance—or, at least, would not have authorised completion on 6 October 1989. But the loss which the society has suffered as a consequence of making the

advance on 6 October 1989 is not caused by the absence of an official search certificate on that day. The title to the property taken as security was not, in fact, defective. The society obtained what it intended to obtain when it decided to enter the transaction. The loss which occurred would have occurred in exactly the same way and to exactly the same extent if the defendants had had what, by implication, they represented they did have on 6 October 1989—namely a clear search certificate showing good title to the property.

The position is different in the case of *Steggles Palmer*. I have held that the defendants were in breach of duty in failing to notify the society that the transaction was by way of sub-sale; in failing to notify the society that they could not confirm that the borrower was to pay the balance of the purchase moneys from his own resources; and in breach of duty in failing to tell the society that they were also acting for the vendor. I have also held that if the society had known of those matters it would not have made the advance. But that is not, in my view, because the society would have been unwilling to lend what it did lend on the security of that property. In deciding how much to lend on the security of the property the society was relying on its own valuation; and there is no evidence that that valuation was wrong, or that it would have been affected by knowledge of the sub-sale or the relationship between vendor and purchaser. The reason why the society would not have made the advance is, in my view, because the society would have been unwilling to lend to that borrower in order to fund a purchase from that vendor. If the society had known what it should have known, it would decided that Mr Whittaker was a borrower to whom it did not wish to lend. In those circumstances it seems to me fair, and in accordance with Lord Hoffmann's test, that the defendants should be responsible for the consequences of the society not being in the position to take the decision which it would have taken if the defendants had done what they should have done. That is to say, the defendants should be responsible for the loss suffered by the society as a result of lending to Mr Whittaker. That, subject to questions of mitigation and contributory negligence, is the whole loss arising from the advance.

I do not think it right to take the same view in the case of *Colin Bishop*. I am not persuaded that disclosure of the 'back to back' arrangement and the price differential would have led the Cheshunt society to the view that Mr Moran and Miss Ging were persons to whom it did not wish to lend. There was no evidence that they were connected with the intermediate vendor, Mr Slater. I think that the disclosure would have led the Cheshunt society to doubt the valuation that it had obtained for the property. The advance would not have been made because the society would been unwilling to lend the amount which it did lend without a further valuation. If that is the correct analysis, then—if, indeed, the property had been overvalued—the defendants should be responsible for the loss suffered by the society as a consequence of the Cheshunt society taking a security which was less valuable than it thought. The defendant's failure to disclose what he should have disclosed had the consequence that the Cheshunt society did not obtain the advice as to value which it was entitled to have. The position seems to me indistinguishable from the valuer cases considered in *SAAMCO* itself. If the property was not, in fact, overvalued, then there is no loss for which the defendant is responsible. The true value of the property at the date of the advance, 7 September 1989, is a matter which (if it cannot be agreed) will have to be determined on evidence adduced at a further hearing.

The defendant's liability in *Cooke & Borsay* is for breach of warranty of authority. Here the measure of damage is the difference between the position which the society would have been in if the authority had been as warranted and the position that it is in the absence of authority (see *Mothew* [1996] 4 All ER 698 at 706, [1997] 2 WLR 436 at 444). The loss in this case is the difference between the value of security over the whole property and the value of security over the husband's share only.

In summary, therefore: (1) *Fancy & Jackson*: I hold that the society can recover only nominal damages. (2) *Steggles Palmer*: I hold that the society can recover the whole amount of the loss arising from the advance, subject to questions of mitigation and contributory negligence. (3) *Colin Bishop*: I hold that the society can recover the amount suffered as a consequence of the Cheshunt society taking a security which was less valuable than it thought, again subject to questions of mitigation and contributory negligence. (4) *Cooke & Borsay*: I hold that the society can recover the difference between the value of security over the whole property and the value of security over the husband's share only, subject to questions of mitigation (but not contributory negligence, which will not arise on a claim for breach of warranty of authority). In the other four cases, for reasons already given, I have held that the society can recover nominal damages only.

I defer examination of the outstanding questions of mitigation and contributory negligence until the parties have had the opportunity of considering this judgment.

22 July 1997. Chadwick J examined questions of mitigation and contributory negligence in relation to *Steggles Palmer, Colin Bishop* and *Cooke & Borsay*. In considering the allegations of failure to mitigate, he said:

It is, I think, beyond argument that such part of the loss as is attributable to the society's failure to realise the mortgaged property at a proper price or within a reasonable time cannot be regarded as having been caused by the breach of the retainer or the breach of the warranty of authority. That part of the loss has been caused by the society's own conduct in failing to mitigate.

The pattern of realisation in cases of this nature requires a number of sequential steps which may be summarised as follows. First, there is the society's decision to initiate the process of realisation following the borrower's default. Second, there is the issue of a summons for possession. Third, there is the order for possession. Fourth, there is the taking of possession. Fifth, there is the contract for sale. Sixth, there is completion of that contract. Delay in taking any of those steps will prolong the period between the borrower's default and the recovery of moneys advanced. Prolongation of that period will increase that element of the society's claim which is said to represent 'lost interest' on the principal advanced. It may also have the effect, on a falling market, of reducing the amount for which the mortgaged property is sold; and so reducing the amount to be set against the claim for principal and lost interest. Accordingly, there are two questions to be considered: (i) whether there has been unreasonable delay by the society in taking any of the steps which had to be taken towards realisation in the particular case and (ii) whether that delay did, in fact, have the effect of reducing the amount for which the mortgaged property was sold.

[After examining the facts in each case his Lordship accepted that the society had failed to mitigate its loss and concluded:]

(a) That in computing the loss suffered by the society in *Steggles Palmer* there is to be excluded lost interest and outgoings in respect of the period of 42 months immediately preceding 20 December 1994; (b) that in computing the loss suffered by the society in *Colin Bishop* there is to be excluded lost interest and outgoings in respect of the period of 30 months immediately preceding 27 June 1994; and (c) that the loss suffered by the society in *Cooke & Borsay* is limited to the value of a one-half share in the property—to be assessed as at 1 March 1995—with interest on that sum from that date.

[After setting out the terms of s 1(1) of the Law Reform (Contributory Negligence) Act 1945, his Lordship continued:]

The defendants claim that the society's loss in *Steggles Palmer* and in *Colin Bishop* was the result, at least in part, of its own fault in lending to the borrowers the amount which it did lend in those cases. The claim has two distinct elements. First, that the society's loss flows, at least in part, from the decision to lend the amount which it did lend on the security of the mortgaged property. Secondly, that the society's loss flows from the decision to lend, on the basis of the facts which it did know, to the particular borrowers. It is convenient to consider these elements separately.

In *Steggles Palmer* the loan to value ratio was 98%; in *Colin Bishop* the ratio was 90%. It is, I think, almost self-evident that, if (as was the case in 1989) interest rates are at or above 10% per annum, a loan in excess of, say, 80% of the value of the basic security (the mortgaged property) carries the risk that, in the event of default by the borrower, the moneys outstanding in respect of principal and interest will not be recovered from the proceeds of sale of that property. The risk can be illustrated by the following example: (i) assume a loan of £80,000 on the security of property valued at £100,000, (ii) assume also that it will take the lender approximately two years from the first default under the mortgage to obtain possession and to sell the property, (iii) on that basis, if no repayment of capital has been made, the moneys outstanding at the end of that two-year period will be approximately £96,000—that is to say, the principal sum of £80,000 together with two years' interest at 10% per annum (£16,000), (iv) assume no appreciation in the market value of the property—alternatively, no ability to realise the property on a mortgagee's sale at a price higher than the original valuation—and assume realisation costs of, say, 4%, (v) on that basis the net proceeds of realisation will be £96,000—an amount equal to the moneys outstanding. There is an inherent risk of default by the borrower in circumstances which cannot be foreseen—say, loss of health or loss of employment. I am satisfied that it is considerations of this nature which has led to the practice (which, on the evidence before me, appears to have been adopted by building society lenders generally) of treating the basic security as adequate security only for a loan equal to 75% of its open market value as at the date of the loan. The Building Societies Act 1986 requires, in effect, that a loan in excess of that amount must be secured by additional security.

The additional security could be provided in a number of different forms. It could, for example, be provided by the borrower in the form of a charge over investments. If that were the case, the risk arising from a loan in excess of 80% of the basic security would be covered. It would be difficult to criticise the lending as imprudent on the ground of lack of security. But that is not the usual arrangement in relation to building society lending. The usual arrangement is to cover the excess by a mortgage indemnity guarantee (MIG) provided by an

insurance company. That was done in each of the two cases with which I am now concerned.

For the reasons explained in my judgment in *May May & Merrimans (a firm) (No 2)* [1997] 3 All ER 206 the question whether or not the society must bring into account, when computing its loss in an action against solicitors, any moneys which it receives under the MIG will depend on the basis upon which that loss is to be assessed.

The basis of assessment in *Steggles Palmer* is such that moneys received under the MIG in that case do not have to be brought into account. The effect is that loss suffered by the society—for the purpose of its claim against the solicitors—includes loss suffered by reason of the decision to lend in excess of 75% of the value of the basic security. It is, I think, common ground that (in the absence of MIG cover) that decision would have been imprudent; and, in so far as it is not common ground, I would reach that conclusion on the basis of the evidence which I have heard. The question, therefore, is whether a decision which would be held imprudent in the absence of MIG cover and which has, in fact, contributed to the loss which the society seeks to recover in its action against these defendants—because the defendants are denied any credit for moneys recovered under the MIG—should be treated as contributory negligence for the purpose of s 1(1) of the 1945 Act. In my view it should be so treated. If, for example, a party undertakes some hazardous activity and is injured partly as a result of his own negligence and partly as the result of the negligence of another it could be no answer to apportionment of liability under the Act in proceedings between them that the injured party had effected insurance against the very injury that occurred. The conduct—or, in the present case, the decision to lend—is negligent or imprudent whether or not the party has insured against consequential loss.

For these reasons I hold that the damages recoverable by the society against the defendants in *Steggles Palmer* should be reduced to such extent as is just and equitable having regard to the society's share in the responsibility for its loss. In my view it is just and equitable that, as between the society and the defendants, the society should bear such part of the loss as is attributable to the decision to lend in excess of 75% of the value of the mortgaged property. In the absence of agreement, I will direct an inquiry for the purpose of ascertaining what that amount should be.

The basis of assessment in *Colin Bishop* is such that the loss which the society can recover may not exceed the difference between the value on which the Cheshunt society based its decision to make the advance (£110,000) and the true value of the mortgaged property at the time of the advance. That is the difference between the position as the Cheshunt society thought it to be and the true position, which the society would have had the opportunity to ascertain if the defendants had provided the information which they ought to have provided. But, within that limit, the loss which the society is entitled to recover may include loss which is attributable to the decision to lend in excess of 75% of the value of the mortgaged property. To the extent that it does, the loss must be reduced in the manner and for the reasons already set out.

I turn, then, to the second of the two elements upon which the defendants' claims to a reduction of damages under the 1945 Act are based—namely that the society (or the Cheshunt society, as the case may be) was at fault in deciding to lend to these particular borrowers on the basis of the facts as it thought them to be.

The decision to lend to Mr Whittaker, the borrower in *Steggles Palmer*, was made on the basis of satisfactory employer's references and an interview by the branch manager. The defendants' criticism is that the society failed to confirm that Mr Whittaker did, in fact, live (as he claimed) in a flat in Great Ormond Street. I am not satisfied that the society was at fault in failing to make such inquiry in the circumstances of this case. I think that it was entitled to make its decision to lend on the facts which were known to it, without further inquiry. Accordingly, I make no further reduction on this ground.

In *Colin Bishop* criticism is made of the Cheshunt society's decision to lend in circumstances (i) that Miss Ging had ceased employment and become a student and (ii) that the borrower's cheque for £110 in respect of a revaluation fee had been returned by the bank unpaid. It is said that the Cheshunt society ought to have appreciated that these borrowers were persons who were more than usually likely to default. There is, I think, some force in that criticism. But I do not think that it leads to the conclusion that damages ought to be reduced under the 1945 Act.

The power under s 1(1) of the 1945 Act is to reduce 'the damages recoverable in respect thereof' by reference to the claimant's share in the responsibility for the damage which he has suffered as the result partly of his own fault and partly as the result of the fault of the defendant. In *Colin Bishop* I have held that the society can recover only that loss which can properly be said to have been caused by the defendant's failure to inform the Cheshunt society of the 'back to back' transaction. I have also held that that loss is the loss attributable to the society having been deprived of the opportunity to seek another valuation of the mortgaged property; and not the loss attributable to the decision to lend to these borrowers. It must follow, in my view, that, in so far as the Cheshunt society was at fault in deciding to lend to Mr Moran and Miss Ging, its fault did not contribute to the only damage which can be recovered from the defendants. The application of the *SAAMCO* test precludes, in this case, further reduction on the grounds of contributory negligence.

[His Lordship concluded:]

(a) That the damages recoverable from the defendants in *Steggles Palmer* should be reduced under s 1(1) of the 1945 Act to the extent that the society's loss is attributable to its decision to lend more that 75% of the value of the mortgaged property; and (b) that there should be a similar reduction in *Colin Bishop*.

Orders accordingly.

Celia Fox Barrister.

National Trust for Places of Historic Interest or Natural Beauty v Knipe and another

COURT OF APPEAL, CIVIL DIVISION
BUTLER-SLOSS, PILL AND JUDGE LJJ
10, 11 APRIL, 15 MAY 1997

Agricultural holding – Notice to quit – Validity – Plaintiffs letting holding consisting of land and farmhouses to defendants – Plaintiffs serving notice to quit complying with Agricultural Holdings Act 1986 – Whether notice having also to comply with regulations under Protection from Eviction Act 1977 – Whether holding constituting 'premises let as a dwelling' – Protection from Eviction Act 1977, s 5.

In 1985 the plaintiffs let a landholding in Cumbria (the holding) to the defendants on an annual tenancy. The holding included two farmhouses and buildings and over 350 acres of pasture land. The tenancy was protected by the provisions of the Agricultural Holdings Act 1986. On 21 November 1994 the plaintiffs served on the defendants under the 1986 Act a notice to pay rent in respect of arrears then due. On the defendants failing to comply, the plaintiffs served a notice to quit purporting to terminate the tenancy on 12 May 1996. The defendants did not exercise their right under the 1986 Act to challenge the notice to quit by arbitration and the plaintiffs issued proceedings to recover possession. The recorder dismissed the plaintiff's claim for possession on the ground that the notice to quit was invalid for failure to include the information prescribed by the Notices to Quit etc (Prescribed Information) Regulations 1988[a], which applied to notices to quit 'premises let as a dwelling' by virtue of s 5[b] of the Protection from Eviction Act 1977. The plaintiffs appealed.

Held – On its true construction, s 5 of the 1977 Act did not apply to a letting of an agricultural holding on which there was a dwelling house, since although the 'premises' referred to the subject matter of the letting, and so included the entire acreage, those premises were not 'let as a dwelling' but as an agricultural holding. It followed, in the instant case, that the 1988 regulations did not apply and that therefore the notice to quit was valid to terminate the tenancy. Accordingly, the appeal would be allowed (see p 633 *j*, p 634 *d f*, p 639 *h j* and p 640 *c d*, post).

Notes

For notice to quit an agricultural holding, see 1(2) *Halsbury's Laws* (4th edn reissue) paras 340–364.

For the Protection from Eviction Act 1977, s 5, see 23 *Halsbury's Statutes* (4th edn) (1989 reissue) 314.

For the Notices to Quit etc (Prescribed Information) Regulations 1988, see 10 *Halsbury's Statutory Instruments* (1994 reissue) 350.

Cases referred to in judgments

Bracey v Read [1962] 3 All ER 472, [1963] Ch 88, [1962] 3 WLR 1194.
Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc [1994] 1 EGLR 93, CA.

a The 1988 regulations, so far as material, are set out at p 629 *j* to p 630 *c*, post
b Section 5, so far as material, is set out at p 629 *g* to *j*, post

Horford Investments Ltd v Lambert [1974] 1 All ER 131, [1976] Ch 39, [1973] 3 WLR 872, CA.
Maunsell v Olins [1975] 1 All ER 16, [1975] AC 373, [1974] 3 WLR 835, HL.
Russell v Booker [1982] 2 EGLR 86, CA.
Whitley v Stumbles [1930] AC 544, HL.

Cases also cited or referred to in skeleton arguments
Baker v Turner [1950] 1 All ER 834, [1950] AC 401, HL.
Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402, [1933] All ER Rep 52, HL.
Billson v Residential Apartments Ltd [1992] 1 All ER 141, [1992] 1 AC 494, HL.
British Land Co Ltd v Herbert Silver (Menswear) Ltd [1958] 1 All ER 833, [1958] 1 QB 530, CA.
Burnes v Radcliffe [1923] 2 IR 158, NI CA.
Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page [1979] 1 All ER 5, [1978] 1 WLR 1329, CA.
Cow v Casey [1949] 1 All ER 197, [1949] 1 KB 474, CA.
Epsom Grandstand Association Ltd v Clarke (1919) 35 TLR 525, CA.
Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59, HL.
Feyereisel v Parry [1952] 1 All ER 728, sub nom *Feyereisel v Turndige* [1952] 2 QB 29, CA.
Godfrey v Waite (1951, unreported) discussed in *Blackmore v Butler* [1954] 2 All ER 403, CA.
Hicks v Snook (1928) 93 JP 55, CA.
Howkins v Jardine [1951] 1 All ER 320, [1951] 1 KB 614, CA.
Kay Green v Twinsectra Ltd [1996] 4 All ER 546, [1996] 1 WLR 1587, CA.
Levermore v Jobey [1956] 2 All ER 362, [1956] 1 WLR 697, CA.
London Corp v Cusack-Smith [1955] 1 All ER 302, [1955] AC 337, HL.
Norton v Knowles [1967] 3 All ER 1061, [1969] 1 QB 572, DC.
Pulleng v Curran (1980) 44 P & CR 58, CA.
R v York, Harrogate, Ripon and Northallerton Areas Rent Tribunal, ex p Ingle [1954] 1 All ER 440, [1954] 1 QB 456, DC.
Thurrock UDC v Shina (1972) 23 P & CR 205, DC.
Vickery v Martin [1944] 2 All ER 167, [1944] KB 679, CA.
Wagle v Trustees of Henry Smith's Charity Kensington Estate [1990] 1 QB 42, CA.
Webb v Barnet London BC [1989] 1 EGLR 49, CA.
Whitty v Scott-Russell [1950] 1 All ER 884, [1950] 2 KB 32, CA.
Wolfe v Hogan [1949] 1 All ER 570, [1949] 2 KB 194, CA.

Appeal
The plaintiffs, the National Trust for Places of Historic Interest or Natural Beauty, appealed with leave from the decision of Mr Recorder Briggs sitting at the Lancaster County Court on 24 February 1997 whereby he dismissed the plaintiffs' claim against the defendants, Ronald Richard Knipe and Richard George Knipe, for possession of a landholding known as Cinderbarrow Holeslack at Flashback in the parishes of Levens and Helsington, Cumbria. The facts are set out in the judgment of Pill LJ.

Derek Wood QC (instructed by *Burges Salmon*, Bristol) and *William Batstone* of that firm for the plaintiffs.
Paul Morgan QC and *Stephen Jourdan* (instructed by *Cartmell Shepherd*, Carlisle) for the defendants.

Cur adv vult

15 May 1997. The following judgments were delivered.

PILL LJ (giving the first judgment at the invitation of Butler-Sloss LJ). This case turns upon the meaning of the expression 'premises let as a dwelling' within the meaning of s 5 of the Protection from Eviction Act 1977. The National Trust for Places of Historic Interest or Natural Beauty, the plaintiffs, appeal from a decision of Mr Recorder Briggs sitting at the Lancaster County Court on 24 February 1997 whereby he dismissed the plaintiffs' claim for possession against Ronald Richard Knipe and Richard George Knipe (the defendants) of a landholding known as Cinderbarrow Holeslack at Flashback in the parishes of Levens and Helsington, Cumbria (the holding).

The holding was let by the plaintiffs to the defendants by a tenancy agreement dated 12 August 1985 on an annual tenancy. The holding included Holeslack farmhouse and buildings, Cinderbarrow farmhouse and buildings and over 350 acres of pasture land. In 1989 a further dwelling house, Holeslack cottage, was added to the letting. The defendants are father and son and members of their family have farmed part of the holding for very many years. Father lives in one of the farmhouses and son in the other.

The agreement is in the plaintiffs' common form and the word 'tenant' appears in the singular. The tenant agreed 'to farm and manage the holding in accordance with the rules of good husbandry', not to use 'the holding or any part thereof for any purpose other than agriculture' and 'personally to reside in the farmhouse and make the same his usual place of residence'. It is common ground that the tenancy was protected by the provisions of the Agricultural Holdings Act 1986.

On 21 November 1994 the plaintiffs served on the defendants under the 1986 Act a notice to pay rent in respect of arrears then due. In default of compliance, the plaintiffs served a notice to quit purporting to terminate the tenancy on 12 May 1996. The defendants did not exercise their right under the 1986 Act to challenge the notice to quit by arbitration and the plaintiffs took proceedings for possession. It is common ground that if the holding came within the definition 'premises let as a dwelling' in s 5 of the 1977 Act the notice to quit was invalid for failure to comply with the Notices to Quit etc (Prescribed Information) Regulations 1988, SI 1988/2201.

Section 5 of the 1977 Act provides, so far as is material:

> '(1) ... no notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless—(a) it is in writing and contains such information as may be prescribed, and (b) it is given not less than 4 weeks before the date on which it is to take effect.
>
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State by statutory instrument, and the statutory instrument containing any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (3) Regulations under this section may make different provision in relation to different descriptions of lettings and different circumstances.'

Regulation 2 of the 1988 regulations provides:

> 'Where ... a landlord gives a notice to quit any premises let as a dwelling, or a licensor gives a notice to determine a periodic licence to occupy premises as a dwelling ... the information prescribed for the purposes of

section 5 of the Protection from Eviction Act 1977 shall be that in the Schedule to these Regulations.' a

The Schedule provides:

'1. If the tenant or licensee does not leave the dwelling, the landlord or licensor must get an order for possession from the court before the tenant or licensee can lawfully be evicted. The landlord or licensor cannot apply for b such an order before the notice to quit or notice to determine has run out.

2. A tenant or licensee who does not know if he has any right to remain in possession after a notice to quit or a notice to determine runs out can obtain advice from a solicitor. Help with all or part of the cost of legal advice and assistance may be available under the Legal Aid Scheme. He should also be able to obtain information from a Citizens' Advice Bureau, a Housing Aid c Centre or a rent officer.'

The notice to quit in this case did not include that prescribed information. It is common ground that if the holding constituted 'premises let as a dwelling' within the meaning of s 5 of the 1977 Act, the defect was fatal to the notice to quit and the plaintiffs were not entitled to possession. It can be said at this stage that the d prescribed information is quite inappropriate to an agricultural tenancy in that if information or advice is required, it is of the tenant's right to serve a counter-notice to the landlord in writing not later than one month from the giving of the notice to quit (s 26 of the 1986 Act).

The defendants' case can be put succinctly. 'Premises' means the subject e matter of the letting and 'let as a dwelling' means let wholly or partly as a dwelling. The premises need not be let predominantly as a dwelling. If premises which are primarily agricultural are let, and there is a dwelling house on the premises, the premises are ~~let~~ as a dwelling within the meaning of s 5. The plaintiffs contend that, in this context, the word 'premises' is confined to premises f which would be held to be a dwelling house and an agricultural holding does not rank as premises for the purposes of the section. Even if the word 'premises' can include an agricultural holding on which there is a dwelling, the premises are let not as a dwelling house but as an agricultural holding and, as such, fall outside s 5. The expression 'premises let as a dwelling' cannot be strained to include a tenancy of an agricultural holding on which there is a dwelling. g

Sections 1 to 3 of the 1977 Act provide, in so far as is material:

'1.—(1) In this section "residential occupier", in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to h remain in occupation or restricting the right of any other person to recover possession of the premises.

(2) If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so, he shall be guilty of an offence unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased j to reside in the premises.

(3) If any person with intent to cause the residential occupier of any premises—(a) to give up the occupation of the premises or any part thereof; or (b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof; does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or

persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence ...

2. Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.

3.—(1) Where any premises have been let as a dwelling under a tenancy which is [not] a statutorily protected tenancy and—(a) the tenancy (in this section referred to as the former tenancy) has come to an end, but (b) the occupier continues to reside in the premises or part of them, it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.'

Section 8(1) provides:

'In this Act "statutorily protected tenancy" means—(a) a protected tenancy within the meaning of the Rent Act 1977 or a tenancy to which Part I of the Landlord and Tenant Act 1954 applies; (b) a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976; (c) a tenancy to which Part II of the Landlord and Tenant Act 1954 applies; (d) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act [1948] ...'

Submissions have been made upon the 1977 Act in the context of statutes which preceded it. The court has also been referred to cases in which the word premises, as used in statutes dealing with tenancies, has been interpreted in the strict legal sense of 'the subject-matter of the habendum' (see *Whitley v Stumbles* [1930] AC 544 at 547 per Viscount Hailsham and *Bracey v Read* [1962] 3 All ER 472, [1963] Ch 88). In *Maunsell v Olins* [1975] 1 All ER 16, [1975] AC 373, however, the House of Lords held, by a majority, that in the context of s 18(5) of the Rent Act 1968 'premises' had the narrower meaning of premises which, as a matter of fact, would be held to be a dwelling house for the purposes of the Act. A farm was not 'premises' within the meaning of that particular section so that the cottage which 'formed part' of the farm was not protected by the Act.

Tenancies of different kinds have for many years been protected by statute; tenancies of dwelling houses by the Rent Acts, of agricultural holdings by Agricultural Holdings Acts and of business tenancies by, for example, Pt II of the Landlord and Tenant Act 1954. Superimposed upon them, or interleaved with them, have been provisions to protect residential occupiers from unlawful eviction and harassment. Such provisions are contained the Protection from Eviction Act 1964, Pt III of the Rent Act 1965 and the Protection from Eviction Act 1977. There is no doubt that the defendants have the protection afforded to agricultural tenancies. They submit that the dwelling house or houses which are a part of their holding also have the protection of s 5 of the Protection from Eviction Act 1977. That statute, including s 5, was intended to apply to all dwelling houses, those which have the protection of other procedures and those which do not, unless there is an express exclusion. Section 1 sets the scene for that.

The plaintiffs do not dispute that s 1 of the Act protects the defendants as 'residential occupiers', from unlawful eviction and harassment. They submit that the inclusion in the same Act of s 5, dealing with notices to quit, and formerly in s 16 of the Rent Act 1957, was not intended and does not have the effect of giving

the protection of the section to agricultural holdings which include a dwelling house. a

The defendants rely on the fact that s 3 of the Act, the side heading of which reads 'Prohibition of eviction without due process of law' expressly excludes from its operation tenancies which are 'statutorily protected'. These are defined in s 8 so as to include tenancies to which Pt II of the Landlord and Tenant Act 1954 applies and tenancies of agricultural holdings within the meaning of the b Agricultural Holdings Act 1948 (the predecessor of the 1986 Act). A point strongly made by Mr Paul Morgan QC for the defendants is that no such exclusion appears in s 5. In the absence of an exclusion which Parliament saw fit specifically to make in s 3, it must be assumed that s 5 was intended to apply to agricultural holdings. The expression 'let as a dwelling' must have the same meaning in ss 2, 3 and 5 and the specific exclusion of premises partly agricultural c and partly residential in s 3 means that but for the exclusion they would have been included in s 3 and are included in s 5.

The defendants also rely upon the provisions of s 5(3), which provide that regulations under s 5 may make different provisions in relation to different descriptions of lettings. While in the event Parliament has made only one set of d regulations, and these are inappropriate in the context of agricultural holdings, the conferring of the power demonstrates that, when enacting s 5 Parliament had in mind making regulations covering the letting of dwelling houses in different contexts and not only where the Rent Act applies.

The court has been referred to many authorities upon whether, under the Rent Acts, premises with a mixed residential and agricultural use or a mixed residential e and business use or premises where the use has changed since the lease was granted, have the protection of the Acts. They are of only limited assistance in construing s 5. Mr Wood QC relies on *Russell v Booker* [1982] 2 EGLR 86. The leased premises consisted of a dwelling house and agricultural land which had constituted an agricultural holding. The tenant alleged that the original f agreement had been superseded by a subsequent contract which had the effect of moving the tenancy out of the protection of the Agricultural Holdings Act into the protection of the Rent Act. Slade LJ set out a series of propositions for dealing with such a situation and it is clear both that a subsequent contract may establish a different use and that a unilateral abandonment of agricultural use does not necessarily bring a tenancy within the Rent Act. It was held that there was no g new contract and it was the terms of the original agreement which were the essential factor in deciding whether the tenancy was one under which the dwelling house was 'let as a separate dwelling' within the meaning of s 1 of the Rent Act 1977. (It is common ground that the presence of the word 'separate' in the expression used in the Rent Acts can, for present purposes, be ignored.) The h letting was for agricultural purposes and was held to be quite inconsistent with 'the letting of the house as a separate dwelling-house' for the purposes of s 1 of the Rent Act 1977. The case is authority for the proposition that protection under both s 1 and the Agricultural Holdings Act is not possible and assists the plaintiffs as a clear statement by this court of the distinction between the two but I do not j find it determinative of the meaning of the expression 'premises let as a dwelling' in s 5 of the Protection from Eviction Act 1977.

Mr Morgan relies on *Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc* [1994] 1 EGLR 93. It was held in this court that 'premises' in s 46(1) of the Landlord and Tenant Act 1987 means the subject matter of the letting and the section applied to an agricultural holding which included a dwelling house.

Section 48 of the Act was governed by s 46(1), which applied it 'to premises which consist of or include a dwelling'. That expression is however so different from the one now under consideration that I do not find the decision of assistance.

The interrelation of the 1977 statutes is not easy to understand. Both the Rent Act 1977 and the Protection from Eviction Act 1977, which received the Royal Assent on the same day, 29 July 1977, are described as consolidating Acts and Mr Wood has not been able to suggest an explanation as to why the provisions were not included within a single Act as similar provisions had been in the Rent Act 1965. The Protection from Eviction Act consolidates Pt III of the 1965 Act, which dealt with other subjects as well as protection from eviction. It includes s 5 (Validity of notices to quit) in a single-section Pt II, which takes a single section, s 16, from the Rent Act 1957.

Mr Morgan submits that, the parliamentary intention in 1977 being to separate provision for 'protection from eviction' from other 'Rent Act' provision, the Act must be read with that purpose in mind and as protecting tenants of dwelling houses as such. Not only s 1 but the rest of the Act is intended to apply to all dwelling houses, including those which are part of agricultural holdings save where there is, as in s 3, an express exclusion. In any event, the express exclusion of agricultural tenancies in s 3 makes plain an intention to include them in s 5.

Mr Wood was inclined to acknowledge the 'inexorable logic' of the defendants' approach. Mr Wood acknowledges the difficulty presented by the exclusion of agricultural tenancies from the operation of s 3 of the Act if, as he submits, the meaning of 'premises let as a dwelling' is clear without the exclusion having to be made. The mystery, as he called it, may be deepened by the exclusion also of business tenancies under the 1954 Act which, upon the defendants' case, would also be covered by s 5 if they included a dwelling house. That exclusion is of little practical significance because in the case of most business tenancies, the procedure for terminating the tenancy does not require a notice to quit.

Mr Morgan's submission is that the application of s 5 to dwelling houses which are on agricultural holdings does not conflict with the regime under the Agricultural Holdings Act. The 1977 Act is intended to protect occupiers of all dwelling houses and the requirement upon landlords to comply with the provisions of both Acts presents no practical problem.

It is also submitted that s 4 of the Act making special provisions for agricultural employees gives the Act an 'agricultural flavour' which makes easier a conclusion that s 5 covers an agricultural situation. It is also submitted that s 7, service of notices, with its reference in s 7(3)(b) to 'any dwelling-house' demonstrates an intention to cover all dwelling houses in the Act. Each of the sections, in my view, is intended to deal with a particular mischief and they do not assist upon the construction of the relevant words in s 5.

While I see force in Mr Morgan's submission as to the purpose of the 1977 Act, I have come to the conclusion that premises let as an agricultural holding, even if there is a dwelling upon the holding, do not constitute premises let as a dwelling for the purposes of s 5 of the Act. I accept the submission that the 'premises' are the subject matter of the letting, that is the entire acreage, but they are let as an agricultural holding and not as a dwelling. The subject matter of the letting includes a dwelling but I cannot read the section as if it used the expression 'premises which include a dwelling' or 'any dwelling house let as a part of premises'. The difficulty, which I share, in understanding why Parliament saw the need to make specific reference to agricultural holdings in s 3 of the Act

dealing with prohibition of eviction without due process of law, does not lead me to the conclusion that agricultural holdings are included in s 5.

In support of that conclusion, I note the enactment of the Agricultural Holdings (Notices to Quit) Act 1977 a few months before the Rent Act and the Protection from Eviction Act of that year. It was an Act to consolidate certain sections of the Agricultural Holdings Act 1948 'and certain other enactments relating to notices to quit agricultural holdings in England and Wales and related notices'. Section 2 of the Act sets out restrictions on the operation of notices to quit agricultural holdings. Had it been the intention of Parliament to include restrictions such as those now contended for in relation to notices to quit agricultural holdings, I would have expected them to appear in that statute and not merely subsumed in a general provision in the Protection from Eviction Act. However, I acknowledge that similar arguments are available upon a consideration of the pre-1977 statutes which might lead to a contrary conclusion, and I base my view essentially upon the impossibility, in my view, of reading s 5 as the defendants require.

It follows that in my judgment the notice to quit was valid and is not rendered invalid by the absence of a notice containing the 'prescribed information' in the 1988 regulations set out earlier in this judgment. The information is inappropriate in the case of an agricultural tenancy as already noted. I do not however regard the contents of regulations made under and after the Act as a proper tool for construing the Act, especially when the Act did provide for 'different provision in relation to different descriptions of lettings' (s 5(3)).

Because of the conclusion I have reached upon the construction of s 5, I do not propose to consider the plaintiffs' further submission, relying on *Horford Investments Ltd v Lambert* [1974] 1 All ER 131, [1976] Ch 39 save to express my doubts that it covers the present situation. They submit that the section could not in any event apply when there is more than one dwelling on the agricultural holding.

I would allow this appeal and hold that the notice to quit was valid to terminate the tenancy.

JUDGE LJ. When they terminated their tenancy agreement with Ronald Knipe and Richard Knipe on 12 May 1996 the National Trust for Places of Historic Interest or Natural Beauty (the landlords) complied meticulously with the provisions of the Agricultural Holdings Act 1986 which provides the statutory foundation of the system designed to protect agricultural tenants from unreasonable, oppressive or precipitate notices to quit. The question in this appeal is whether the notice to quit served by the landlords on 26 January 1995 in accordance with the detailed statutory requirements of the 1986 Act was nevertheless invalid because it failed in addition to comply with s 5 of the Protection from Eviction Act 1977 and the Notices to Quit etc (Prescribed Information) Regulations 1988, SI 1988/2201.

The 1977 Act consolidated a collection of statutory provisions from earlier legislation. In its present form it is divided into three Parts. Part I effectively repeats provisions found in Pt III of the Rent Act 1965. Subsequent insertions and substitutions were made by the Housing Acts 1980 and 1988. The focus of this Part of the 1977 Act is to provide protection against eviction and harassment of tenants and to restrict the enforcement by landlords of their contractual rights without 'due process of law'. Part II is concerned with notices to quit and derives from s 16 of the Rent Act 1957 and the Housing Act 1974. Subsequent insertions

were made by the Housing Act 1988. Part III contains supplemental provisions which include a definition section originally derived from the Rent Act 1965 and as currently in force includes amendments made by the Agricultural Holdings Act 1986, the Agricultural Tenancies Act 1995, the Housing Act 1988 and the Local Government and Housing Act 1989.

Although this complicated legislative history is not without some relevance and because there are circumstances in which legislation enacted in this way may not represent a coherent whole (see the observations of C S Greaves QC, the parliamentary draftsman of the Offences against the Person Act 1861, quoted by Professor Sir John Smith QC in [1996] Crim LR 333) I should record that I agree with the submission by Mr Paul Morgan QC that unnecessary confusion would be caused unless each term in the 1977 Act is given the same meaning wherever it appears, and that different terms should not be construed as if they have the same meaning.

For present purposes the first crucial distinction in the 1977 Act is between 'residential occupiers', that is, in relation to 'any' premises, persons 'occupying premises as a residence' including such occupation under the terms of a contract (s 1) and premises 'let as a dwelling' whether on a lease (s 2) or under the terms of a tenancy (s 3). It is an offence either to evict unlawfully or to harass any residential occupier. Liability to prosecution extends to 'landlords', identified for this purpose as persons who would otherwise be entitled to possession of the premises. Where premises are 'let as a dwelling' restrictions are imposed on the exercise of any rights of forfeiture or re-entry contained in a lease (s 2) and rights to recover possession of premises let under a tenancy (s 3). These rights may only be enforced by proceedings in court, unless in the case of a tenancy within s 3 (but not a lease within s 2) it is an excluded tenancy under s 3A which was not entered into or agreed before 15 January 1989, the date when the Housing Act 1988 came into force, or a 'statutorily protected tenancy', which is defined for the purposes of the Act in s 8. Even when the premises have been 'let as a dwelling' the statutorily protected tenant is excluded from protection against eviction without due process provided by s 3. This provision formed part of the 1977 Act when it came into force and indeed was derived from earlier legislation. It therefore follows that express provision is made to exclude from the effect of s 3 of the 1977 Act a series of tenancies within the ambit of a number of different statutes, including a protected tenancy within the Rent Act 1977, a long residence tenancy under Pt I of the Landlord and Tenant Act 1954 together with a business tenancy under Pt II of the same Act, a protected 'occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976', and finally, and most significant for present purposes, 'a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986' (which is a tenancy in relation to which that Act applies).

Part II of the 1977 Act, which is confined to a single section, s 5, creates circumstances in which a notice to quit shall be 'invalid'. Like ss 2 and 3, but not s 1, it applies to premises 'let as a dwelling'. It therefore has no application to premises occupied as a 'residence' in the general sense identified in s 1 unless the premises so identified have been 'let as a dwelling'. By further statutory insertion (to coincide with the concept of an excluded tenancy inserted by the Housing Act) it is expressly stated not to apply to an excluded tenancy entered into on or after the Housing Act 1988 came into effect. Provision was made for regulations to create 'different provision in relation to different descriptions of lettings and different circumstances', but no relevant regulations have yet been made. Unlike

'excluded tenancies' which did not form part of the 1977 Act as originally enacted and which are expressly referred to in s 5, s 5 itself is entirely silent about whether it does or does not apply to the statutorily protected tenancies identified in s 8, which include the tenancy of an agricultural holding. The question therefore is whether the exclusion of the tenancy of an agricultural holding from the ambit of s 3 should lead to the conclusion that the requirements of s 5 apply to notices to quit an agricultural holding, or indeed any dwelling which forms part of an agricultural tenancy. Mr Morgan's prime submission is that the express exclusion from s 3 of such a tenancy, coupled with the omission of any appropriate similar reference in s 5, makes this conclusion inevitable.

Three considerations suggest that the apparent logic of Mr Morgan's argument should be approached with caution. If he is right, s 5 imposes a positive obligation on a landlord of an agricultural tenancy in relation to notices to quit without using language appropriate for this purpose. Moreover, the foundation for the argument is not the imposition but the express exclusion of any obligation on the landlord to take court proceedings before enforcing his right to recover possession of premises which have been 'let as a dwelling' under an agricultural tenancy: in other words Mr Morgan relies on the deliberate exclusion of one form of obligation on a landlord of such a tenancy as establishing the existence of another. Finally as the history of the legislation demonstrates, although identical or virtually identical provisions relating to notices to quit premises let as a dwelling were in force prior to the enactment of the 1977 Act the argument based on the simultaneous inclusion of ss 3 and 8 in the same statute as s 5 would not then have been available.

On 30 March 1977, just four months prior to the enactment of the 1977 Act, the Agricultural Holdings (Notices to Quit) Act 1977 received Royal Assent. With immaterial amendments this legislation was re-enacted in ss 25 to 30 of the Agricultural Holdings Act 1986. Apart from a short period immediately after enactment these statutory provisions were in force simultaneously with the 1977 Act and expressly identified the precise circumstances in which a notice to quit an agricultural tenancy should be invalid, as well as the further circumstances in which the operation of such notices should be restricted. These provisions were specific to agricultural tenancies, and when first enacted, as the title of the Agricultural Holdings (Notices to Quit) Act 1977 suggests, they set out and were intended to provide a comprehensive scheme relating to notices to quit such tenancies. If Mr Morgan's submission based on the construction of the 1977 Act were correct it would mean that Parliament, having purported to set out a comprehensive system relating to notices to quit agricultural holdings, failed to do so. If he is right the omission is surprising, yet the failure to make any express provision persisted not only when the provisions in the 1977 Act were consolidated a few months later, but also when the 1986 Act omitted straightforward amendments which would have ensured that the purported comprehensive system was indeed comprehensive, and finally, when the 1977 Act itself was amended (by the Housing Act 1988), the situation of those employed in agriculture was expressly covered while the simple language making plain that s 5 of the 1977 Act applied to agricultural tenancies continued to be omitted. In my judgment these omissions cannot be regarded as accidental.

This view is fortified by consideration of the Rent Act 1977 which came into force simultaneously with the 1977 Act. Without attempting any comprehensive analysis of its provisions this Act was concerned with 'dwelling houses' let as 'separate' dwellings and expressly excluded from the ambit of 'protected

tenancies' tenancies of dwelling houses let with agricultural land exceeding two acres in extent (ss 6 and 26) and dwelling houses 'comprised in an agricultural holding ... and ... occupied by the person responsible for the control of the farming of the holding' (s 10). Where tenants were 'protected' under this Act by express reference they fell within the statutorily protected tenancies covered by s 8 of the 1977 Act. Therefore s 3 did not extend to them. However after termination of a protected tenancy if the tenant continued to use the dwelling house as his residence he became a 'statutory tenant'. In this context express reference was made to s 5 of the 1977 Act which by s 3(3) of the Rent Act 1977 is made to apply to such a statutory tenancy. The cross-references between these Acts and in particular to the 'notice' provisions reinforce my conclusion that the omission of any such reference in the Agricultural Holdings (Notices to Quit) Act 1977 was not accidental.

The regulations subsequently made under s 5 of the 1977 Act cannot be decisive of its true meaning and effect, but it is not unhelpful to consider the practicalities involved in s 5 of the 1977 Act and the prescribed notice. Under s 5 itself the notice to quit must give the tenant not less than four weeks' notice of the date on which it is to take effect. The information required by the regulations is that the tenant should be provided with a statement of the legal position that the court must make an order for possession before the landlord may lawfully evict the tenant. The tenant must also be advised about the value of obtaining legal advice. The first of these requirements plainly echoes the provisions in s 3 of the 1977 Act from which, as already observed, a tenancy of an agricultural holding is excluded. Even if this consideration is irrelevant there remains the second aspect of the notice, legal advice. This second requirement is unhelpful, certainly when the notice is served on the basis of non-payment of rent within Sch 3, Pt I, Case D. In such cases, the crucial response to a notice under the Agricultural Holdings Act 1986 is a counter-notice, which must be served within a limited period. In such cases, however, the prescribed form itself advises urgent contact with a solicitor *before* the landlord ever becomes entitled to serve a notice to quit. Finally, any notice to quit an agricultural holding must give 12 months' rather than four weeks' notice. It is accordingly difficult to understand how the protection envisaged by s 5 adds anything of practical advantage to the tenant of an agricultural holding who has been served with appropriate statutory notices by a landlord who is in a position to serve valid notices under the 1986 Act and who has done so in accordance with the statutory scheme.

Numerous authorities were cited in argument. Perhaps the most significant result of the analysis by counsel on both sides of the authorities in which the phrase 'premises let as a dwelling' or similar phrases found in various different statutes relating to tenancies, was to demonstrate the critical importance in each case of focusing on the specific statutory provision as well as the tenancy under immediate consideration. It is in my judgment sufficient for present purposes to refer to only three of them. In *Maunsell v Olins* [1975] 1 All ER 16 at 18 , [1975] AC 373 at 383 when considering s 18(5) of the Rent Act 1968 in the context of agriculture Viscount Dilhorne said:

> 'The Agricultural Holdings Act 1948 contains a separate code for dealing with agricultural holdings ... it would, indeed, be surprising to me if Parliament, in an Act dealing with housing and rents, had intended s 41 to apply to agricultural holdings, that no reference should be made to such a holding.'

Lord Wilberforce, with whom both Lord Reid and Viscount Dilhorne agreed, having commented that: 'Most language, and particularly all language used in rents legislation, is opaque ...', added:

> 'Nobody can be unaware that the law relating to tenancies of agricultural land is one of considerable political import and delicacy and I am very reluctant to believe that the particular aspect of this law which relates to subtenancies, treated with evident circumspection in 1948, would have been dealt with in a general provision such as appears in s 41 of the 1954 Act.' (See [1975] 1 All ER 16 at 21, 24, [1975] AC 373 at 386, 389.)

While acknowledging the force of the proposition to be found in the then current edition of Megarry *The Rent Acts*, that agricultural holdings were a self-contained code, Lord Wilberforce was not prepared to approach the construction of the word 'premises' in s 18(5) of the Rent Act 1968 as if it were, observing ([1975] 1 All ER 16 at 24, [1975] AC 373 at 389): '... I think that a particular exception limited in this way would have received specific legislative mention and this is not to be found.'

In *Russell v Booker* [1982] 2 EGLR 86 the Court of Appeal considered the problem of a tenancy originally let as an agricultural holding which was followed by abandonment of such agricultural use. The holding included a dwelling house on the land known as Gladstone House and the tenant agreed to reside in it. Although defined in the agreement as 'the premises' the use of this term was non-technical. In due course the tenant's daughter who had resided with him continuously until his death in 1980 claimed that the tenancy was a protected tenancy (and by an amendment of the pleadings, a statutory tenancy) within the Rent Act 1977. The first contention advanced by the landlord was that as the original tenancy was an agricultural holding it cannot have been or become a protected tenancy. After the relevant authorities were analysed it was concluded (at 90) that:

> 'Where the terms of a tenancy agreement provide for or contemplate the use of the premises for some particular purpose, then ... that purpose is the essential factor in deciding the question whether or not the house can be said to have been let "as a separate dwelling-house" so as to fall within the Rent Acts ... The terms of the original ... agreement accordingly remain the essential factor in deciding whether the tenancy was one under which the dwelling-house was "let as a separate dwelling" within the meaning of section 1 of the 1977 Act. They show that the tenancy was not of this nature. A letting of agricultural land exceeding two acres in extent, albeit together with a dwelling-house, which is intended by both parties to be a letting for agricultural purposes and to confer on the tenant the protection of the Agricultural Holdings Acts, is in our opinion quite inconsistent with the letting of the house as a separate dwelling-house.'

When legislation concerned with the same subject matter is enacted simultaneously in different statutes it is inherently unlikely that different principles will apply when an identical or similar question is under consideration. Mr Morgan submitted that this authority was concerned with changes in use during the course of a tenancy which are insufficient to permit the tenant 'to move the goal posts' and acquire better protection at the expense of the landlord. In my judgment however it provides authority for the principle that a dwelling house which forms part of an agricultural estate resided in by the tenant does not

come within the ambit of the Rent Act 1977 if at the outset of the tenancy the dwelling house formed part of an agricultural holding. Notwithstanding the use of the dwelling house as a residence the protection of the Rent Act was not available, even when the agricultural use of the land as a whole had ceased.

By contrast *Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc* [1994] 1 EGLR 93 concerned the application of ss 46 and 48 of the Landlord and Tenant Act 1987 to an agricultural holding. The tenancy included a manor house and a number of cottages occupied by employees under service tenancies. The tenant failed to pay due rent. The landlord deployed notice procedures in the 1986 Act. The tenant challenged the notice on the basis that a notice under s 48 of the Landlord and Tenant Act 1987 had not been served. While expressly excluding business tenancies under Pt II of the Landlord and Tenant Act 1954, s 46(1) applied to 'premises which consist of or include a dwelling' and the dwelling was defined by s 60 as a 'building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it'. The Court of Appeal concluded that the 1987 Act was concerned with housing legislation but it was not possible to conclude 'that the application of section 48 to agricultural tenancies' was not a connected purpose (see [1994] 1 EGLR 93 at 96). Given the express exclusion of business tenancies from the ambit of the Act it was impossible to conclude that agricultural tenancies were excluded when no such exclusion was made in respect of them. In the words of Peter Gibson LJ (at 99): 'It is simply not permissible to cut down the meaning of the words in section 46(1) so as to exclude agricultural holdings.' In the context of the 1987 Act 'premises' meant much more than a dwelling in its extended meaning. In effect the language of the 1987 Act permitted the tenant to enjoy the benefits conferred on other tenants of premises which consisted of or included a dwelling whether or not the dwelling formed part of an agricultural holding. However, and significantly, the court felt able to distinguish *Maunsell v Olins* on the basis only of the strict construction of the statute under consideration.

In my judgment this decision supports two principles relevant for present purposes. The first is obvious: if the language of the relevant statute makes clear the conclusion that a dwelling house which forms part of an agricultural holding may be treated separately from the rest of the holding, then it can and if necessary should be so treated for the purpose of the relevant statute. Accordingly, in such circumstances, the legislation relating to agricultural holdings cannot be regarded as a self contained whole. Second, unless the statutory provision under consideration clearly applies to an agricultural tenancy it should not be treated as if it does. Nothing in the decision casts doubt on the principle applied in *Russell v Booker*, and approached in this way it is consistent with the observations of the majority of the House of Lords in *Maunsell v Olins*. Accordingly, in view of the statutory provisions of direct relevance in the present appeal, in my judgment the conclusion to be drawn from the omission from s 5 of the 1977 Act of express provisions apt to include agricultural tenancies within its ambit is not that such tenancies fall within it, but that they do not.

It remains to analyse the nature of the tenancy in this case. It described itself as an agricultural holding. Express reference was made to the Agricultural Holdings Act 1948. For the purposes of the 1986 Act an 'agricultural holding' is the aggregate of the land (whether agricultural land or not) comprised in a contract tenancy which is a contract for an agricultural tenancy not being a contract under which the land is let to the tenant for the purpose of his

employment or any other appointment by the landlord. The crucial question is whether the actual or contemplated use of the land is agricultural. This definition is not on its face apt to describe 'any premises let as a dwelling' within s 5 of the 1977 Act, and it is not without significance that unlike ss 46(1) and 48 of the Landlord and Tenant Act 1987 no reference is made in the 1986 Act to premises 'which consist of or include a dwelling'. A dwelling house, or indeed more than one, is a feature of many agricultural holdings. However, a dwelling house is not an essential ingredient of every agricultural tenancy. Where the tenancy includes a dwelling house it is usual (as in this case) for the tenant to accept a contractual obligation to live in it, as his residence, and to manage and farm the holding from it, but not as an employee of the landlord. Whatever is included in the tenancy, for example, dwelling houses, barns, woods or streams and fields, the whole represents the agricultural holding. In my judgment this tenancy of an agricultural holding included a dwelling house used as a 'residence' within s 1 of the 1977 Act but the dwelling house did not amount to premises 'let as a dwelling' within s 5. Accordingly, the failure to give notices which complied with s 5 of the Act did not invalidate the notices given by the landlords and the consequent application of the provisions relating to the termination of the holding.

Accordingly I should allow this appeal.

BUTLER-SLOSS LJ. I agree.

Appeal allowed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Kleinwort Benson Ltd v Glasgow City Council

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD MUSTILL, LORD NICHOLLS OF BIRKENHEAD, LORD CLYDE AND LORD HUTTON

18, 19 JUNE, 30 OCTOBER 1997

Conflict of laws – Jurisdiction – Challenge to jurisdiction – Restitution – Bank entering into interest rate swap contracts with local authority – Agreements subsequently declared void ab initio – Bank bringing restitutionary claims in England against local authority domiciled in Scotland – Scottish authority challenging jurisdiction of English court – Whether English court having special jurisdiction over bank's claim – Whether claim 'relating to a contract' or 'relating to tort' – Civil Jurisdiction and Judgments Act 1982, Sch 4, art 5(1)(3).

Contract – Restitution – Interest swap agreement – Bank entering into interest swap agreements with local authority – Agreement ultra vires the local authority and void – Whether bank entitled to recover payments made.

In 1982 the defendant, a Scottish local authority, entered into a number of interest rate swap agreements with the plaintiff bank. Following the House of Lords ruling that such transactions were ultra vires the local authorities and void ab initio, the bank brought an action in England against the defendant, claiming restitution of the sums paid by it to the defendant on the basis of unjust enrichment. The defendant however challenged the jurisdiction of the English court and applied for an order dismissing the action on the ground that it was domiciled in Scotland for the purposes of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982) and should be sued in the courts of Scotland pursuant to s 16(1)[a] of and art 2[b] of Sch 4 to the 1982 Act, which made provision for the allocation of jurisdiction within the United Kingdom. The bank contended, inter alia, that the English court had jurisdiction under the special provisions embodied in art 5[c] of Sch 4 to the Act, which provided (i) that a person domiciled in a part of the United Kingdom could be sued in another part in 'matters relating to a contract' in the courts for the 'place of performance of the obligation in question' (art 5(1)) and, 'in matters relating to tort, delict or quasi-delict', in the courts for the 'place where the harmful event occurred or in the case of a threatened wrong [was] likely to occur' (art 5(3)). The judge granted the defendant's application and struck out the bank's claim, holding that it did not fall within the terms of either art 5(1) or art 5(3). The bank appealed to the Court of Appeal which, following a decision by the Court of Justice of the European Communities that it did not have jurisdiction to give a preliminary ruling as to whether the claim was within the scope of art 5(1) or art 5(3) of Sch 4, reversed the decision of the judge, holding that the court had jurisdiction under art 5(1). The local authority appealed to the House of Lords.

a Section 16, so far as material, is set out at p 666 *a b*, post

b Article 2, so far as material, is set out at p 645 *b*, post

c Article 5, so far as material, is set out at p 645 *c d*, post

Held – (1) (Per Lord Goff of Chieveley, Lord Clyde and Lord Hutton) A claim could only fall within art 5(1) if it was based on a particular contractual obligation, the place of performance of which was within the jurisdiction of the court. In the instant case, however, the plaintiff's claim was for the recovery of money paid under a supposed contract which in law never existed and so was not based on a contractual obligation but was a claim for restitution based on the principle of unjust enrichment. Accordingly, since no express provision was made in respect of such claims in art 5, and it was legitimate to infer that that omission was due to the absence of any connecting factors consistently linking such claims to any jurisdiction other that the defendant's domicile, it followed that the plaintiff's claim did not fall within art 5(1) (see p 647 *a* to *c*, p 649 *e* to *j*, p 650 *f g*, p 651 *a* to *f*, p 662 *a* to *h*, p 665 *d* to *g*, p 667 *j*, p 668 *c*, p 671 *h j*, p 672 *f* and p 674 *h* to p 675 *f*, post); *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 and *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 applied.

(2) Article 5(3) did not apply to a claim based on unjust enrichment, since such a claim did not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong. It followed (Lord Mustill and Lord Nicholls of Birkenhead dissenting) that the English court did not have jurisdiction to entertain the plaintiff's claim and accordingly the bank's appeal would be allowed (see p 653 *j* to p 654 *b d* to *f*, p 658 *h j*, p 665 *g* to *j* and p 675 *f* to p 676 *c*, post).

Decision of the Court of Appeal [1996] 2 All ER 257 reversed.

Notes

For the jurisdiction of the courts with respect to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, see 8(1) *Halsbury's Laws* (4th edn reissue) paras 618–647.

For the Civil Jurisdiction and Judgments Act 1982, s 16, Sch 4, arts 2, 5, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1113, 1190.

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Arcado SPRL v Haviland SA Case 9/87 [1988] ECR 1539.

Bank of Scotland v Investment Management Regulatory Organisation Ltd 1989 SLT 432, Ct of Sess.

Bank of Scotland v Seitz 1990 SLT 584, Ct of Sess.

Boss Group Ltd v Boss France SA [1996] 4 All ER 970, [1997] 1 WLR 351, CA.

Custom Made Commercial Ltd v Stawa Metallbau GmbH Case C-288/92 [1994] ECR I-2913.

Davenport v Corinthian Motor Policies at Lloyds 1991 SLT 774, Ct of Sess.

DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep 74.

Dumez France v Hessische Landesbank (Helaba) Case C-220/88 [1990] ECR I-49.

Effer SpA v Kantner Case 38/81 [1982] ECR 825.

Ets A de Bloos SPRL v Société en commandite par actions Bouyer Case 14/76 [1976] ECR 1497.

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122, [1943] AC 32, HL.

Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA Case 21/76 [1976] ECR 1735.

Hazell v Hammersmith and Fulham London BC [1991] 1 All ER 545, [1992] 2 AC 1, [1991] 2 WLR 372, HL.

Industrie Tessili Italiana Como v Dunlop AG Case 12/76 [1976] ECR 1473.
Ivenel v Schwab Case 133/81 [1982] ECR 1891.
Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS) Case C-26/92 [1992] ECR I-3967.
Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co Case 189/87 [1988] ECR 5565.
Kleinwort Benson Ltd v Birmingham City Council [1996] 4 All ER 733, [1997] QB 380, [1996] 3 WLR 1139, CA.
Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512, [1991] 2 AC 540, [1991] 3 WLR 10, HL.
Marinari v Lloyds Bank plc (Zubaidi Trading Co intervening) Case C-364/93 [1996] All ER (EC) 84, [1996] QB 217, [1996] 2 WLR 159, ECJ.
Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging Case 34/82 [1983] ECR 987.
Pavey & Matthews Pty Ltd v Paul (1987) 69 ALR 577, Aust HC.
Powell Duffryn plc v Petereit Case C-214/92 [1992] ECR I-1745.
Shearson Lehman Hutton Inc v Treuhand für Vermögensverwaltung und Beteiligungen (TVB) mbH Case C-89/91 [1993] ECR I-139.
Shenavai v Kreischer Case 266/85 [1987] ECR 239.
Sinclair v Brougham [1914] AC 398, [1914–15] All ER Rep 622, HL.
Société ISI v Société de Promotion des Centres Privés Audiovisuels 1983 Revue Critique de Droit International Privé 516.
Somafer v Saar-Ferngas AG Case 33/78 [1978] ECR 2183.
Strathaird Farms Ltd v G A Chattaway & Co 1993 SLT (Sh Ct) 36.
Tesam Distribution Ltd v Schuh Mode Team GmbH [1990] ILPr 149, CA.
Union Transport plc v Continental Lines SA [1992] 1 All ER 161, [1992] 1 WLR 15, HL.
Westdeutsche Landesbank Girozentrale v Islington London BC [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.
Woolwich Building Society v IRC (No 2) [1991] 4 All ER 577, [1993] AC 70, [1991] 3 WLR 790, CA.

Appeal

The defendant, Glasgow City Council appealed with leave of the Appeal Committee of the House of Lords given on 9 December 1996 from the decision of the Court of Appeal (Roch and Millett LJJ; Leggatt LJ dissenting) ([1996] 2 All ER 257, [1996] QB 678) on 25 January 1996 whereby it allowed the appeal of the plaintiff bank, Kleinwort Benson Ltd, from the decision of Hirst J ([1994] 4 All ER 865, [1993] QB 429) on 27 February 1992 striking out its action against the defendant for restitution of the sum of £807,230·31 standing to the council's credit under seven interest swap agreements which were null and void ab initio, on the ground that the court had no jurisdiction to hear the claim. The facts are set out in the opinion of Lord Goff of Chieveley.

Michael Burton QC and *Jonathan Tecks* (instructed by *Lewis Silkin*) for Glasgow.
Gordon Pollock QC and *Thomas Beazley* (instructed by *Clifford Chance*) for Kleinwort.

Their Lordships took time for consideration.

30 October 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, the question in this appeal arises in the wake of the decision of your Lordships' House in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 54, [1992] 2 AC 1. In that case, the House held that an interest swap agreement to which a local authority was a party was ultra vires the local authority and so void ab initio. Between 7 and 15 September 1982 the appellants, the City of Glasgow Council, then the City of Glasgow District Council (Glasgow), entered into seven interest swap agreements with the respondents, Kleinwort Benson Ltd (Kleinwort). Pursuant to the agreements, on various dates between 9 March 1983 and 10 September 1987 Kleinwort made payments to Glasgow totalling £807,230·31, and Glasgow made payments to Kleinwort totalling £79,152·41. Following the decision in *Hazell*, Kleinwort on 6 September 1991 commenced proceedings in the English High Court claiming restitution of the sums so paid by it to Glasgow. On 16 October 1991 Glasgow issued a summons claiming a declaration that the English High Court had no jurisdiction over the claim, over which the Scottish courts alone had jurisdiction. The appeal now before your Lordships' House relates to that issue of jurisdiction.

It is right that I should record at once why this question of jurisdiction is being so keenly fought. In England, the limitation period generally applicable to a claim such as this is six years, whereas in Scotland it is five years. That of itself makes England a more beneficial jurisdiction for Kleinwort, but only to the limited extent that Kleinwort could claim to recover about one-sixth more in England than it could do in Scotland. However it appears that Kleinwort's anxiety to proceed in England is actuated by a more fundamental consideration. It seeks to take advantage of s 32(1)(c) of the Limitation Act 1980, for which there is no precisely equivalent provision in Scotland (compare s 6(4) of the Prescription and Limitation (Scotland) Act 1973). The subsection provides:

> '... where in the case of any action for which a period of limitation is prescribed by this Act ... (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it.'

Reliance by Kleinwort on this provision in the present case faces the obstacle that the money was here paid under a mistake of law and, as English law stands at present, money so paid is not generally recoverable in restitution. However Kleinwort intends, in linked appeals pending before your Lordships' House (*Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733, [1997] QB 380) to argue that the mistake of law rule should be judicially abrogated. If this argument should succeed the practical effect in the present case, if litigated in England, would be wholly to undo the contractual result (under which Glasgow would have emerged as the successful party) and to increase very substantially Kleinwort's restitutionary claim. It is substantially for this reason, the Appellate Committee was told, that this jurisdictional battle is so strongly contested. However these considerations have no impact on the question of the applicable jurisdiction, to which I now turn.

Pursuant to ss 16 and 17 of the Civil Jurisdiction and Judgments Act 1982, which incorporates the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 into the law of the United

Kingdom, Schs 4 and 5 to the Act make provision for the modification of Title II of the convention for the allocation of jurisdiction within the United Kingdom. In this appeal, your Lordships are concerned with three provisions of Title II as so modified, viz art 2 which falls within Section 1, concerned with 'General provisions'; and art 5(1) and (3) which falls within Section 2, concerned with 'Special jurisdiction'. These provide:

> '2. Subject to the provisions of this Title, persons domiciled in a part of the United Kingdom shall ... be sued in the court of that part ...
>
> 5. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued:
>
> (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question ...
>
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur ...'

It was the case of Glasgow that the English High Court had no jurisdiction over Kleinwort's claim because Glasgow was domiciled in Scotland and so, by virtue of art 2, should have been sued in the Scottish courts. Kleinwort however claimed that the English courts had jurisdiction by virtue of four provisions including art 5(1) and 5(3) the only two provisions now relied on by Kleinwort.

The matter came before Hirst J (sub nom *Barclays Bank plc v Glasgow City Council, Kleinwort Benson Ltd v Glasgow City Council* [1994] 4 All ER 865, [1993] QB 429), who held that none of the provisions relied on by Kleinwort applied, and so granted the declaration asked for by Glasgow. Kleinwort then appealed to the Court of Appeal ([1994] 4 All ER 865, [1994] QB 404). In relation to art 5(1) and (3), the Court of Appeal sought a preliminary ruling from the European Court of Justice as to the interpretation of the corresponding provisions of the Brussels Convention. Written submissions were submitted to the court not only by Glasgow and Kleinwort, but also by the European Commission, the United Kingdom, and three other member states—France, Germany and Spain. However Advocate General Tesauro expressed the opinion that the court had no jurisdiction to deal with the question referred by the Court of Appeal, and his opinion was accepted by the court. The court concluded (Case C-346/93, [1995] All ER (EC) 514, [1996] QB 57) that, although the national law was based on the Brussels Convention, the convention was not directly applicable. The court of the contracting state was free to decide whether the interpretation to be given by the Court of Justice was equally valid for the purposes of the application of the national law based on the convention, and so the Court of Justice lacked jurisdiction to make the preliminary ruling asked for by the Court of Appeal.

The case therefore returned to the Court of Appeal and was heard by a reconstituted court, none of the members of the previous court being available. On 25 January 1996, the court by a majority (Roch and Millett LJJ; Leggatt LJ dissenting) ([1996] 2 All ER 257, [1996] QB 678) held, reversing the decision of Hirst J, that the claim fell within art 5(1), and that on that basis the English High Court had jurisdiction. In the circumstances, the court expressed no concluded view as to the application of art 5(3). It is from that decision that Glasgow now appeals to your Lordships' House, with the leave of the Court of Appeal.

The applicable principles

Before I consider the reasoning in the judgments delivered by the members of the Court of Appeal, I feel that it is desirable first to set out some of the basic principles which underlie the provisions in question. For this purpose I propose to put on one side art 5(3), to which little attention was paid in argument before the Appellate Committee, and to concentrate on arts 2 and 5(1).

(1) I wish first to stress that, although the European Court of Justice declined to provide the guidance asked for by the Court of Appeal, nevertheless it is clear that the courts of this country, in considering questions which arise under Sch 4 to the 1982 Act, must have regard to the principles laid down by the Court of Justice in connection with Title II of the Brussels Convention, and any relevant decisions of the court as to the meaning and effect of any provision of that Title: see s 16(3) of the Act. A contrast is therefore drawn with s 3(1), which provides that any question as to the meaning or effect of the convention is to be determined 'in accordance with the principles laid down by and any relevant decision of the European Court'. Even so, too much should not be read into this distinction, which appears to be drawn only to accommodate the fact that Sch 4 forms part of the national law, and because there are parts of Sch 4 which do not correspond with Title II of the convention. It will however be a rare case in which a provision of Sch 4 bears a materially different meaning from the corresponding provision in Title II: see O'Malley and Layton *European Civil Practice* (1989) para 41.09. It follows that your Lordships' House should, in cases arising under Sch 4, take the relevant decisions of the European Court of Justice fully into account.

(2) The first point which is clearly established in the European jurisprudence is that the basic principle is to be found in art 2. This is the principle of domicile, viz that a person domiciled in a part of the United Kingdom shall be sued in the courts of that part. This principle is expressed to be subject to the provisions of Title II, which includes the special jurisdiction in Section 2. Article 5, which falls within Section 2, states that a person domiciled in a part of the United Kingdom may be sued in another part of the United Kingdom in the circumstances specified in the paragraphs of the article, including of course art 5(1) with which we are here concerned. But it is clearly recognised that art 5 is in derogation from the basic principle of domicile in art 2 (see *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987 at 1001), and that as a result the provisions of art 5 are to be construed restrictively (see *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 19)). In this connection, it is not to be forgotten that the defendant can always be sued in the courts of his domicile.

(3) Next, in considering the function of the various provisions of art 5, it is to be remembered that these provisions exist 'because of the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings': (see the *Martin Peters* case, [1983] ECR 987 at 1002 (para 11)). In the case of art 5(1), the relevant court is specified as being the court 'for the place of performance of the obligation in question' which is described in the Jenard Report (OJ 1979 C59, p 1) as the court of the place of performance of the obligation on which the claim is based. It is between the dispute and that court that a particularly close connecting factor is recognised to exist. Mr Jenard, gives as an example proceedings for the recovery of fees,

particularly where the obligation to pay must be performed where the services are provided.

(4) It follows that, in order to identify the relevant court, it is necessary first to identify the obligation in question. This was made plain in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497, in which the European Court of Justice held that the word 'obligation' in art 5(1) refers to 'the contractual obligation forming the basis of the legal proceedings' (see [1976] ECR 1497 at 1508 (para 11). The Court of Justice subsequently affirmed that 'the obligation'—

> 'cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff's action is based ...' (See *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 at 2957 (para 23).)

(5) Within the scope of these principles, we can see the Court of Justice giving full effect to art 5(1). For example:

(a) It was held in the *Martin Peters* case that membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract, and that the obligations between them may be regarded as contractual for the purposes of art 5(1). This was on the basis that the concept of 'matters relating to a contract' should be regarded as an independent or autonomous concept, to be interpreted by reference chiefly to the system and objectives of the convention, and not by reference simply to the national law of the relevant contracting state (see [1983] ECR 987 at 1002, paras 9, 10 and 13, applied in *Powell Duffryn plc v Petereit* Case C-214/92 [1992] ECR I-1745 at 1774 (para 13)).

(b) In a case in which the plaintiff invokes the jurisdiction of the court of the place of performance, if the defendant denies the existence of the contract the court can consider the question whether there is a binding contract as one of the essential preconditions of its jurisdiction.

> 'If that were not the case, Article 5(1) of the Convention would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision it is sufficient for one of the parties to claim that the contract does not exist.' (See *Effer SpA v Kantner* Case 38/81 [1982] ECR 825 at 834–835 (para 7).)

(c)

> 'In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5(1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims.'

(See *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 at 1508 (para 14)). This is a point to which I shall have to return later.

(6) However, attempts to broaden the scope of art 5(1) beyond the established principles have, with one notable exception, failed.

(a) The notable exception occurred in *Ivenel v Schwab* Case 133/81 [1982] ECR 1891. There the Court of Justice held, in a case concerned with claims based on different obligations arising under a contract of employment, that the obligation

to be taken into account for the purposes of the application of art 5(1) of the convention is the obligation which characterises the contract (see [1982] ECR 1891 at 1901 (para 20)). It is plain from the preceding paragraphs of the judgment in that case that this conclusion was derived from special considerations affecting contracts of employment. Subsequently however in *Shenavai v Kreischer* Case 266/85 [1987] ECR 239, a case concerned with a claim by an architect to his fees, the Court of Justice rejected an argument that a similar approach to that in *Ivenel v Schwab* should there be adopted. The reasoning of the court most relevant for present purposes reads ([1987] ECR 239 at 255–256 (paras 16–19)):

> '16. In that connection it should first be observed that contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts—even those for the provision of services—by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. It is on account of those particularities that the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise.
>
> 17. When no such particularities exist, it is neither necessary nor appropriate to identify the obligation which characterizes the contract and to centralize at the place of performance thereof jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract. The variety and multiplicity of contracts as a whole are such that the above criterion might in those other cases create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the Convention is designed to reduce.
>
> 18. On the other hand, no such uncertainty exists for most contracts if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings. The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.
>
> 19. Admittedly, the above rule does not afford a solution in the particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff. However, in such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale*; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction.'

I have taken the unusual course of quoting these paragraphs in full, because they demonstrate that the Court of Justice has returned to, and indeed has reinforced, the reasoning and conclusion in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 that the 'obligation' in art 5(1) is the contractual obligation on which the claim is based. It is the courts of the place of

performance of that obligation in which jurisdiction is vested under art 5(1). It is in that sense, if at all, that art 5(1) is applicable in the present case.

(b) In *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 a case concerned with art 5(3) of the convention, it was proposed by Advocate General Darmon that, where there are overlapping (concurrent) claims in contract and tort, only art 5(1) will determine the jurisdiction of the court, since the matters relating to contract will 'channel' all the aspects of the dispute. In that connection he stressed the manifest practical advantages of this course, since the court dealing with the contract is best placed to understand the context and the implications as regards legal proceedings (see [1988] ECR 5565 at 5577 (paras 25–30)). This proposal was however rejected by the Court of Justice, which held (see at 5585 (paras 18–19), 5587) that: (i) the term 'matters relating to tort, delict or quasi-delict' in art 5(3) must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to contract under art 5(1); and (ii) that a court which has jurisdiction under art 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. In so holding, the court stressed (see at 5585 (para 19)) that the 'special jurisdictions' in arts 5 and 6 must be interpreted restrictively; and further stressed (see at 5585 (para 20)) that, while disadvantages may arise from different aspects of the same dispute being adjudicated upon by different courts, the plaintiff is always entitled to bring his action in its entirety before the courts of the defendant's domicile.

The application of the principles in the present case

With these principles in mind, I turn to consider the question in the present case. That question is whether the claim of Kleinwort to restitution of the sums paid by it to Glasgow under a contract accepted to be void ab initio falls within art 5(1).

I have to confess that I find it very difficult to see how such a claim can fall within art 5(1). It can only do so if it can properly be said to be based upon a particular contractual obligation, the place of performance of which is within the jurisdiction of the court. Where however, as here, the claim is for the recovery of money paid under a supposed contract which in law never existed, it seems impossible to say that the claim for the recovery of the money is based upon a particular contractual obligation.

In truth, the claim in the present case is simply a claim to restitution, which in English law is based upon the principle of unjust enrichment; and claims of this kind do not per se fall within art 5(1). It is not necessary for the purposes of the present case to hold that a claim to restitution can never fall within art 5(1). Very exceptionally, there may be particular circumstances in which it can properly be said, at least in cases arising under the convention, that the claim in question, although a claim to restitution, is nevertheless based on a contractual obligation and so falls within the article. This is a point to which I will return at a later stage. But no such circumstances arise in the vast majority of claims to restitution, which are founded simply upon the principle of unjust enrichment. Such is, in my opinion, the present case. No express provision is made in art 5 in respect of claims for unjust enrichment as such; and it is legitimate to infer that this omission is due to the absence of any close connecting factor consistently linking such claims to any jurisdiction other than the defendant's domicile. Article 2 therefore provides the appropriate jurisdiction for such claims.

The point is very simple. I therefore propose to turn next to the judgments of the majority of the Court of Appeal, and to examine in some detail the reasons for which they held that this simple reasoning should not prevail.

The judgments of the majority in the Court of Appeal

The majority judgments were delivered by Roch and Millett LJJ. Roch LJ relied strongly on the *Martin Peters* case as showing that art 5(1) applies even where there is no contract according to the national law. In my opinion, however, he sought to derive too much from that case. Certainly, the case shows that the expression 'matters relating to a contract' must be construed in such a manner as to give effect to the system and objectives of the convention, so that an independent or autonomous meaning must be given to the word 'contract', which must be read as wide enough to embrace other consensual arrangements even though these may not be regarded as contractual under the national law of the relevant contracting state. But that decision provides no useful guidance on the question whether, in the context of art 5(1), the word 'contract' is to be construed as including a supposed contract which is void ab initio, so that a claim to recover money paid under such a void contract falls within the article. Next Roch LJ ([1996] 2 All ER 257 at 269, [1996] QB 678 at 694) invoked art 10(1)(e) of the Convention on the Law applicable to Contractual Obligations 1980 (the Rome Convention) (enacted into English law by s 2 of and Sch 1 to the Contracts (Applicable Law) Act 1990) which expressly provides that the law applicable to a contract shall govern in particular 'the consequences of nullity of the contract'. However, the fact that such express provision is made in the Rome Convention in relation to the governing law provides no guidance on the scope of art 5(1) forming part of the Brussels Convention which is concerned with jurisdiction and which contains no such provision. It is for that purpose entirely neutral, as was vividly illustrated by the fact that it was relied upon by both parties to the present litigation. Lastly, Roch LJ asserted that the word 'obligation' in art 5(1) is not confined to contractual obligations. Again, I am unable to agree; it is plain both from *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 and *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 that the word does indeed refer to the contractual obligation on which the claim is based, though such a claim is not limited to a claim for the direct enforcement of the obligation. For these among other reasons, I am unable to accept the reasoning in Roch LJ's judgment.

In a most impressive judgment, which it is difficult to summarise in a few words, Millett LJ developed a thesis which led to the conclusion that the word 'contract' in art 5(1) includes a void contract, ie a supposed contract which is void ab initio and so has never had any existence in law, and that the expression 'place of performance of the obligation in question' includes the intended place of performance of the supposed obligation under a void contract ([1996] 2 All ER 257 at 269, [1996] QB 678 at 699). He therefore considered that a claim to recover money paid under a 'contract' which is ultra vires the recipient is a 'matter relating to a contract' within the opening words of art 5(1). He went on to hold ([1996] 2 All ER 257 at 273, [1996] QB 678 at 698) that, provided the matter relates to a contract, the jurisdiction conferred by art 5(1) is available, and that the expression 'matters relating to a contract' is not to be equated with 'contractual causes of action' or 'the enforcement of contractual obligations' or even 'claims based on contract'. He concluded that, when parties act pursuant to such a contract, the intended place of performance is no less relevant a connecting factor

because the contract is afterwards held to be void ([1996] 2 All ER 257 at 274, [1996] QB 678 at 699).

Impressive though his judgment is, in my opinion Millett LJ's thesis founders upon the terms of art 5(1) as construed in the established jurisprudence of the European Court of Justice. We know from *Ets A de Bloos SPRL v Societé en commandité par actions Bouyer* Case 14/76 [1976] ECR 1497 at 1508 (para 11) that the reference in art 5(1) to the 'obligation in question' is to 'the contractual obligation forming the basis of the legal proceedings', and is that obligation 'which corresponds to the contractual right on which the plaintiff's action is based'. It was that principle which was reaffirmed by the court in *Shenavai v Kreischer* [1987] ECR 239 at 256 (para 18)), where it was stated that uncertainty was avoided 'if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings'. Moreover, again in the *de Bloos* case [1976] ECR 1497 at 1508 (para 14), it was recognised that where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the defendant, the obligation referred to in art 5(1) is 'still that which arises under the contract and the non-performance of which is relied upon to support such claims'. With the exception of *Ivenel v Schwab* [1982] ECR 1891, in no case cited to the Appellate Committee, either from the European Court of Justice or from the courts of this country, has the 'obligation in question' been construed to mean anything other than the particular contractual obligation upon which the plaintiff's claim is based, the performance or non-performance of which is relied upon to support the plaintiff's claim. It is in my opinion plain that this principle can have no application in a case where the supposed contract in question is void ab initio and so has never had any legal existence. Furthermore, art 5(1) specifies in clearly defined terms a particularly close connecting factor between the dispute and the court which will be called on to hear it, ie the place of performance of the contractual obligation in question. No such close connecting factor can, in my opinion, exist in a case where the contract is void ab initio and the only question at issue relates to the recovery of money paid under it on the ground of unjust enrichment. Furthermore the approach of Millett LJ offends, in my opinion, against the fundamental principle that the special jurisdiction in art 5 is in derogation from the general jurisdiction in art 2 and so falls to be construed restrictively; on the contrary, Millett LJ's approach constitutes an expansion of the special jurisdiction in art 5(1). Indeed the effect in the present case would be that for the courts of the defendant's domicile are substituted the courts of the plaintiff's domicile; and it is difficult to understand why, in this as in most other cases of unjust enrichment for which no provision is made in art 5, the courts of the defendant's domicile should not have jurisdiction.

In his judgment, Millett LJ relied on two matters in particular as providing support for his thesis.

(1) The first matter relied upon by him was that in most cases the validity of the contract will be in issue; and it would not be consistent with the objectives of the convention if a court having jurisdiction to decide the validity of the contract did not also have jurisdiction to decide the consequences. But there must be serious doubt whether, as a general rule, a court can have jurisdiction under art 5(1) to rule upon the validity of a contract. True it appears that, in France, the Cour de Cassation has decided that jurisdiction may exist under art 5(1) in the case of an action for the annulment of a contract: see *Société ISI v Société de Promotion des Centres Privés Audiovisuels* 1983 Revue Critique de Droit

International Privé 516. In that case a German company granted to a French company exclusive rights in respect of a method of teaching shorthand; and the French company, having discovered that the method in question was merely a counterfeit of another, brought an action for the invalidity of the contract on the grounds, essentially, that the object was illegal. The Cour de Cassation held that the Commercial Court of Paris was entitled to exercise jurisdiction in respect of the issue of invalidity under art 5(1), apparently on the basis that all the contractual duties should be performed in Paris. However, in her commentary on the decision, Professor Hélène Gaudemet-Tallon points out that in other cases performance of the contractual duties could well take place in more than one state. She therefore commends the solution of M Huet, viz that, in the case of an action for invalidity of contract, art 5(1) is applicable, the competent court by virtue of the article being the court of the place of the performance of the characteristic duty of the contract. This solution is, she suggests, necessary 'both to avoid a multiplicity of competent courts and to be assured that the judge approached does indeed have a serious connection with the case' (1983 Revue Critique de Droit International Privé 516 at 520). In abstract terms, this solution has much to commend it; but, since the decision of the European Court of Justice in *Shenavai v Kreischer* Case 266/85 [1987] ECR 239, it is as a general rule no longer appropriate to invoke the characteristic obligation of the contract in this context. Moreover it is striking that when, in *Effer SpA v Kantner* Case 38/81 [1982] ECR 825 the Court of Justice held that a national court could, in a case under art 5(1), consider the question whether the relevant contract was binding, this was only on the basis that the court could do so as one of the essential preconditions of its jurisdiction to adjudicate on the contractual claim before it. In these circumstances, although the point does not fall to be decided in the present case, there must be serious doubt whether the issue of the validity of a contract alleged to be void ab initio would fall within art 5(1).

I wish to record in parenthesis at this stage that Professor Gaudemet-Tallon, departing from her previous view in which she favoured 'channelling', now considers that art 5(1) cannot apply to quasi-contracts, favouring instead art 2: see the written observations of the Commission of the European Communities to the Court of Justice in the present case (para 63, n 80) and Gaudemet-Tallon *Les Conventions de Bruxelles et de Lugano* (1st edn, 1993) para 161; (2nd edn, 1996) at 114–115, para 161).

(2) The second matter relied upon by Millett LJ was this. He took the example of a case of breach of contract in which the plaintiff can sue the defendant either for damages for breach of contract or for recovery of money paid to him under the contract, the claim for such recovery being on the basis of failure of consideration. Millett LJ suggested that, on his thesis, the nature of the remedy chosen by the plaintiff does not prevent the action from being tried in the place of performance of the contractual obligation the breach of which has given rise to the relief claimed. But (although again it is not necessary to decide the point in the present case) it is at least possible that, in cases arising under the convention, the same result can be achieved on the basis of the established European jurisprudence. It is true that in English law a claim to recover money on the ground of failure of consideration is classified as a claim in restitution, based on unjust enrichment. Nevertheless it was (as I have already recorded) established in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 at 1508 (para 14) that the plaintiff's claim to be paid damages or to seek dissolution of a contract on the ground of the defendant's

default may fall within art 5(1), the contractual obligation being the obligation the non-performance of which is relied upon to support the claim. Moreover a claim to recover, on the ground of failure of consideration, money paid under a valid contract is capable of being classified in some systems of law as contractual; and, on the principle recognised in the *Martin Peters* case it may be appropriate, at least in cases arising under the convention, to treat the concept of contractual obligation as being, for the purposes of art 5(1), broad enough to provide the basis of such a claim. Whether it would be appropriate to do so in cases arising under Sch 4 to the 1982 Act is, however, more problematical.

More fundamentally, however, it seems to me that the whole basis of Millett LJ's thesis is that art 5(1) should be construed broadly so that any matter relating to a contract should be held to fall within the article; and he seeks to justify this on the practical basis that all claims relating to contracts should fall to be considered in the same jurisdiction, viz the jurisdiction of the courts for the place of performance, or intended performance, of the contract, even where no such contract ever existed. I feel bound to say, however, that the jurisprudence of the European Court of Justice reveals an understanding that art 5(1) has a more limited purpose, an understanding which is moreover more consistent with the words of the article. This appears most clearly from the judgment of the court in *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 at 256 (para 18) in which the court recommended that regard should be had 'solely to the contractual obligation whose performance is sought in the judicial proceedings'. As I have already recorded, the court continued:

> 'The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.'

The obligation is, of course, the 'obligation in question.' The view of the court appears to be that, once this criterion is abandoned, the justification for jurisdiction being vested in the court of the place of performance of the obligation in question is destroyed. If that criterion cannot be fulfilled, it must not be forgotten that (as the court pointed out in a related context—see *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5586 (para 20)): '... a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant ...'

I have exceptionally subjected the judgment of Millett LJ to close examination, not out of any desire to disparage his work, but rather out of respect for the formidable thesis which he has propounded and developed.

Article 5(3)

Before the appellate committee, Mr Pollock QC for Kleinwort advanced a brief argument to the effect that art 5(3), which is concerned with 'matters relating to tort, delict or quasi-delict' and places jurisdiction in the courts for the place 'where the harmful event occurred or in the case of a threatened wrong is likely to occur' applied in cases of unjust enrichment, and was therefore applicable in the present case. This argument is impossible to reconcile with the words of art 5(3), if only because a claim based on unjust enrichment does not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong. The argument was based on a misreading of para 2(a) of the ruling of the

Court of Justice in *Kalfelis'* case [1988] ECR 5565 at 5587, a misreading which is plainly inconsistent with para 2(b) of the same ruling (which I have referred to earlier in this opinion). There is, in my opinion, no substance in the point, which was rightly rejected by Leggatt LJ in the Court of Appeal ([1996] 2 All ER 257 at 267, [1996] QB 678 at 691–692).

Postscript

May I by way of postscript express my indebtedness to the written observations of the Federal Republic of Germany to the Court of Justice in the present case, prepared by Professor Dr Christof Böhmer. These observations are of particular relevance because, as appears from the Jenard Report, the wording of art 5(1) of the convention was influenced by German law. It is of significance that, as Dr Böhmer records, the unanimous view in German case law and literature has hitherto been that art 5(1) does not cover claims based on unjust enrichment. He does not however specifically consider the case where money has been paid under a valid contract, and it is sought to recover such money on the ground of failure of consideration, following upon a breach of contract by the defendant.

Conclusion

For the reasons I have given, I find myself to be in agreement with the conclusion reached by Hirst J, and by Leggatt LJ in his dissenting judgment in the Court of Appeal. I would, therefore, allow the appeal, with costs before your Lordships' House and below, and restore the order of Hirst J.

LORD MUSTILL. My Lords, I have read the speech which will be delivered by my noble and learned friend Lord Nicholls of Birkenhead. I agree with it, and have nothing to add.

LORD NICHOLLS OF BIRKENHEAD. My Lords, this appeal raises the question whether a restitutionary claim in respect of money paid in purported performance of a contract, subsequently found to be null and void because of the lack of capacity of one party, is within art 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as modified for allocation of jurisdiction within the United Kingdom by the Civil Jurisdiction and Judgments Act 1982, Sch 4). It is a short but teasing question of construction.

The proper approach to the interpretation of the convention is well established. The basic jurisdictional provision is art 2—persons shall be sued in the courts of the contracting state where they are domiciled. Article 5, like other articles conferring a special jurisdiction, is a derogation from the basic provision and should be construed restrictively. The rationale of art 5 is the existence, in 'certain clearly-defined situations', of a particularly close connecting factor between a dispute and the court called upon to hear it. In those situations the plaintiff may opt to choose the special jurisdiction, with a view to the efficacious conduct of the proceedings (see *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* Case 21/76, [1976] ECR 1735 at 1745–1746 (paras 10–11) and *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987 at 1002 (para 11)). In the case of contractual matters, the place of performance of the obligation in question usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it—hence the terms of art 5(1). When more than one contractual obligation is in

issue, the principal issue determines the jurisdiction (see *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 at 256 (paras 18–19).

The phrase 'matters relating to a contract' in art 5(1) is an independent convention concept, but the European Court has not yet given any basic definition of the concept or its scope. The article itself gives little guidance. The second limb of art 5(1) identifies the close connecting factor in these terms: '... in the courts for the place of performance of the obligation in question.' Bearing in mind the need to construe the ambit of this special jurisdiction restrictively, this wording might suggest that, despite the apparent width of the concept, to be within art 5(1) the dispute must relate solely to the performance of a contractual obligation, and that other contractual disputes are not within the special jurisdiction because they would lack any connection with the place of performance.

This beguilingly simple approach cannot withstand even the most superficial examination. Not only would it cut down the ambit of art 5(1) by removing from its scope many disputes normally regarded as contractual matters: for instance, a dispute over whether a contract complied with prescribed formalities, such as the need for writing. This construction would also produce capricious practical results inconsistent with the underlying aims of the convention and with the pragmatic interpretation given to it by the European Court of Justice. The court has emphasised the importance of certainty. The court said in *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 at 2956 (para 15):

> 'The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought.'

The court has also drawn attention to the desirability of the whole of a single dispute being resolved by one court. In the *Martin Peters* case [1983] ECR 987 at 1003 (para 17) the court observed:

> 'It should be noted that multiplication of the bases of jurisdiction in one and the same type of case is not likely to encourage legal certainty and effective protection throughout the territory of the Community. The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related.'

Not surprisingly, the European Court has rejected the narrowest interpretation of art 5(1). Article 5(1) is not confined to the determination of disputes relating strictly to a performance obligation. The jurisdiction is wider than this, because the jurisdiction under art 5(1) is not ousted by a dispute between the parties over the existence of the contract sought to be enforced (see *Effer SpA v Kantner* Case 38/81 [1982] ECR 825).

This decision shows that, at least for the purpose of establishing jurisdiction, the court of the place of performance of a contractual obligation can also decide a dispute relating to the existence of a contract even though this may raise issues having no particular connection with the place of performance. Disputes over the existence of a contract cover an exceedingly wide range: whether the parties

were ad idem, whether there was an intention to create legal relations, whether the parties had legal capacity, whether apparent agreement was vitiated by mistake or misrepresentation or undue influence, whether the making of the contract was illegal. These issues on the formation of a contract do not necessarily have a connection with the place of performance of the contractual obligation being sued upon by the plaintiff. Nevertheless, for reasons of obvious good sense and convenience, these issues may fall within the competence of the court of the place of performance as much as a dispute focused more narrowly on failure of performance.

Against this background I approach the question of construction arising in the present case. I say at once that the feature which ultimately has weighed heavily with me is the unattractive practical difficulties which would result from the narrow interpretation urged by the appellant local authority. I can illustrate these difficulties most easily by taking a simple case where D agrees to carry out work for P. P makes part payments in advance. Subsequently D asserts that the agreement was ultra vires because he lacked legal capacity to enter into such a contract. He declines to carry out the work and he refuses to return the part-payments. Clearly, if P sues D for damages for non-performance, art 5(1) would apply. The jurisdiction of the court of the place where the work was to be done would not be displaced by the ultra vires dispute. The court would determine the ultra vires issue.

Suppose next that P, anxious to dispose of this dispute once and for all, adds an alternative claim. He wishes to recover the money he has already paid, should the court uphold the ultra vires defence. So, as an alternative to damages for breach of contract, he seeks repayment of the part payments on the footing that there is no legally binding contract. This alternative claim is not based on any term of the contract: the contract is a nullity. The claim is a restitutionary claim.

To my mind it is really unthinkable that such an alternative claim should lie outside art 5(1). The convention is concerned to promote the efficacious conduct of proceedings and to avoid multiplicity of closely related proceedings in different contracting states. It would be surprising and unfortunate if, having decided that the contract is null and void, the same court cannot proceed to decide on the restitutionary consequences following directly from this. What matters is not whether the consequential relief is classified by English or Scottish law or the law of some other contracting state as part of its national law of contract or part of its national law of restitution. What matters is that, however labelled, the relief is no more than part of the effective determination of a dispute relating to a contract. It is one facet of a single dispute.

The application of art 5(1) in this situation would not take the article beyond its underlying rationale. Contracts are consensual arrangements. Part-payments made in advance in purported performance of a contractual obligation are likewise made and accepted on an agreed, consensual basis. They are made on the terms of that contract, and they are explicable only by reference to those terms. This remains so, even if subsequently the contract is found to be void in law. As Millett LJ observed in the Court of Appeal ([1996] 2 All ER 257 at 274, [1996] QB 678 at 699):

> 'When parties act pursuant to such a contract, the intended place of performance is no less relevant a connecting factor because the contract is afterwards found to be void.'

The next step in this line of examples is to assume that P reverses the order in which he makes his two claims in the proceedings. D is constantly prevaricating, sometimes saying there is a contract, sometimes not. The primary claim brought by P is for restitution on the footing that there is no binding contract. His alternative claim is for damages for breach of contract. Here again, to my mind it would be surprising if this reversal of the order of presentation of the alternative claims affected the application of art 5(1), so that the dispute would be within the article if the claims were formulated in one order in the proceedings but not if the identical claims were presented in a different order.

The penultimate step in this sequence is to consider whether the outcome would be different if, in the previous example, the alternative claim for damages for breach were omitted. The answer must surely be no. If a claim for restitutionary relief in respect of payments made in purported performance of a contract is a matter relating to a contract within the meaning of art 5(1), this must be so irrespective of whether there is also an alternative claim based on the existence of the contract.

In this series of simple examples there can be no sound distinction between one example and another. The repayment claim falls within art 5(1) in all the examples or in none. If none, there will be considerable practical inconvenience in some cases in seeking to separate a claim based on breach of contract from a claim for repayment of money paid in purported performance of a contract. Further, in practice the positions of parties often shift as cases proceed and the issues change. Courts and parties could find themselves hamstrung after a case has been properly and reasonably started in one country in reliance on the art 5(1) jurisdiction. The narrow view would obstruct rather than advance the convention objectives of promoting certainty and finality.

This is not surprising. At root the narrow view seeks to draw a line between cases where relief is sought for non-performance of a contractual term and all other cases. This would mean that when the existence of the contract is disputed, a claim for damages for breach of contract is within the article but not a claim for relief consequential upon a successful defence that the contract is void or ought to be set aside. This, in turn, means that the narrow interpretation ascribes to the court an incomplete role in what is a common enough situation.

This is unattractive. It is not a conclusion compelled either by the language of the article or, more importantly, by its underlying rationale. As to the language, all that need be said is to repeat that a dispute over the existence of a contract is one of the commonest types of disputes relating to contracts. Claims to set aside contracts are also of everyday occurrence. Such disputes would fall naturally within the words used in art 5 when defining its ambit— 'matters relating to a contract'. Claims for consequential relief are an integral and unexceptional part of the resolution of such disputes by the court. In short, a dispute over the existence of a contract and, if it is held to be void, over the consequences for payments already made under the contract, is as much a dispute 'relating to a contract' as a dispute over the existence of a contract and, if it is held to be valid, over the consequences of non-performance.

The application of the second limb of art 5(1) in such cases is not quite so obvious because the repayment claim is not based on a contractual obligation. In such cases, however, where the existence of the contract is in dispute, the 'obligation in question' can be read, without undue straining of language, as a reference to the obligation whose existence is in dispute.

In argument before your Lordships' House much reliance was placed on observations repeatedly made by the European Court to the effect that the obligation referred to in art 5(1) is the contractual obligation which forms the actual basis of the legal proceedings. These observations, however, were directed at a different point. In *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 and also in *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 the question was which contractual obligation was the relevant one for the purposes of the article. *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 concerned identification of the place of performance of an obligation. These observations cannot be read as indicative of the thinking of the European Court on the altogether different issue now under consideration. That would be a misuse of authority.

Nor is the narrow interpretation compelled by the rationale underlying the article. I have already touched upon this. I add only that it is, of course, true that the issues arising on claims for consequential restitutionary relief may have little or no particular connection with the place of performance of the contractual obligation whose existence was disputed. However, as noted above, it is now established that the issues coming before the court identified in art 5(1) can include issues falling outside the connecting factor upon which that article fastens.

One final step remains to be taken, having regard to the unusual facts of the present case. After P has paid D in purported performance of the contract, the nullity of the contract is established in other proceedings. Thereafter there is no dispute between the parties over the nullity of the contract. The dispute between the parties is confined to the consequences directly flowing from the nullity. P claims to be entitled to repayment, by way of restitution. D denies this. I find it difficult to see on what basis this reduction in the ambit of the dispute can have the consequence of taking outside art 5(1) a dispute otherwise within the article. If the whole is within the article, so should be a part of that whole. There can be no justification for distinguishing between repayment claims where nullity is disputed and repayment claims where nullity is no longer in dispute.

For these reasons I would dismiss this appeal. The last of my examples covers the present case. Article 5(1) is to be construed restrictively, but it must also be construed with due regard to the underlying objectives of the convention. Disputes relating to the existence of a contract are to be regarded as within the convention concept of contractual matters, as also are disputes on the restitution consequences flowing from a decision that a contract is void. I am fortified in this view by noting that in the course of the abortive reference to the European Court a similar conclusion was expressed in the written observations submitted by France, Spain, the United Kingdom and the Commission of the European Communities. Germany alone expressed a contrary view.

On art 5(3) I agree with the views of my noble and learned friends Lord Goff of Chieveley, Lord Clyde and Lord Hutton.

LORD CLYDE. My Lords, the appellant in this appeal is the City of Glasgow Council, formerly the City of Glasgow District Council. In 1982 the district council entered into a number of financial arrangements with the respondent (Kleinwort) which were of the kind known as interest rate swap contracts. In *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1, your Lordships' House held that it was ultra vires of a local authority to enter into such arrangements. That decision had considerable repercussions. There were

a number of local authorities who had entered into them and in a number of those cases there was a balance standing to the credit of the local authority at the time when the transactions were found by your Lordships' decision to have been void ab initio. Such was the position in the case of the district council. Kleinwort raised proceedings in England against the council for restitution of the sums which had been paid by them to the council. The question which has arisen is whether the proceedings fall within the jurisdiction of the courts in England under the provisions of the Civil Jurisdiction and Judgments Act 1982.

The majority of the judges in the Court of Appeal held that the English court had jurisdiction under art 5(1) of Sch 4 to the Act. Kleinwort also argued before that court that in the alternative there was jurisdiction under art 5(3), but that argument did not prevail. Article 5 provides:

> 'A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued:
>
> (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question ...
>
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur ...'

Schedule 4 prescribes the rules for the allocation of jurisdiction within the United Kingdom. It is a modified form of Title II of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. The references in the opening passage of the article to the parts of the United Kingdom and in art 5(3) to the case of a threatened wrong are modifications of the text of the convention. That convention is set out in Sch 1 and together with certain other conventions is declared by s 2(1) of the Act to have the force of law in the United Kingdom. In relation to the interpretation of these conventions s 3(1) of the Act requires that any question as to their meaning and effect is to be 'determined in accordance with the principles laid down by and any relevant decision of the European Court'. The corresponding provision in s 16 which requires effect to be given to Sch 4 for the purpose of allocating jurisdiction within the United Kingdom in the civil proceedings to which it refers is in slightly different terms. Section 16(3) provides:

> 'In determining any question as to the meaning or effect of any provision contained in Schedule 4—(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title ...'

Since the provisions in Sch 4 comprise a modified version of the convention it is understandable that they should not be interpreted with the full rigour provided by s 3 of the Act for the construction of the conventions.

In the present case the Court of Appeal referred to the European Court of Justice the questions now raised in this appeal. But that court has held that it has no jurisdiction to give a preliminary ruling. It regarded the issue as being one of the application not of the convention but of the national law. It pointed to the difference between ss 3(1) and 16(3) and indicated that the matter was one for interpretation by the English court. But while the matter has thus been returned for a domestic decision regard must still be paid to any principles relevant to the provisions of the convention which correspond with those directly in issue in the present case. In addition to the statutory requirement it would in any event be

proper to have regard to European law in the interests of uniformity. It is true that Mr Advocate General Tesauro recognised in his opinion when the present case was before the European Court that different rules for internal jurisdictional problems could well exist in different countries and that the scheme of the convention was indifferent to purely internal situations, but it seems to me that where the issue concerns phrases taken directly from the convention which are of some importance in the definition of the classes of case to which certain jurisdictional rules should apply it is desirable to find solutions which are consonant with the principles applicable to the convention itself. One objective of the convention was to strengthen the legal protection of persons established in the Community. But the court has recognised that the effectiveness of that protection may be reduced by the multiplication of bases of jurisdiction in one and the same case. For that reason the court observed in *Somafer v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183 at 2191 (para 7):

> '... it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2 ...'

Consistently with the aim of achieving a uniform application of the convention it is established that at least for the purposes of the convention the phrase 'matters relating to a contract' should not be given the technical meaning which it might have in the particular national law of a member state, but should be seen as an independent concept. That was the view expressed in *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987, in *Arcado SPRL v Haviland SA* Case 9/87 [1988] ECR 1539 and in *Powell Duffryn plc v Petereit* Case C-214/92 [1992] ECR I-1745. It is not necessary to decide whether that interpretation should be followed under national law for the purposes of Sch 4, but I proceed on the basis that this wider interpretation should be followed.

It seems to me that one clear principle is that it is art 2 of the convention which sets out the basic rule on jurisdiction, namely that persons are to be sued in the courts of their domicile. It would seem that that should also be the basic rule for the interpretation of art 2 in Sch 4. The provisions of art 5 then are to be seen as derogations from the basic rule, although of course both art 2 and art 5(1) may be equally available if their respective qualifications are met: *Bank of Scotland v Seitz* 1990 SLT 584 It is sufficient to refer in this connection to *Somafer v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183 at 2191 and to *Arcado SPRL v Haviland SA* Case 9/87 [1988] ECR 1539 at 1554). It may also be noted that art 2 is in mandatory terms, while art 5 is permissive. It follows from all of this that the approach to the construction of art 5 should be narrow rather than generous. As the European Court put it in *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 19):

> '... the "special jurisdictions" enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.'

This approach has been recognised and followed in relation to art 5(3) of Sch 4 in *Davenport v Corinthian Motor Policies at Lloyds* 1991 SLT 774.

It is of course for the plaintiff to identify the jurisdiction under the convention in which his proceedings should be taken. If there is a question about the

applicability of any of the special jurisdictions he can always sue under the basic jurisdiction provided in art 2. The rules of jurisdiction should not be construed so as to favour the wishes of the plaintiff. One particular reason for discouraging a liberal interpretation of the special jurisdictions, which was advanced in *Marinari v Lloyds Bank plc (Zubaidi Trading Co intervening)* Case C-364/93 [1996] All ER (EC) 84, [1996] QB 217 is that it might lead to the recognition of a jurisdiction in the courts of the plaintiff's domicile, which the convention seeks in the second paragraph of art 3 to exclude. A like point is made by the court in *Dumez France v Hessische Landesbank (Helaba)* Case C-220/88 [1990] ECR I-49 at 80. The Jenard Report (OJ 1979 C59, p 1) makes it clear, that the intention was to avoid recourse to the plaintiff's forum (see the edition in O'Malley and Layton *European Civil Practice* (1989) pp 1586–1587, para A1.100).

The characteristic of the special jurisdictions which explains and justifies the provision for them is, as the court put it in *Somafer v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183 at 2191 (para 7):

> '... the existence, in certain clearly-defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings.'

This same view was expressed in the later case of *Dumez France v Hessische Landesbank (Helaba)* Case C-220/88 [1990] ECR I-49 at 80. The point was made with greater particularity in *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS)* Case C-26/92 [1992] ECR I-3967 at 3994 (paras 14–15), where the court stated that the jurisdictional rules which derogate from the general principle laid down in art 2—

> '14. ... must not lead to an interpretation going beyond the situations envisaged by the Convention.
>
> 15. It follows that the phrase "matters relating to a contract", as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.'

It is thus not enough for the invocation of jurisdiction under art 5(1) that some remote connection can be found between the point in dispute and a contractual relationship. The question then is where the line is to be drawn. Academic opinion seems to be divided on the point.

The language of the article should provide the solution. There is no direct reference to restitution, although that remedy is mentioned in art 5(4), and there is no direct reference to quasi contract (even if that was relevant to a claim for restitution), although delict and quasi-delict are identified in art 5(3). The express reference to cases of nullity in art 10(1)(e) of the Convention on the Law applicable to Contractual Obligations 1980 (the Rome Convention) (enacted into English law by s 2 of and Sch 1 to the Contracts (Applicable Law) Act 1990) can also be seen to contrast with the language of art 5(1) of the Brussels Convention. So the phrase 'relating to' has to be considered. The distinction drawn by the Sheriff Principal in *Strathaird Farms Ltd v G A Chattaway & Co* 1993 SLT (Sh Ct) 36 at 40 between the words 'relating' and 'related' seems to me to be helpful. The present participle indicates that there is a relationship still continuing between the current issue and a contract. The contract is not a matter of past history forming the background to the current controversy but is still of present relevance. Furthermore the reference to 'a' contract appears to envisage an identifiable

agreement. The point is not so evident from the French text of the Brussels Convention, although at least in the context of Sch 4 the use of the indefinite article may be significant. But however that may be the later words of art 5(1) 'in the courts for the place of performance of the obligation in question' are of considerable importance. The use of the definite article shows that there is a particular obligation to be performed. Moreover the reference is to 'the obligation in question.' That is a reference not to the contract but to the obligation which is at the heart of the dispute. That obligation is the obligation on which the claim is based. There must be an obligation to be performed and the obligation must be in dispute. I can see no other obligation which could here be intended than an obligation based on contract. The 'question' concerns a contractual obligation. The existence of a contract then becomes an essential element. And while the question may appear in a variety of forms essentially at the heart of the dispute will be a consideration relating to its performance. It can then be seen that the later words demonstrate the narrow scope of the phrase 'relating to.' It is not every connection with a contract however remote or tenuous which is intended here. The relationship is one whereby the matter is based on a contractual obligation. In my view it is essential for jurisdiction to lie under art 5(1) that there should be at the heart of the proceedings a dispute about the performance of a contractual obligation. If there is no obligation because there has never been a contract then there is no jurisdiction under the article.

That view seems to accord with the decision of the court in the *de Bloos* case [1976] ECR 1497 at 1509 (para 15) where it was stated that the word 'obligation' contained in art 5(1) of the convention—

> 'refers to the obligation forming the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.'

The point was again taken up by the court in *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 where it was stated under reference to the *de Bloos* case [1994] ECR I-2913 at 2957 (para 23):

> 'The Court has ruled that the obligation cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff's action is based ... '

As Lord McCluskey observed in *Davenport v Corinthian Motor Policies at Lloyds* 1991 SLT 774 at 778: '... the words "in matters relating to" become virtually synonymous with the words "in proceedings based upon".'

Accordingly it is necessary to be able to identify 'the obligation in question', that is, the obligation which forms the basis of the particular proceedings. It must be an obligation under a contract. It is here that a difference appears in the analyses adopted by the majority of the judges in the Court of Appeal ([1996] 2 All ER 257, [1996] QB 678. Roch LJ considered that an 'obligation' could include something other than a contractual obligation ([1996] 2 All ER 257 at 271, [1996] QB 678 at 694). That could open the way to regarding the word as capable of including an obligation to make restitution. Millett LJ considered that the 'place of performance of the obligation in question' could mean the 'intended place of performance of the supposed obligation' ([1996] 2 All ER 257 at 276, [1996] QB 678 at 694). On this analysis the obligation is consensual but the contract is

non-existent. Neither of these two solutions seem to me to be consonant with the decisions to which I have referred.

But cases may well arise where there is a dispute about the existence of the contract. Where one party is claiming that there is a contract and is seeking some remedy in respect of the performance or the non-performance of its obligations and the other party is resisting the claim on the ground that there has never been a contractual relationship between them art 5(1) should be available. In such a case if the court holds that there never has been a contract its jurisdiction will not extend beyond the decision on that point. If on the other hand it holds that a valid contract has been constituted its jurisdiction to entertain the dispute will be affirmed. In that kind of situation the court is inquiring into its own jurisdiction and such a preliminary issue can properly be brought within the scope of art 5(1). In *Effer SpA v Kantner* Case 38/81 [1982] ECR 825 it was held that jurisdiction for that initial issue could be found under art 5(1). The basic dispute was whether it was against Effer or against a bankrupt undertaking called Hykra that Kantner should enforce the contract in question. Kantner had sued Effer. The case was one of enforcement of the performance of a contract. The preliminary problem of determining whether there was a contract between the parties in such circumstances falls within the scope of art 5(1). The court reasoned that the power to determine questions relating to a contract included the power to consider the constituent parts of the contract itself, since that was indispensable for the determination of its jurisdiction. Once there is a dispute as to the existence of a contract the performance of which the one party is seeking to enforce or for the non-performance of which he is seeking a remedy, then it should not matter whether procedurally it is the defendant or the plaintiff who raises the issue of the existence of the contract. In *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970, [1997] 1 WLR 351 where an alleged breach of contract was in issue the English court accepted jurisdiction under art 5(1) in proceedings whereby declarations were sought denying the existence or the continued existence of the contract in question.

Where on the other hand there has undoubtedly been a contract constituted and the court has jurisdiction under art 5(1) the court should be able to deal not only with such issues as whether the obligation is still enforceable or indeed whether the contract is still extant but also with any claims which arise consequentially on the determination of any issue about performance, such as damages or an award quantum meruit. When the defendant challenges the continued existence of the contract and seeks some remedy on the basis that it has terminated, that could procedurally be brought within the scope of art 6(3) whereby the court of the place of performance is given jurisdiction to entertain a counterclaim arising from the same contract or facts on which the original claim was based. Where the remedy is sought by the plaintiff that should be competent under the principle expressed in the maxim accessorium sequitur principale. That principle was recognised in *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 at 256 (para 19) as an applicable guide where several obligations arise under the same contract are in issue. That approach was adopted in this House in *Union Transport plc v Continental Lines SA* [1992] 1 All ER 161, [1992] 1 WLR 15. But the obligation in such cases will still be the contractual obligation which formed the basis of the proceedings. It will not be any separate obligation, such as an obligation to pay damages or an obligation to make a quantum meruit payment. As was stated in the *de Bloos* case [1976] ECR 1497 at 1508 (para 14):

'In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in article 5(1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims.'

But in order for the court to entertain the accessory or consequential matters the principal matter must be within the jurisdiction. In a case where there has never been a contract, either after inquiry by the court or by admission, so that no jurisdiction lies under art 5(1) for the determination of any dispute about the performance of a contractual obligation, there is nothing to which any relief then claimable can be seen as accessory.

There are of course attractive arguments in favour of giving one court the power to deal with the whole extent of claims which are in some way related to each other. Certainly it is desirable to avoid an accumulation of different grounds of jurisdiction for associated claims. But the apparent convenience of such a course cannot be allowed to overcome the jurisdictional rules set out in the Act. In *Kalfelis'* case, the Advocate General put forward a view to the effect that different grounds of claim can all be attracted to art 5(1) and channelled into it together. But that view was not adopted by the court. What the court stated was ([1988] ECR 5565 at 5586 (para 20)):

'Whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that Article 22 of the Convention allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.'

Two sentences from the judgment in the *Martin Peters* case [1983] ECR 987 at 1003 (para 17) may usefully be quoted here:

'The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related. Moreover, respect for the purposes and spirit of the Convention requires an interpretation of article 5 which enables the national court to rule on its own jurisdiction without being compelled to consider the substance of the case.'

Where the court has jurisdiction on the ground of an acknowledged contractual obligation it should be able to dispose of all the issues raised in the case. If there is a fundamental question about its jurisdiction because there is a dispute whether there has ever been a contractual obligation it may try that issue under art 5(1) but has no obligation and indeed no power to go further if the attempt to establish the jurisdiction fails.

In this context the close connecting factor which provides the basis for the special jurisdiction prescribed by art 5(1) is of importance. It was stated in the *Martin Peters* case [1983] ECR 987 at 1002 (para 12) that—

'the designation by Article 5(1) of the Convention of the courts for the place of performance of the obligation in question expresses the concern that, because of the close links created by a contract between the parties

thereto, it should be possible for all the difficulties which may arise on the occasion of the performance of a contractual obligation to be brought before the same court: that for the place of performance of the obligation.'

Where there is no contractual obligation and no place for the performance of a contractual obligation there is no close connecting factor and no justification for the invocation of art 5(1). In addition there must be an identifiable place of performance. In *Industrie Tessili Italiana Como v Dunlop AG* Case 12/76 [1976] ECR 1473 at 1485 (paras 13–14) the court stated that the identification of the place of performance required to be determined by national law adding (at 148 (para 14)) that 'the determination of the place of performance of obligations depends on the contractual context to which these obligations belong'. And as Lord Maxwell observed in *Bank of Scotland v Investment Management Regulatory Organisation Ltd* 1989 SLT 432 at 445 in relation to the corresponding provision in Sch 8 to the 1982 Act: 'If they (the petitioners) are unable to identify a place of performance of the obligation in question in my opinion they cannot rely on rule 2(2).'

These wider considerations however are not of immediate relevance to the particular issue which arises in the present case. The claim which is being made by Kleinwort in the present case is simply and solely a claim for restitution. That is not a claim based on a contract but a claim based on the principle of undue enrichment. The remedy of restitution is in a category distinct from that of contractual remedies. That appears to be the position not only in England and Scotland but also in at least a number of the other states in Europe. That the parties purported to enter into a contract which turned out to be void ab initio is matter of background history, too remote from the claim now made to be related to a contract in the sense intended by art 5(1), even if what is now agreed to be a void contract can properly be called a contract at all. In the present case the plaintiffs do not seek to found on any contract; indeed their claim is one which is pursued in the absence of any contract. There is no contractual obligation forming the basis of their claim. There is no clear place of performance such as can establish the close connection between the dispute and the courts of that place. In my view there is no jurisdiction available under art 5(1) for the purposes of the present case.

Counsel for Kleinwort presented a brief argument upon the possible applicability of art 5(3) to the present proceedings. This was based on a passage in the opinion of Advocate General Darmon in *Shearson Lehman Hutton Inc v Treuhand für Vermögensverwaltung und Beteiligungen (TVB) mbH* Case C-89/91 [1993] ECR I-139 at 178 where he construed a passage in the judgment of the court in *Kalfelis'* case [1988] ECR 5565 at 5585 (para 18) as enabling a claim for unjust enrichment to fall within art 5(3). It is evident that the argument depends upon an imprecise translation of the passage in *Kalfelis'* case and properly understood the judgment does not support the suggested conclusion. The basis for the argument in the present case then disappears.

For the reasons which I have given I consider that the order granted by Hirst J was correct and I would allow the appeal.

LORD HUTTON. My Lords, s 16 of the Civil Jurisdiction and Judgments Act 1982 allocates proceedings in civil and commercial matters within the different jurisdictions of the United Kingdom in accordance with Sch 4 to that Act which contains a modified version of Title II of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

Section 16(3) provides:

> 'In determining any question as to the meaning or effect of any provision contained in Schedule 4—(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title ...'

Article 2 of Sch 4 provides:

> 'Subject to the provisions of this Title, persons domiciled in a part of the United Kingdom shall ... be sued in the court of that part.'

Article 5 of Sch 4 provides:

> 'A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued:
> (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question ...
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur ...'

The appellant, the City of Glasgow Council (Glasgow), is domiciled in Scotland and the first issue for determination on this appeal is whether in the action brought in the High Court of Justice in England by the respondent, Kleinwort Benson Ltd (Kleinwort), for restitution of moneys paid under interest rate swap agreements which were void ab initio, Glasgow is being sued pursuant to art 5(1) 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

The claim of Kleinwort in its writ of summons is for restitution and there is no claim in contract. In English law it is clear that a claim for restitution is a separate and distinct cause of action from a claim in contract. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 135, [1943] AC 32 at 61 Lord Wright stated:

> 'It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.'

In *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 at 993, [1996] AC 669 at 710 Lord Browne-Wilkinson stated:

> 'The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 136–137, [1943] AC 32 at 63–64 per Lord Wright, *Pavey & Matthews Pty Ltd v Paul* (1987) 69 ALR 577 at 579, 583, 603, *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578 and *Woolwich Equitable Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70. In my

judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v Brougham* on this point.'

Therefore in English law the action brought by Kleinwort against Glasgow is not a claim in contract.

However, in my opinion, the consideration that the action brought by Kleinwort is not in English law a claim in contract is not decisive, for two reasons, in favour of Glasgow on the question whether, within the meaning of art 5(1), it is being sued 'in matters relating to a contract'. First, the words 'may ... be sued ... in matters relating to a contract' are wider than the words 'may be sued on a contract'. Secondly, pursuant to s 16(3)(a) of the 1982 Act the meaning of art 5(1) is to be determined having regard to—

'any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title; ...'

In the present case the Court of Appeal referred to the European Court for a preliminary ruling the questions arising in the present appeal. The European Court held that it had no jurisdiction to give a preliminary ruling as the provisions of the convention which the court was asked to interpret were not directly applicable to the present case, and therefore the court did not have jurisdiction to give replies which were merely advisory and would not have binding effect. But, in my opinion, whilst the European Court has declined to give a ruling for the reason it stated, and notwithstanding the difference in wording between s 16(3)(a), which requires regard to be had to any relevant principles laid down by, and any relevant decisions of, that court, and s 3(1) of the 1982 Act, which requires any question as to the meaning or effect of any provision of the convention, if not referred to the European Court, to be determined 'in accordance with the principles laid down by and any relevant decision of the European Court', the wording of s 16(3)(a) does not mean that regard is only to be had to the principles laid down by, and decisions of, the European Court if English law does not provide clear guidance on the meaning of an article in Sch 4. Rather I consider that s 16(3)(a) provides that an English court is to seek guidance from any relevant principle laid down by, and any relevant decision of, the European Court, where the English court is construing an article in Sch 4. Schedule 4 closely follows the wording of Title II of the convention and the wording of art 5(1) of Sch 4 is identical to the first part of art 5(1) of the convention, save for the substitution of the words 'part of the United Kingdom' for the words 'Contracting State', and it is clearly desirable that an English court should give the same meaning to art 5(1) of Sch 4 as the European Court gives to art 5(1) of the convention.

The primary submission advanced on behalf of, Glasgow, by Mr Burton QC was that as the contract between Glasgow and Kleinwort Benson was void ab initio and as Kleinwort Benson is suing, not in contract, but for restitution, the present action is not one in which Glasgow is being sued 'in matters relating to a contract'.

The primary submissions advanced on behalf of Kleinwort by Mr Pollock QC can be briefly summarised as follows. First, art 5(1) does not distinguish between contracts which, in accordance with differing domestic systems of law, are treated as valid, voidable, unenforceable or void. Secondly, where two parties

have come together for the purpose of entering into a contractual relationship, have fulfilled the requirements of certainty and finality necessary to conclude an agreement, intend to enter into a contract and believe that they have in fact done so, it is intelligible and sensible to treat the resolution of the consequences of their acts, having proved ineffective in law, as falling within the concept of 'matters relating to a contract'. Thirdly, an important objective of the convention is that a national court should be able to rule upon the issue of its own jurisdiction by applying a relatively simple test without being compelled to consider the substance of the case, and that a purposive interpretation of art 5(1) leads to the conclusion that the present claim arose from 'matters relating to a contract'.

My Lords, whilst there is no decision of the European Court directly on the point which arises for decision in this appeal, consideration of the judgments of that court has led me to the conclusion that the submissions on behalf of Glasgow should be accepted and that its appeal should succeed. The judgments relied on by Mr Burton which have caused me to form this opinion are the following. In *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 the court treated a claim for unjust enrichment as a cause of action separate and distinct from a cause of action in contract and a cause of action in tort, and the judgment states (at 5581 (para 3):

> 'The object of Mr Kalfelis's action is to obtain an order that the defendants, as jointly and severally liable for the debt, should pay him DM 463 019·08 together with interest. His claim is based on contractual liability for breach of the obligation to provide information, on tort, pursuant to Paragraph 823(2) of the Bürgerliches Gesetzbuch (Civil Code) in conjunction with Paragraph 263 of the Strafgesetzbuch (Criminal Code) and Paragraph 826 of the Bürgerliches Gesetzbuch, since the defendants caused him to suffer loss as a result of their conduct *contra bonos mores*. He also alleges unjust enrichment, on the ground that futures stock-exchange contracts, such as futures transactions in silver bullion, are not binding on the parties by virtue of mandatory provisions of German law and therefore reclaims the sums which he paid over.'

Moreover in *Kalfelis'* case [1988] ECR 5565 at 5585–5586 (paras 19–20) the court observed that arts 5 and 6 should be interpreted restrictively and that a plaintiff is always entitled to bring his action in its entirety before the courts of the domicile of the defendant:

> '19. With respect to the second part of the question, it must be observed, as already indicated above, that the "special jurisdictions" enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. It must therefore be recognised that a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.
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> 20. Whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that Article 22 of the Convention allows the first court seised, in

certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.'

In *Somafer v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183, in referring to the words of art 5(5) of the Brussels Convention, the European Court also stated that in interpreting art 5 a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in art 2 must be avoided, and the court said (at 2191 (para 7)):

'Their function in the context of the Convention must be decided in relation to the general rule conferring jurisdiction contained in Article 2(1) of the Convention which states "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state." Although Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may choose, this is because of the existence, in certain clearly-defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings. Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2. This is all the more so since in national laws or in bilateral conventions the similar exception is frequently due, as the United Kingdom rightly points out in its written observations, to the notion that a national state serves the interests of its nationals by offering them an opportunity to escape the jurisdiction of a foreign court and this consideration is out of place in the Community context, since the justification for the exceptions contained in Article 5 to the general rule of jurisdiction in Article 2 is solely in the interests of due administration of justice.'

The second limb of art 5(1) is worded 'in the courts for the place of performance of the obligation in question'. I consider that these words help to define the meaning of the words 'in matters relating to a contract'. The European Court has held that 'the obligation in question' is a contractual obligation; it is an obligation arising under the contract which the plaintiff is seeking to enforce. Accordingly the wording of the second limb as interpreted by the European Court leads to the conclusion that it is only where a party is seeking to enforce the performance of an obligation contained in a contract (or of an obligation arising from a relationship closely akin to a contract such as membership of an association: see *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987 referred to later in this judgment) that the action can be brought in the place of performance of that obligation, rather than in the domicile of the defendant. In *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 at 1508–1509 (paras 8–15) the European Court stated:

'8. As stated in its preamble, the Convention is intended to determine the international jurisdiction of the courts of the contracting States, to facilitate the recognition and to introduce an expeditious procedure for securing the enforcement of judgments.

9. These objectives imply the need to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract.

10. Because of this, Article 5 (1) of the Convention cannot be interpreted as referring to any obligation whatsoever arising under the contract in question.

11. On the contrary, the word "obligation" in the article refers to the contractual obligation forming the basis of the legal proceedings.

12. This interpretation is, moreover, clearly confirmed by the Italian and German versions of the article.

13. It follows that for the purposes of determining the place of performance within the meaning of Article 5, quoted above, the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.

14. In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5 (1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims.

15. For these reasons, the answer to the first question must be that, in disputes in which the grantee of an exclusive sales concession charges the grantor with having infringed the exclusive concession, the word "obligation" contained in Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters refers to the obligation forming the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.'

In *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* (*TMCS*) Case C-26/92 [1992] ECR I-3967 at 3994–3995 (paras 14–16) the court stated:

'14. The rules on special and exclusive jurisdiction and those relating to prorogation of jurisdiction thus derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself. Consequently, the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention.

15. It follows that the phrase "matters relating to a contract", as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.

16. Where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages on the ground that the goods are not in conformity, it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former.'

In *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 at 2957 (paras 21–24) the court stated:

> '21. It follows that under Article 5(1), in matters relating to a contract, a defendant may be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.
>
> 22. It is accordingly necessary to identify the "obligation" referred to in Article 5(1) of the Convention and to determine its "place of performance."
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> 23. The Court has ruled that the obligation cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff's action is based (see Case 14/76 *De Bloos v Bouyer* ([1976] ECR 1497 (paras 10 and 13)).
>
> 24. Having allowed an exception in the case of contracts of employment presenting certain special features (see, in particular, Case 133/81 *Ivenel v Schwab* ([1982] ECR 1891)), in paragraph 20 of its judgment in *Shenavai,* cited above, the Court confirmed that the obligation referred to in Article 5(1) is the contractual obligation which forms the actual basis of the legal proceedings.'

A further consideration referred to by the European Court is that the reason why under art 5(1) a court for the place of performance of the contractual obligation is given jurisdiction is that the bringing of an action in such a court will enable the action to be brought in an efficacious way and the place of performance of the contractual obligation will be the place where the case can conveniently be heard. In *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* Case 21/76 [1976] ECR 1735 at 1745–1746 (paras 9–11) the court stated that the scheme of conferment of jurisdiction contained in Title II of the convention:

> '9. ... is based on a general rule, laid down by Article 2, that the courts of the State in which the defendant is domiciled shall have jurisdiction.
>
> 10. However, Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may opt to choose.
>
> 11. This freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings.'

However in the present case this consideration is not applicable and the 'particularly close connecting factor' between the dispute and the English court does not exist, because the action is brought, not to enforce a contract to be performed in England, but to recover moneys which are repayable to the plaintiff because the contract never existed and because the plaintiff cannot seek to enforce it. In this case where Kleinwort is suing Glasgow, domiciled in Scotland, for the repayment of moneys unjustly retained by Glasgow, there is no 'particularly close connecting factor' between the dispute and the court in England, which justifies departure from the general principle the defendant should be sued in the place of its domicile.

The judgments relied on by Mr Pollock do not, in my opinion, lead to the conclusion that the present action brought by Kleinwort comes within the scope

of art 5(1). Mr Pollock cited the judgment of the European Court in the *Martin Peters* case [1983] ECR 987 at 1002–1003 (paras 12, 13 and 17): a

> '12. In that context, the designation by Article 5(1) of the Convention of the courts for the place of performance of the obligation in question expresses the concern that, because of the close links created by a contract between the parties thereto, it should be possible for all the difficulties which may arise on the occasion of the performance of a contractual obligation to be brought before the same court: that for the place of performance of the obligation. b
>
> 13. In that regard it appears that membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract and that consequently the obligations to which the national court refers may be regarded as contractual for the purpose of the application of Article 5(1) of the Convention ... c
>
> 17. It should be noted that multiplication of the bases of jurisdiction in one and the same type of case is not likely to encourage legal certainty and effective legal protection throughout the territory of the Community. The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related. Moreover, respect for the purposes and spirit of the Convention requires an interpretation of Article 5 which enables the national court to rule on its own jurisdiction without being compelled to consider the substance of the case.' d e

This judgment shows that the words of art 5(1) can include a consensual relationship between an association and its members which, as Hirst J ([1994] 4 All ER 865 at 875, [1993] QB 429 at 439) observed at first instance 'was manifestly very closely akin to an actual contract' but I do not consider that a claim based on unjust enrichment can be regarded as contractual in the same way as the close links and obligations created by membership of an association were regarded as being contractual in that case. f

Mr Pollock also relied on the judgment of Mr Moore-Bick QC in *DR Insurance Co v Central National Insurance Co* [1996] 1 Lloyd's Rep 74 where the deputy judge was considering the words of RSC Ord 11, r 1(1)(d) in relation to a claim brought to 'enforce, rescind, dissolve, annul or otherwise affect a contract'. Mr Moore-Bick stated (at 79–80): g

> 'If there is a genuine dispute as to the legal effect of an apparent contract which falls within the scope of sub-par. (*d*)(i)–(iii) it is just as desirable in principle that the Court should have the power in an appropriate case to give leave for service out of the jurisdiction as it is in the case where there is a dispute whether a contract originally valid and effective has been discharged by frustration or rescission ... I respectfully agree with both Mr. Justice Saville and Mr. Justice Hobhouse that the policy which underlies O. 11, r. 1(1)(*d*) is to enable all disputes about the existence or effect of contractual rights and liabilities falling within the scope of sub-pars. (*d*)(i)–(iii) to be brought before the English courts. In my view an unduly technical approach to the construction of the rule is liable to frustrate its purpose. Without seeking to define the precise limits of sub-par. (*d*) for all purposes, I for my part accept Mr. Crane's submission [for the plaintiff] that the word h j

a "contract" in this context should be construed widely enough to include agreements such as those between the parties in this case which were clearly entered into with intent to create legal relations. Lawyers commonly speak of a "contract" being rendered void by reason of illegality or other matters and I see no reason why the language of O. 11, r. 1(1)(*d*) should be construed with any greater technicality so as to exclude cases such as the present.'

b However the wording of Ord 11, r 1(1)(d) differs from the wording of art 5(1) and does not contain the words 'in the courts for the place of performance of the obligation in question'.

Mr Pollock further relied on the judgment of the European Court in *Arcado SPRL v Haviland SA* Case 9/87 [1988] ECR 1539 at 1554–1555 (paras 11–13 and 15):

c '11 ... the concept of "matters relating to a contract" is to be regarded as an independent concept which, for the purpose of the application of the Convention, must be interpreted by reference principally to the system and objectives of the Convention in order to ensure that it is fully effective.

12. There is no doubt that a claim for the payment of commission due d under an independent commercial agency agreement finds its very basis in that agreement and consequently constitutes a matter relating to a contract within the meaning of Article 5 (1) of the Convention.

13. The same view must be taken of a claim for compensation for the wrongful repudiation of such an agreement as the basis for such compensation is the failure to comply with a contractual obligation. ...

e 15. In addition, Article 10 of the [Rome] Convention on the Law applicable to Contractual Obligations of 19 June 1980 (Official Journal 1980, L 266, p.1) confirms the contractual nature of judicial proceedings such as those in point inasmuch as it provides that the law applicable to a contract governs the consequences of a total or partial failure to comply with f obligations arising under it and consequently the contractual liability of the party responsible for such breach.'

To the same effect was the earlier judgment of the European Court in *Effer SpA v Kantner* Case 38/81 [1982] ECR 825 where the question referred to the court was:

g 'May the plaintiff invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even where the existence of the contract on which the claim is based is in dispute between the parties?'

In its judgment the court stated ([1982] ECR 825 at 834 (para 7):

h 'It follows from the provisions of the Convention, and in particular from those in Section 7 of Title II, that, in the cases provided for in Article 5(1) of the Convention, the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to j enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention. If that were not the case, Article 5(1) of the Convention would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision, it is sufficient for one of the parties to claim that the contract does not exist. On the contrary, respect for the aims and spirit of the Convention demands that that provision should be construed as

> meaning that the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract.'

Therefore the European Court has held that the national court has jurisdiction under art 5(1) to decide a dispute relating to the repudiation of a contract or a dispute as to the existence or non-existence of a contract.

In *Tesam Distribution Ltd v Schuh Mode Team GmbH* [1990] ILPr 149, where the defendants claimed that no contract had been entered into, the Court of Appeal applied the decision of the European Court in *Effer SpA v Kantner* and held (at 150):

> 'The court may determine a dispute whether a contract was entered into by the parties in exercise of its article 5(1) jurisdiction. Where the existence of the contract is in dispute, the court's jurisdiction to hear and determine a claim under article 5(1) does not depend upon the court first satisfying itself that the contract does exist. That is the subject matter of the dispute.'

In his judgment Stocker LJ recognised that if it were clear that no contract had existed a court would not have jurisdiction under art 5(1) and stated (at 165 (para 44)):

> 'If in order to decide the question of jurisdiction it is necessary to determine finally whether a contract exists or not it would seem to follow that if the conclusion arrived at was that no contract existed then ex hypothesi the conditions of article 5(1) would not be met and the court would have no jurisdiction.'

He later stated (at 165 (para 45)):

> 'In my view the effect of the *Effer v. Kantner* decision is that a court other than a court of the defendant's country of domicile cannot accept jurisdiction on the mere assertion or pleading of the plaintiff. There must be evidence adduced from which a conclusion could properly and genuinely be drawn that a contract existed and that the place of performance was the country in which the action was brought. Once jurisdiction can properly be established on this basis then the effect of article 5(1) in the light of the *Effer v. Kantner* decision is that the court has jurisdiction finally to determine the issues between the parties. If after full trial the conclusion is that no contract existed then since the court had jurisdiction to try the issue that determination is final and binding upon the parties.'

Therefore, whilst as a matter of legal analysis there may be fine distinctions between a contract which is void and a contract which is voidable or unenforceable, there is nevertheless in my opinion for the purposes of art 5(1) a distinction, which is not difficult to apply in practice, between a case where one party claims that the contract is, or was, in existence and the other party claims that the contract never existed or has ceased to exist, and a case such as the present one where both parties accepted before the commencement of the action that the contract was void ab initio.

Accordingly, in my opinion, the judgments of the European Court give guidance in three respects to a national court considering the ambit of art 5(1) of the convention, and therefore to a court of the United Kingdom considering the

ambit of art 5(1) of Sch 4 to the 1982 Act. First, the special jurisdiction given by art 5(1) constitutes a derogation from the general rule contained in art 2 that jurisdiction is vested in the courts of the state where the defendant is domiciled, and accordingly a wide interpretation of art 5(1) should be avoided. Secondly, whilst, as in the *Martin Peters* case the words 'in matters relating to a contract' can apply to a consensual obligation similar to that created by a contract, nevertheless when read with the words 'in the courts for the place of performance of the obligation in question', the jurisdiction under art 5(1) only arises when the claim is to enforce an obligation arising under a contract or a relationship akin to a contract such as membership of an association. Thirdly, the reason for the national court having jurisdiction is that there is a close connecting factor between the dispute giving rise to the claim and that court. Having regard to these considerations, and to the further consideration that in *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 the European Court treated a claim for unjust enrichment as a cause of action separate and distinct from a claim in contract. I consider that the present action for restitution does not come within art 5(1). Accordingly I am in agreement with the decision of Hirst J at first instance ([1994] 4 All ER 865, [1993] QB 429) and the conclusion of Leggatt LJ in his dissenting judgment in the Court of Appeal ([1996] 2 All ER 257, [1996] QB 678). As I consider that the claim must be to enforce an obligation arising under a contract or a relationship akin to a contract I respectfully differ from the view of Roch LJ ([1996] 2 All ER 257 at 269, [1996] QB 678 at 694) that in art 5(1) the word 'contract' embraces a contract that is a nullity, and from the view of Millett LJ ([1996] 2 All ER 257 at 274, [1996] QB 678 at 699), that the word 'contract' in art 5(1) can include 'void contract' and that the expression 'place of performance of the obligation in question' can mean 'intended place of performance of the supposed obligation'.

Kleinwort submitted, in the alternative, that the claim fell within art 5 (3) of Sch 4. As the claim is one based on unjust enrichment, and not on tort or delict, I consider that it does not come within art 5 (3). In my opinion it would be inappropriate to apply the words 'where the harmful event occurred' to a claim for unjust enrichment. I further consider that the judgment of the European Court in *Kalfelis'* case operates to strengthen the submission of Glasgow that art 5(3) is inapplicable rather than to assist the argument of Kleinwort. In that case question 2 referred to the court for a preliminary ruling was in these terms ([1988] ECR 5565 at 5569):

> '(a) Must the term "tort" in Article 5(3) of the EEC Convention be construed independently of the Convention or must it be construed according to the law applicable in the individual case (*lex causae*), which is determined by the private international law of the court applied to?
>
> (b) Does Article 5(3) of the EEC Convention confer, in respect of an action based on claims in tort and contract *and for unjust enrichment*, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort?' (My emphasis.)

The court considered that question in paras 14 to 21 of its judgment and answered the question as follows:

> '(2)(a) The term "matters relating to tort, delict or quasi-delict" used in Article 5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and

which are not related to a 'contract' within the meaning of Article 5(1); (b) A court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.' (See [1988] ECR 5565 at 5584–5586 and 5587.)

I agree with Hirst J that the word 'liability' in answer 2(a) must be interpreted as meaning liability within the scope of art 5(3), namely liability in tort, delict or quasi-delict. Accordingly, in my opinion, the court in its answer to question 2(b) is stating that a court which has jurisdiction under art 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over an action in so far as it is not based on tort or delict but is based on unjust enrichment.

Accordingly I consider, for the reasons which I have given, that the decision of Hirst J was correct and I would allow this appeal.

Appeal allowed.

Celia Fox Barrister.

AIB Finance Ltd v Debtors

CHANCERY DIVISION

CARNWATH J

21 FEBRUARY, 18 MARCH 1997

Mortgage – Sale – Duty of mortgagee – Standard of duty in exercising power of sale – Security including business – Duty to ensure that value of combined asset maximised – Duty to take into account effect of sale on goodwill – Duty to safeguard and maintain business.

Evidence – Fresh evidence – Appeal – Bankruptcy – Evidence relating to valuation of premises subject to a charge – Court's power to receive evidence submitted after trial – Whether petition to set aside a statutory demand in bankruptcy proceedings hearing on the merits – RSC Ord 59, r 10(2).

The defendants were the registered proprietors of premises which they ran as a post office, newsagent and off-licence. In October 1988 they entered into a mortgage with the plaintiff bank under the terms of which both the premises and the goodwill of the business were charged by way of security for a loan of £160,000. By 1994 they had ceased making payments and a restructuring of the loan was agreed. In September 1995, after further defaults in payments, the bank obtained an order for possession and judgment for arrears amounting to £212,806·72. The property was sold in April 1996 for £43,500 and statutory demands were served by the bank for the balance of the judgment debt which amounted to £143,951·42. The defendants applied to set aside the statutory demands on the grounds that if the premises had been sold as a going concern the proceeds of sale would have amounted to approximately £180,000. They did not however adduce any valuation evidence to support that assertion. The district judge allowed the application, holding that there was an arguable case that the bank had been negligent in failing to ensure that the business was preserved as a going concern and that the defendants had a substantial counterclaim. However, she failed to take account of whether the amount of the counterclaim equalled or exceeded the amount of the debt as required by r 6.5(4)(a)[a] of the Insolvency Rules 1986. The bank appealed, contending that it had owed no duty in law to maintain the business because doing so involved taking some degree of risk. At the hearing of the appeal the defendants applied to place new valuation evidence before the court.

Held – (1) When exercising his power of sale, a mortgagee whose security included a business carried on on the property charged, had a duty to ensure that the value of the combined asset was maximised. Accordingly, although he had a free choice as to the timing of the sale, once he decided to exercise his power to repossess and sell the property, he had to take into account the effect of that on the value of the goodwill. In such circumstances, therefore, he had a duty to safeguard and maintain the business and should normally make arrangements to ensure continuity before taking physical possession as otherwise there would inevitably be a break in the business and consequent damage to its value as a

a Rule 6.5(4) is set out at p 680 *c* to *e*, post

going concern. It followed therefore that it was arguable that the bank had been negligent (see p 686 *j* to p 687 *a f* to *j* and p 690 *g*, post); *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633 and *Palk v Mortgage Services Funding plc* [1993] 2 All ER 481 applied.

(2) On an appeal to the High Court from the decision of a bankruptcy county court, the court had power by virtue of r 7.49[b] of the 1986 rules and RSC Ord 59, r 10(2)[c] to receive further evidence on special grounds where there had been a trial or hearing on the merits. In the context of an application to set aside a statutory demand in bankruptcy proceedings the merits in question were the merits of the potential defences specified in paras (a) to (d) of r 6.5(4) of the 1986 rules and there could only be said to have been a final decision on the merits where the application to set aside the statutory demand had failed. It followed, in the instant case, where the application to set aside the statutory demand had succeeded, that there had been no hearing on the merits. Nevertheless, the court still had a general discretion whether to admit fresh evidence and in the circumstances would do so since the justice of the case required it. However, having regard to the evidence, although the defendants had an arguable counterclaim, it was not one which had any prospect of being found to equal or exceed the amount of the statutory demand. Accordingly, the appeal would be allowed (see p 680 *j*, p 681 *b* to *d g*, p 684 *b d*, p 685 *d e* and p 690 *g* to *j*, post).

Notes

For the duty of mortgagee exercising power of sale, see 32 *Halsbury's Laws* (4th edn) para 726.

For the Insolvency Rules 1986, rr 6.5, 7.49, see 3 *Halsbury's Statutory Instruments* (1995 reissue) 385, 442.

Cases referred to in judgment

China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, [1990] 1 AC 536, [1990] 2 WLR 56, PC.

Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd [1971] 2 All ER 633, [1971] Ch 949, [1971] 2 WLR 1207, CA.

Debtor, Re a (No 59 of 1987, Newcastle-upon-Tyne) (1988) Independent, 1 February.

Debtor, Re a (No 2389 of 1989), ex p Travel and General Insurance Co plc v The debtor [1990] 3 All ER 984, [1991] Ch 326, [1991] 2 WLR 578.

Gilmartin (a bankrupt), Re, ex p the bankrupt v International Agency and Supply Ltd [1989] 2 All ER 835, [1989] 1 WLR 513.

Industrial and Commercial Securities plc, Re (1989) 5 BCC 320.

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Langdale v Danby [1982] 3 All ER 129, [1982] 1 WLR 1123, HL.

Lodge Green Ltd v Leitch (t/a Manx Electronics) [1982] CA Transcript 436.

McHugh (decd) v Union Bank of Canada [1913] AC 299, PC.

Palk v Mortgage Services Funding plc [1993] 2 All ER 481, [1993] Ch 330, [1993] 2 WLR 415, CA.

Palmer v Barclays Bank Ltd (1972) 23 P & CR 30.

Skone v Skone [1971] 2 All ER 582, [1971] 1 WLR 812, HL.

Tse Kwong Lam v Wong Chit Sen [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.

Weller v Dunbar [1984] CA Transcript 18.

Whitley v Challis [1892] 1 Ch 64, CA.

b Rule 7.49, so far as material, is set out at p 680 *j*, post

c Rule 10(2) is set out at p 681 *c d*, post

Cases also cited or referred to in skeleton arguments

Debtor, Re a (No 1 of 1987, Lancaster), ex p the debtor v Royal Bank of Scotland plc [1989] 2 All ER 46, [1989] 1 WLR 271, CA.

Debtor, Re a (No 415/SD/93), ex p the debtor v IRC [1994] 2 All ER 168, [1994] 1 WLR 917.

Appeal

By notice dated 2 October 1988 the appellant bank, AIB Finance Ltd, appealed from the order of District Judge Fawcett sitting at Brighton County Court on 6 September 1996 setting aside the statutory demands dated 22 February 1996 served by the bank on the respondent debtors. The facts are set out in the judgment.

David Iwi (instructed by *Moran & Co*, Tamworth) for the bank.

Peter Leighton (instructed by *R G F Vickery & Co*, Bexleyheath) for the debtors.

Cur adv vult

18 March 1997. The following judgment was delivered.

CARNWATH J. The appellant bank appeals against two orders made by District Judge Fawcett at Brighton County Court on 6 September 1996. The cases relate respectively to the respondent debtors, and the facts are for material purposes the same in each case. The district judge set aside statutory demands served by the bank on the debtors, and the bank appeals against that decision.

The debtors were the registered proprietors of the Post Office Stores at Cross-in-Hand. They ran it as a post office, newsagent and off-licence. On 10 October 1988 they entered into a mortgage with the bank, charging both the premises and 'the goodwill' by way of security for a loan of £160,000 and interest. 'The goodwill' was defined in the preamble as including the goodwill of the business carried on on the premises and the benefit of any licences held in connection with it or any ancillary rights. They fell into arrears and by 1994 they had stopped making any payments. A restructuring of the loan was agreed in August 1994 but following a further default the bank sought repossession.

On 14 September 1995 the bank obtained judgment in the Eastbourne County Court for possession, and arrears of principal and interest totalling £212,806·72. The bank repossessed the property in December 1995. It was sold in April 1996 for £43,500. The sale by the bank followed advice from two sets of local surveyors. Brian Kingston advised that the possibility of continued use as a shop in the long term was limited, and put the current market value at £35–40,000. Crickmay & Partners saw the possibility of continued Post Office use as a 'substantial incentive', but thought it to be a 'longshot' whether anyone would be prepared 'to risk substantial sums of money to relaunch the retail trade once the business had been closed for a number of months'. They recommended an asking price of £49,950 and consideration of offers over £40,000. The marketing of the property is described in Crickmay's letter of 9 May 1996.

The bank also obtained £32,299·62 in respect of the sale of other property subject to a charge at Wickham Lane, London. Statutory demands for the balance, by then amounting to £143,951·42, were served on 22 February 1996. Applications were made by the debtors on 27 March 1996 to set aside the statutory demands. The grounds of the application, in summary, were that the Post Office Stores should have been sold as a going concern, and if it had been it

would have been worth approximately £180,000. The district judge allowed the applications. She said:

> 'The crucial question is whether AIB Finance Ltd was negligent in not ensuring that the business was preserved. In my opinion, there is an argument that AIB Finance Ltd should have ensured that the business was preserved. Failure to preserve the business affords the debtors with a defence of some substance and possibly a substantial counterclaim and the point should be argued elsewhere. Since there is a possibility that there is a defence, it is appropriate for the statutory demands to be set aside. The point in issue should be argued in other proceedings.'

The relevant statutory provisions relating to the setting aside of statutory demands are in the Insolvency Rules 1986, SI 1986/1925. The grounds upon which the court may allow the application are in r 6.5(4), as follows:

> '(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or (b) the debt is disputed on grounds which appear to the court to be substantial; or (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or (d) the court is satisfied, on other grounds, that the demand ought to be set aside.'

Before me it is agreed that the only relevant ground is para (a).

It is also common ground that the district judge's reasoning is flawed, because she has based her decision on her conclusion that there was an arguable counterclaim, without considering whether such counterclaim 'equals or exceeds the amount of the debt'. Had she addressed that issue she would have found herself in some difficulty, since the applicants adduced no valuation evidence before her to support their assertion that the premises as a going concern were worth £180,000.

Before me they seek to supplement the evidence by adducing a report by a firm of chartered surveyors, Langleys, dated 4 December 1996, which concludes that the value of the freehold, goodwill, fixtures and fittings prior to closing would have been 'in the region of £185,000'. They also give their views as to the manner in which the property ought to have been marketed, including advertising in specialist publications. The bank submit that this evidence is not admissible, since it could and should have been obtained prior to the hearing before the district judge. This raises an issue of principle as to the court's discretion to admit evidence in such circumstances.

New evidence in insolvency appeals

The authorities to which I have been referred do not disclose a straightforward answer to this question and it is desirable therefore to consider it in some detail. The right of appeal to the High Court against decisions of the county court in bankruptcy matters is conferred by s 375(2) of the Insolvency Act 1986 and r 7.48(2). Procedure is governed by r 7.49, which provides that 'the procedure and practice of the Supreme Court relating to appeals to the Court of Appeal' are to apply, save that references to the Court of Appeal are to be treated as replaced by references to a single judge of the High Court.

So far as this court is concerned, it is established that the appeal is a 'true appeal', rather than a complete hearing de novo, so that the court will only interfere with the decision below if the judge has erred in law or otherwise in principle (see *Re Gilmartin (a bankrupt), ex p the bankrupt v International Agency and Supply Ltd* [1989] 2 All ER 835, [1989] 1 WLR 513 per Harman J, *Re Industrial and Commercial Securities plc* (1989) 5 BCC 320 per Knox J and *Re a debtor (No 2389 of 1989), ex p Travel and General Insurance Co plc v The debtor* [1990] 3 All ER 984, [1991] Ch 326 per Vinelott J). The approach follows that of the Court of Appeal in relation to decisions of the judge at first instance on matters of discretion.

The provisions relating to the admission of new evidence are in RSC Ord 59, r 10(2), which provides:

> 'The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.'

Thus, where there has been 'a trial or hearing on the merits' it is necessary to show 'special grounds' before fresh evidence may be admitted. The grounds upon which the Court of Appeal will act in such cases are well established. Three conditions must be satisfied:

> '... first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.' (See *Ladd v Marshall* [1954] 3 All ER 745 at 748, [1954] 1 WLR 1489 at 1491, approved by the House of Lords in *Skone v Skone* [1971] 2 All ER 582 at 586, [1971] WLR 812 at 815.)

Where there has not been a trial on the merits, the court has a general discretion whether to admit fresh evidence, although clearly one factor to be taken into account is the reason why the evidence was not adduced in the court below.

I have been referred to *Re a Debtor (No 59 of 1987, Newcastle-upon-Tyne)* (1988) Independent, 1 February, in which Knox J refused to admit evidence on the appeal to the High Court. The case summary records the matter thus:

> 'The single High Court judge sitting on appeal against the dismissal refused to admit affidavits sworn after the dismissal on the grounds that *Ladd v Marshall* was applicable having regard to the way in which the Rules of the Supreme Court had been drafted and that in principle, the procedure applicable to the Court of Appeal under RSC Ord 59, r 10(2) had been imposed upon the single High Court judge when exercising appellate jurisdiction unless there was overwhelming reason for not so doing.'

Unfortunately, the judgment is not reported more fully elsewhere.

In *Re Gilmartin* Harman J cited this decision in support of his conclusion as to the appropriate approach to the substantive appeal, but he did not need to deal specifically with the question of new evidence. Normally, of course, I would

regard such a decision as that of Knox J as sufficient for my purposes. However, the short report does not show how the learned judge dealt with the question whether there had been 'a hearing on the merits'. In the context of a petition to set aside a statutory demand in bankruptcy proceedings, that does not seem to me an easy concept to apply. Furthermore, that case differed from the present, in that the county court had dismissed the application, thereby impliedly holding that there was on the merits no answer to the bankruptcy notice; in the present case the district judge has allowed the application, on the basis that there is an arguable counterclaim, which ought to be tried on the merits. Accordingly, it is right that I should look at the matter de novo.

The Supreme Court Practice 1997 para 59/10/8 cites as the leading authority a decision of the House of Lords, *Langdale v Danby* [1982] 3 All ER 129, [1982] 1 WLR 1123. In that case the plaintiff had obtained summary judgment under Ord 86 for specific performance of a contract with the sale of land. On the appeal he sought to adduce fresh evidence, including evidence contradicting an admission made before the judge. The Court of Appeal admitted the fresh evidence and allowed the defendant's appeal in the light of that evidence. The House of Lords held that the summary judgment was a judgment after a hearing on the merits for the purposes of Ord 59, r 10(2), and that accordingly the Court of Appeal had misdirected themselves in holding that it was open to them to admit the new evidence in the absence of special grounds. Lord Bridge thought the words 'hearing on the merits' were—

> 'as clearly apt to embrace a hearing under Ord 86 which results in judgment for the plaintiff as the trial of an action. What the judge must do before he gives judgment for the plaintiff under r 4 is to be satisfied that the merits of the plaintiff's claim are duly verified as required by r 2 and, more importantly, that the defendant has failed to mount a sufficient challenge to those merits on the law or on the facts to show that there is any issue or question in dispute which ought to be tried. In other words, the judge can only give judgment for the plaintiff if satisfied that there are no such merits on the defendant's side as to warrant giving leave to defend. In the ordinary use of language, a hearing leading to the conclusion that there are no merits to be tried is just as much a hearing "on the merits" as a full scale trial of the disputed issues.' (See [1982] 3 All ER 129 at 137, [1982] 1 WLR 1123 at 1132.)

Lord Bridge referred to the ability of 'people who have the legal aid fund at their command ... to exhaust the resources of an antagonist who does not qualify for legal aid'. He continued ([1982] 3 All ER 129 at 137, [1989] 1 WLR 1123 at 1132):

> 'But, leaving that aside, the principle that a successful litigant is not likely to be deprived of his judgment seems to me of particular importance to a plaintiff, frequently pursuing a recalcitrant and obstructive defendant, who has secured a judgment by showing that a defendant has no defence.'

Commenting on the conditions laid down in *Ladd v Marshall*, he said ([1982] 3 All ER 129 at 138, [1982] 1 WLR 1123 at 1133):

> 'In the situation arising on an appeal to the Court of Appeal from a summary judgment, the application of these conditions and perhaps the conditions themselves will require some modification. It may well be that the standard of diligence required of a defendant preparing his case in opposition to a summons for summary judgment, especially if under

> pressure of time, will not be so high as that required in preparing for trial. The second and third conditions will no doubt be satisfied if the further evidence tendered is sufficient, according to the ordinary principles applied on applications for summary judgment, to raise a triable issue. But I can see no injustice at all in requiring a defendant to use such diligence as is reasonable in the circumstances to put before the judge on the hearing of the summons, albeit in summary form, all the evidence he relies on in defence, whereas it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but was not produced.'

Lord Bridge's reasoning is specifically directed to summary judgment in favour of the plaintiff, since that requires a decision that the defence has no merits justifying a trial. The same reasoning does not apply to a decision refusing summary judgment, since such a decision recognises that there are merits in the defence which require a full hearing.

The Supreme Court Practice 1997 para 59/10/8 does not refer to any authority specifically on the latter point, but it refers to *Weller v Dunbar* [1984] CA Transcript 18, in which it was conceded that an order setting aside a default judgment is not a decision after a 'hearing on the merits' for these purposes. The Court of Appeal regarded that concession as correct. Stephenson LJ said:

> 'Mr Nelson has properly conceded that this is not a case in which it can be said that the judgment of Farquharson J was a judgment on the merits after a trial; it clearly was nothing of the kind. There was a reference to the merits which enabled the judge to say, not after a trial but in advance of a trial, "I think there ought to be a trial".'

The court accepted that even in such a case the *Ladd v Marshall* tests should be taken into account, but the court was not limited to those considerations:

> 'In this case as it seems to me this court must look at the whole position and consider whether, in the interests of justice, it is right or wrong to allow this evidence to be given.'

The court allowed the new evidence to be admitted, even though it directly contradicted the position taken by the defendant before the judge, and even though he had delayed for two years in applying to set aside the judgment. The only mitigating factor appears to have been the fact that the defendant was aged 14 at the date of the accident which was the subject of the claim.

The Supreme Court Practice, correctly in my view, suggests that the same reasoning would apply by analogy where an application for summary judgment is refused, or where conditional leave to defend is granted. In such cases the court is not reaching a judgment after a hearing on the merits, but is saying that there are merits which ought to be further investigated in a full trial.

Similar considerations arise in the context of applications to set aside statutory demands, but with different effects. The issue for the court (at least under paras (a) to (c)) is whether the applicant's case 'appears' to have merits which ought to be further investigated. If it does, the statutory demand is set aside. For this reason, Mr Iwi for the bank, submits that there has been a decision after a hearing on the merits of the particular 'cause or matter', namely the application to set aside the statutory demand, which has been finally disposed of on its own

merits, even though the merits of the underlying case fall to be investigated in further proceedings.

I see the force of this argument on a strict reading of r 10(2), but it does not seem to me to give effect to the purpose of that provision or the reasoning of the House of Lords. In the special context of this procedure the relevant 'merits' in my view are the merits of the potential defences specified in paras (a) to (d). Only if the application to set aside the demand fails, can there be said to have been a final decision 'on the merits', in the sense explained by Lord Bridge. If the application succeeds, the merits fall to be investigated in separate proceedings. Although the decision may finally dispose of the particular application to set aside the statutory demand, it does not dispose of the underlying cause. It is therefore directly analogous to a decision to refuse summary judgment, or to give conditional leave to defend. The position is distinguishable from the decision of Knox J, to which I have referred, where the application had been dismissed, this amounting in effect to a decision that the defence had no merits.

In my view therefore, the decision of the district judge in this case to set aside the statutory demand was not a judgment after a hearing 'on the merits' for the purposes of r 10(2). It therefore becomes a matter of my discretion as to whether the new evidence should be admitted. To that question I now turn.

Admission of evidence

The reasons for the late submission of the expert evidence are given in an affidavit of the solicitor Anita Bharaj. It was only on 6 August 1996 that the legal aid certificates were transferred to her firm from the previous solicitors, in advance of the hearing before District Judge Fawcett fixed for 6 September. Counsel was instructed on 14 August and her advice was received on 27 August. At that stage counsel did not advise seeking an expert's report and in any event there would not have been time to obtain it before the hearing. However, an affidavit of the second debtor was sworn on 27 August, in which she referred to her own researches with local estate agents and others, and sales of other properties in the area. On 4 September the bank filed two further affidavits in response to the second debtor's affidavit, and there was no opportunity for a further response to that before the hearing on 6 September. Following the district judge's decision in the debtors' favour, and the bank's notice of appeal on 2 October, there were further applications to the Legal Aid Board to enable the debtors to be represented on the appeal. At the end of October new counsel was instructed who advised at the beginning of November that expert evidence would be required if the appellants were to have reasonable prospects of upholding the appeal. The hearing of the appeal had been fixed on 14 November 1996 before Judge Weeks, but this was adjourned to enable a report to be obtained, without prejudice to the bank's case that the evidence would not be admissible.

A further affidavit of the second debtor was sworn on 9 December 1996 exhibiting the report of Mr Mustapha of Langleys dated 4 December. She also exhibited a report prepared for the bank in April 1994 by a Mr Madden of Asset Management and Recovery Services Ltd (AMR), which was disclosed by the bank following the hearing before Judge Weeks. This had recommended the appointment of a manager following repossession, and had expressed the view that the value at that time of the property and the business as a going concern was £130,000, as compared to a value if closed for trading and under a forced sale of £75,000. Finally, a further affidavit was sworn by Mr Isherwood for the bank on

17 December 1996, again without prejudice to the contention that no further evidence should be admitted.

If my discretion were confined by the conditions laid down in *Ladd v Marshall*, then they would not in my view be satisfied. The mere fact that the solicitors acted with reasonable diligence, following their instructions shortly before the September hearing, would not be enough for the respondent, who must accept responsibility for the previous conduct of the matter, of which I have no evidence. In one of the cases referred to in *The Supreme Court Practice 1997*, *Lodge Green Ltd v Leitch* (*t/a Manx Electronics*) [1982] CA Transcript 436 (a transcript of which I have seen since the hearing), the Court of Appeal dealt specifically with the position of a solicitor recently instructed and faced with inadequate affidavits and material. It held that in those circumstances, the test of reasonable diligence being objective, it was the duty of the solicitor if he found the material to be inadequate to apply for an adjournment, and if he failed to do so he would subsequently be bound by the material on which the judge was then asked to exercise his discretion.

However, for the reasons I have given, I think I am entitled to exercise a wider discretion. It seems to me that the justice of the case requires that the new evidence should be admitted. There is no evidence of any prejudice to the bank. This is not a case where they are being deprived of a final judgment. The district judge's decision meant that they had to come to this court in any event. The issues with which they had to deal are not materially widened in scope by the new evidence. Bearing in mind the seriousness for the respondents of the bankruptcy procedure, the interests of justice would not be served if the court had to consider the material without the assistance of the new evidence, in particular the consideration given by the bank's own adviser in 1994 and the independent report for Langleys. I therefore hold that the new evidence should be admitted.

The bank's duty as mortgagee

As I have said, the judge held that there was an arguable case that the bank was negligent in failing to ensure that the business was preserved. Mr Iwi, for the bank, before me, submits that this assumes a duty which the law does not impose. As he puts it in his skeleton argument: 'Running a business involves taking risks ... However a mortgagee who sells property is not obliged to run risks in order to effect the sale ...' He cites in support the words of Lord Templeman in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 at 59, [1983] 1 WLR 1349 at 1355:

> 'The mortgagee is however not bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss.'

This raises the question as to the extent of the mortgagee's duty where the charge extends not simply to the property but to a business carried on there. Lord Templeman's words were not directed to that situation, and there appears to be little authority on the matter. The duties of a mortgagee exercising a power of sale have been the subject of considerable discussion, and the expressions used to describe it have not always been consistent. I was referred to a valuable discussion of the authorities in Gray *Elements of Land Law* (2nd edn, 1993) pp 1010ff. However, the modern law is normally taken as authoritatively explained by the Court of Appeal in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*, *Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] 2 All ER 633, [1971] Ch 949. The

crucial passage is in the judgment of Salmon LJ, where he said ([1971] 2 All ER 633 at 644, [1971] Ch 949 at 966): a

> 'Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the "proper price", others to the "best price" ... I cannot see any real difference between them. "Proper price" is perhaps a little nebulous, and "the best price" may suggest an exceptionally high price. That is why I prefer to call it "the true market value".' b

He concluded ([1971] 2 All ER 633 at 646, [1971] Ch 949 at 968): c

> '... a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be judged to be in default unless he is plainly on the wrong side of the line.' d

One important qualification to this general principle is established, that is that once a power of sale has accrued the timing of the sale is a matter for the mortgagee. As Salmon LJ put it ([1971] 2 All ER 633 at 643, [1971] Ch 949 at 965):

> 'Once the power has accrued the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes.' e

A more recent statement of the same principle is to be found in *Palk v Mortgage Services Funding plc* [1993] 2 All ER 481 at 486–487, [1993] Ch 330 at 337–338, where Nicholls V-C expresses the matter thus: f

> '... a mortgagee does owe some duties to a mortgagor. As Lord Templeman noted in *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at 842, [1990] 1 AC 536 at 545, a mortgagee can sit back and do nothing. He is not obliged to take steps to realise his security. But if he does take steps to exercise his rights over his security, common law and equity alike have set bounds to the extent to which he can look after himself and ignore the mortgagor's interests. In the exercise of his rights over his security the mortgagee must act fairly towards the mortgagor ... he must take reasonable care to maximise his return from the property. He must also take reasonable care of the property. Similarly, if sells the property: he cannot sell hastily at a knock-down price sufficient to pay off his debt ... He must exercise reasonable care to sell only at the proper market value. As Lord Moulton said in *McHugh (decd) v Union Bank of Canada* [1913] AC 299 at 311: "It is well settled law that it is a duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."' g h j

In principle, where, as here, the goodwill of a business forms part of the mortgagee's security, the same approach should apply. It is not sufficient for the

mortgagee simply to repossess the property, without regard to the effect on the value of the goodwill. If he is to take 'reasonable care to maximise his return from the property', he must, in exercising his right to repossess and sell the property, take account of the effect of that on the value of the goodwill.

The only case cited to me in which this question is touched upon, is *Palmer v Barclays Bank Ltd* (1972) 23 P & CR 30. In that case the charge was over a property, which had the benefit of planning permission for use as a restaurant and guest house, and for which the owner had obtained a Justices' on-licence and a music and dancing licence. The property had been advertised for sale by the mortgagee, without mentioning the planning permission or the music and dancing licence. One of the issues considered by Goulding J was whether the goodwill of the current business, with the benefit of the permission and a licence, should have been included in the sale. It was held (at 37) that, since the charge did not in terms extend to the goodwill, there was no such duty:

> '... the mortgagee can pass the building with all its advantages, but cannot restrain the competitive activity of the mortgagor (unless his charge expressly or by necessary implication includes the goodwill of the business) ... In my judgment, the defendant in the present case offered and sold all that its charge empowered it to sell.'

Goulding J referred to *Whitley v Challis* [1892] 1 Ch 64, where the Court of Appeal refused to appoint a manager of a hotel, at the instance of a mortgagee whose security comprised the building but did not mention the goodwill. That case itself contrasts the position where the goodwill is included in the charge. In such a case, as Bowen LJ (at 71) recognised:

> 'If indeed the business and the goodwill of the hotel had been included in the security, either by express terms or by implication, then I do not doubt that the court might in a fit case appoint a manager to manage that which, as being included in the security, those entitled to the benefit of the security might have a right ultimately to sell.'

Although that case does not refer to the duty of the mortgagee in such circumstances, the corollary of the power there recognised is that he should act fairly to the mortgagor in the exercise of that power, to ensure that the value of the combined asset is maximised. He may have a free choice as to the timing of any sale, but once he decides to exercise his power of sale over the property, fairness requires that he should take into account the effect of that sale on the value of the goodwill.

Accordingly, I reject the submission that there is no duty in law to maintain the business, merely because running a business inevitably involves taking some degree of risk. Mr Iwi says that in any event there could be no duty here, as the business had been closed down before the bank took possession. However, that may have been the inevitable consequence of the enforcement of the order for possession. If the bank had a duty to safeguard the business, it would normally involve making arrangements to ensure continuity before taking physical possession. Otherwise there would inevitably be a break in the business, and consequent damage to its value as a going concern.

I do not find it possible to reach a conclusion that there is no arguable merit in the debtors' case without more detailed investigation of the events leading up to the possession than is appropriate at this stage. If this were the only point in the case I would regard it as being a matter properly within the discretion of the district judge, with which it would not be appropriate for me to interfere. The

precise nature of the mortgagee's duty in such circumstances and its application to the facts of this case is something which would require investigation at trial. The fact that a property and business, valued by the bank's own advisers at £130,000 in 1994, realised a figure of only £43,000 in 1996 appears to me (as it did to the judge) to raise at least a prima facie case that the bank fell short of the duties it owed to the mortgagor.

Value of the counterclaim

Contrary to the judge's view, however, the matter does not rest there. It is not sufficient to show that there is a substantial counterclaim; it must be a counterclaim 'which equals or exceeds the amount of the debt or debts specified in the statutory demand'. The demand in this case was dated 22 February 1996. The amount specified as owing was £187,451·42. This represented the judgment debt of £212,806·72 with interest, less the sum of £32,299·62 stated as received on 21 December 1995. The value of the charge over the Post Office Stores, was put at £43,500, leaving the amount owing payment of which was claimed by the demand as £143,951·42. The matter was put in that way because, at the time of the demand, the sale of the property had not been completed. In April 1996 it was, as I have said, sold for £43,500.

It follows that, for the applicants to succeed in setting aside the demand, they must show a prima facie case that the counterclaim is likely to exceed £143,951·42; in effect that the property should properly have been sold for £187,000-odd rather than £43,500. The debtors' case as put in their original affidavit was that the property was worth £180,000 at the time of the repossession hearing, and that 'provided that the Post Office and off-licence business was to be on-going they would have at that time been able to make monthly repayments in the sum of £1,750'.

As I have said, Mr Mustapha's report supports a figure of £185,000 for the value of the property, business, and fixtures and fittings immediately prior to closing in November 1995. There is a small gap between this figure and the amount which would need to be established to show a counterclaim equal to or greater than the amount in the statutory demand. However, the claim has not yet been formulated in detail. It seems to me likely that if the debtors were to succeed on their basic claim of negligence, it is at least arguable that the bank's duty commenced before the actual date of repossession, and there would be some consequential loss arising from that period, if only because, if continuity of the business was to be achieved, it is likely that they would have continued to be employed and earning salary during the transition period. It seems to me therefore it would not be right to refuse the application merely because of the small potential gap between Mr Mustapha's figure and the figure required to meet the statutory demand.

The issue therefore is whether the debtors have any realistic prospect of establishing at trial the full amount of Mr Mustapha's valuation, against the background of the other evidence. Mr Iwi, for the bank, makes four main criticisms of the report.

(1) The value prior to closing is irrelevant since the business was closed before the Bank took possession, and there was no duty on the bank to re-establish the business.

(2) Mr Mustapha has ignored material evidence. In particular, the trading figures used by him are inconsistent with figures that the borrowers themselves had supplied to the bank earlier in 1995, and he ignores the valuations obtained by the bank prior to the sale.

(3) The valuation takes no account of the discount appropriate when considering a sale by a mortgagee in possession.

(4) Mr Mustapha has failed to make allowances for the dilapidated state of the property.

I shall take these points in turn. Mr Iwi's first point to my mind begs one of the questions which is at the heart of the negligence case. As I have said, I do not accept that it is open to a mortgagee, whose security includes both the property and the business, simply to seek possession of the property, without taking such steps as are reasonable to ensure that the value of the other part of the security is protected.

The evidence before me contains very limited information on this aspect. Mr Madden of AMR advised in April 1994 that the best course of action for the bank would be to repossess, and to appoint AMR as managers, and they advised seeking the co-operation of the borrowers 'as significant goodwill could be lost if the borrowers become alienated'. I am told there was some form of restructuring of the loan in August 1994, but it is not clear what form that took. At around the time of the possession order, on 18 September 1995, the second debtor wrote to the bank referring to 'other parties involved with the business concern ... with whom business arrangements need to be sorted out'. It is not clear precisely what she meant by this or whether there was any response. Mr Isherwood's affidavits for the bank rest on the position that since the business had closed by the time the bank took possession, the question of a 'going concern' sale did not arise. He does not deal with the events leading up to that position. Mr Iwi suggests there would have been difficulty in securing the transfer of the Post Office contract and the licences to a new manager, but the evidence does not show that this would have been an insuperable problem. It is implicit in Mr Madden's report that the goodwill could, with co-operation, be protected.

The second point is of more substance. Mr Iwi's most recent affidavit exhibits a letter from the first debtor dated 4 April 1995 (addressed to a Mr Glendenning of the bank) in which he is asking for some indulgence in relation to payments. In that letter he says: 'I want to explain from the outset that our trade has been devastated since the opening of a new Co-op Superstore in Heathfield.' He goes on to enclose details of the weekly takings to show that the weekly turnover has reduced to 'under £3,000 and towards the lower end of £2,000'. He says that as a result there is 'no money left to pay the last month's mortgage payment'. These figures are to be contrasted, says Mr Iwi, with the average annual turnover used by Mr Mustapha of £200,000, which implies average weekly takings of some £4,000. Furthermore, the fact that Mr Mustapha does not mention the more recent information, or the effects of the opening of the superstore in Heathfield suggests that either he has not investigated the matter fully, or the debtors have not been wholly open with him.

Unfortunately, there is no independent evidence of the value of the business in the period leading up to the possession order during 1995. There is the Madden report in April 1994, and there are various reports, including that of Mr Mustapha, in 1996. The bank's experts have considered the position following closure of the business and therefore do not assist on the value before closure. The only evidence of the 1995 position is that of the first debtor's letter. It is fair to say that, although he refers to the business being 'devastated', he goes on to speak of his current negotiations with the 'Spar' group and his hopes that there will be some return of shoppers from the Co-op after the initial interest has been lost. He also reports an increase in the Post Office business. Mr Leighton, for the debtors, on

instructions told me that Mr Mustapha had been given the accounts up to the time of closure, and that the downturn referred to by the first debtor in his letter was a temporary factor. However, I have no actual evidence on this, even though Mr Isherwood's latest affidavit has been available since December. I find it hard to believe that Mr Mustapha would not have referred specifically to the recent figures, if he had seen them.

The omission, in Mr Mustapha's report, of any reference to the most recent trading figures does seriously diminish its authority. A further weakness of Mr Mustapha's report is that, while it refers to the 1994 report, it does not mention the valuations obtained by the bank immediately prior to the sale, nor Crickmay's letter of 9 May 1996 giving details of the sale. It is not clear whether he was shown this evidence. Although they did not consider the going concern value, they are relevant to the valuation of the premises themselves. The reports are particularly important, because it was on the basis of that advice that the bank conducted the sale and accepted the offer of £43,500. Whatever criticisms may be made of it in relation to the failure to maintain the business, the premises themselves were marketed in accordance with proper professional advice. Even allowing for the points made in Mr Mustapha's report, it is difficult for the court to accept as credible a valuation for the premises (£100,000) more than twice that which was actually obtained.

I can deal more quickly with the other two points made by Mr Iwi. The proposition that Mr Mustapha should have assumed a discount for a sale by a mortgagee in possession again begs the question what the nature of the mortgagee's duties is. If proper arrangements had been made to secure continuity of the business, it is not self-evident that there would have been a discount on sale. As to the state of the property, again I have no satisfactory evidence of this at or about the time of the possession order, assuming this to be the relevant time. The reports which the bank obtained prior to sale were made after the property had been left vacant over the winter. Mr Mustapha has taken account of his own limited inspection, the information obtained from his clients, and the earlier report. However, it is inevitably a weakness of his evidence that he did not see the property at the time to which his valuation applies.

Conclusion

In conclusion, I am satisfied that there is a serious issue as to the extent of a mortgagee's obligations in circumstances such as this, and as to whether the bank fell short of them on the facts. There is an arguable counterclaim. However, even accepting Mr Mustapha's evidence at its highest, the case on the figures is marginal. To justify setting aside the statutory demand, there would need to be a realistic prospect that his evidence would emerge from a trial wholly unscathed. This in my view is not credible. There are serious weaknesses in his report, to which I have referred, particularly his failure to address the expert reports on which the bank acted, and his failure to refer to the up-to-date trading figures. In summary, there is an arguable counterclaim, but not one which has any prospect of being found to 'equal or exceed' the amount of the statutory demand. In these circumstances the requirements of ground (a) are not met, and I cannot uphold the district judge's order. The appeal is allowed.

Appeal allowed.

Celia Fox Barrister.

R v Chief Constable of the North Wales Police and others, ex parte AB and another

QUEEN'S BENCH DIVISION

LORD BINGHAM OF CORNHILL CJ AND BUXTON J

30 JUNE, 1, 10 JULY 1997

Police – Disclosure of information – Extent of powers – Police formulating policy of disclosing information about paedophiles resident in area to persons potentially at risk – Police acquiring information on two convicted paedophiles staying at caravan site in area – Police concluding that public interest required them to disclose identity of paedophiles to site-owner – Whether police policy of disclosing information lawful – Whether decision to inform site owner lawful.

The applicants were released from prison, having served the full period of their sentences less remission in respect of their convictions for serious sexual assaults against a number of children. They attempted to settle first in the north of England and then in the Colwyn Bay area. On each occasion, following the publication of articles in the local press detailing their names, whereabouts and offences, they were forced to leave, fearing violent reprisals from the local community. They subsequently obtained a caravan and moved to a caravan site in North Wales. The local police, having received information from another force detailing the risk that the applicants posed to children and vulnerable people within the community where they settled, became concerned at the risk the applicants might present if they remained at the site during the Easter holidays when the area would be full of children. Accordingly, in pursuance of its policy to disclose information where it was in the public interest to do so and necessary for the protection of individuals who might otherwise become the victims of crime, the police disclosed to the owner of the caravan site material relating to the applicants which had appeared in the press and which was therefore already in the public domain. Thereupon the site owner told the applicants that they would have to move on, which they did at once. The applicants thereafter applied for judicial review of the policy of the North Wales Police in relation to the release of information about paedophiles in their area and of the decision to inform the site owner of their presence on his site.

Held – As a general rule of good public administration, the police should not disclose information acquired in the course of performing their public duties, in relation to a member of the public, which was not generally available and was potentially damaging to that person if disclosed. However, where the police considered in the exercise of a careful and bona fide judgment that it was desirable or necessary in the public interest to make disclosure for the purpose of preventing crime or alerting members of the public to an apprehended danger, they were entitled to make such limited disclosure as was judged necessary to achieve that purpose. In the instant case, the policy adopted by the police recognised and acknowledged that disclosure was not to be made unless it was in the public interest and could only be justified for the protection of a member of the public who might otherwise become the victim of crime and who might be in need of protection. Since it was implicit that each case would be considered on

its merits and explicit that clearance at the highest level should be obtained before disclosure was made, the policy was not open to legal challenge. Moreover, in deciding to make disclosure in relation to the applicants on the grounds that it was necessary in the public interest, the police had come to a decision to which they were entitled. The application would accordingly be dismissed (see p 698 *f* to p 699 *b e* to p 700 *b*, p 702 *j* and p 703 *b j*, post).

Dictum of Viscount Cave LC in *Glasbrook Bros Ltd v Glamorgan CC* [1924] All ER Rep 579 at 582 and of Lord Parker CJ in *Rice v Connolly* [1966] 2 All ER 649 at 651 applied.

Notes

For general functions of chief officers of police, see 36 *Halsbury's Laws* (4th edn) para 249, and for cases on the subject, see 37(1) *Digest* (Reissue) 329–330, *2124–2127*.

Cases referred to in judgments

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, sub nom *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, [1988] 3 WLR 776, HL.

British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165, [1971] AC 610, [1970] 3 WLR 488, HL.

Elliott v Chief Constable of Wiltshire (1996) Times, 5 December.

Glasbrook Bros Ltd v Glamorgan CC [1925] AC 270, [1924] All ER Rep 579, HL.

Hellewell v Chief Constable of Derbyshire [1995] 4 All ER 473, [1995] 1 WLR 804.

Hooper v Eaglestone (1977) 34 P & CR 311, DC.

Northern Territory v Mengel (1995) 69 ALJR 527, Aust HC.

R v Brown (Gregory) [1994] QB 547, [1994] 2 WLR 673, CA; *affd* [1996] 1 All ER 545, [1996] AC 543, [1996] 2 WLR 203, HL.

R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.

Rice v Connolly [1966] 2 All ER 649, [1966] 2 QB 414, [1966] 3 WLR 17, DC.

Three Rivers DC v Bank of England (No 3) [1996] 3 All ER 558.

Cases also cited or referred to in skeleton arguments

Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, [1991] 1 AC 696, HL.

Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, HL.

Chapman v DPP (1988) 89 Cr App R 190, DC.

Coco v A N Clarke (Engineers) Ltd [1969] RPC 41.

Haynes v G Harwood & Son [1935] 1 KB 146, [1934] All ER Rep 103, CA.

Hill v Chief Constable of West Yorkshire [1987] 1 All ER 1173, [1988] QB 60, CA; *affd* [1988] 2 All ER 238, [1989] AC 53, HL.

Marcel v Comr of Police of the Metropolis [1992] 1 All ER 72, [1992] Ch 225, CA.

Morris v Beardmore [1980] 2 All ER 753, [1981] AC 446, HL.

Piddington v Bates, Robson v Ribton-Turner [1960] 3 All ER 660, [1961] 1 WLR 162, DC.

R v Devon CC, ex p L [1991] 2 FLR 541.

R v East Sussex CC, ex p R [1991] 2 FLR 358, DC.

R v Harrow London BC, ex p D [1990] 3 All ER 12, [1990] Fam 133, CA.

R v Lewisham London BC, ex p P [1991] 3 All ER 529, [1991] 1 WLR 308.

R v Metropolitan Police Comr, ex p Blackburn [1968] 1 All ER 763, [1968] 2 QB 118, CA.

R v Norfolk CC, ex p M [1989] 2 All ER 359, [1989] QB 619.
R v Secretary of State for the Home Dept, ex p McQuillan [1995] 4 All ER 400.
R v Waterfield [1963] 3 All ER 659, [1964] 1 QB 164, CCA.

Application for judicial review

AB and CD applied for judicial review of the policy of the first respondent, the Chief Constable of the North Wales Police (the NWP), in relation to the disclosure of information about paedophiles in their area, and of the decision on 27 March 1997 to inform the owner of a caravan site of the applicants' presence at the site. The Secretary of State for the Home Department and the National Association for the Protection and Resettlement of Offenders (NACRO) were also respondents to the application. The facts are set out in the judgment of Lord Bingham of Cornhill CJ.

Stephen Solley QC and *Jonathan Crystal* (instructed by *Michael Purdon*, Newcastle upon Tyne) for the applicants.
Presiley Baxendale QC and *Pushpinder Saini* (instructed by *Jennifer A Trigger*, Colwyn Bay) for the NWP.
James Eadie (instructed by the *Treasury Solicitor*) for the Secretary of State.
Michael Douglas QC (instructed by *Eversheds*, Birmingham) for NACRO.

Cur adv vult

10 July 1997. The following judgments were delivered.

LORD BINGHAM OF CORNHILL CJ. The applicants, AB and his wife, CD, seek to challenge the policy of the North Wales Police (the NWP) in relation to the release of information about paedophiles in their area and the decision of Wrexham Police on 27 March 1997 to inform the owner of a caravan site at Ruabon of the applicants' presence at the site.

In October 1989 AB pleaded guilty to one count of rape, one count of indecent assault on a female child and three counts of gross indecency with a child. He was sentenced to a total of 11 years' imprisonment. On the same occasion CD pleaded guilty to two counts of aiding and abetting rape, one count of indecent assault on a female child, three counts of indecent assault on a male child and three counts of gross indecency with a child. She also received a sentence totalling 11 years' imprisonment. The victims of all these counts were children of either AB or CD save for the victim of the rape counts, who was the 17-year-old girlfriend of one of their children. The applicants were released from their respective prisons in the North East of England on 17 July 1996, having served the full period of their sentences less remission. They were subject to no continuing statutory supervision.

On release the applicants went to Blyth, where a flat had been obtained for their accommodation. This was a convenient location, since it was well away from the area where the applicants' offences had been committed, and it was close to the hospital where AB had been receiving treatment for his seriously deteriorating health. On the day of their release and arrival in Blyth, however, the applicants were greeted by articles in the local newspaper which included their photographs and information of their whereabouts and offences, and the applicants made a hurried departure, fearing that violent reprisals from members of the local community were inevitable if they remained.

Having spent a few nights sleeping in their motor car, and a period in bed and breakfast accommodation, the applicants moved into a flat in Colwyn Bay, North Wales. On arrival the applicants voluntarily made contact with the probation service. It appears that while they were there they were questioned by police officers concerning the disappearance of two children from a boat in Norfolk. More seriously, however, as in Blyth, articles were published in the newspaper circulating locally which revealed the applicants' names, whereabouts and offences and included their photographs. The applicants then met with an angry response from neighbours, and being apprehensive of violence they hurriedly abandoned the flat leaving their belongings behind.

They again slept in their car for some days and, having eventually bought a caravan, moved onto a caravan site at Ruabon near Wrexham in early October 1996.

On 14 January 1997 the NWP received a copy of a report prepared by the Northumbria Police shortly before the release of AB and CD from prison in July 1996. The purpose of this report was to alert recipients to the danger which AB and CD were thought to present. The report recorded the view, attributed to the Probation Service, that AB and CD were—

> 'extremely dangerous people who will pose a considerable risk to children and vulnerable adults within the community where they settle and they will target and procure such people for sexual abuse. There is a genuine concern that whilst in prison they have been networking for this purpose.'

The report said that AB had proved resistant to probation intervention while in prison, and described him as a dangerous man who had for some time refused all attempts to engage him in sex-offending work. CD was said to have been described by her therapist as the most devious sex offender the therapist had ever experienced. She was said to have expressed the capability to kill. Probation officers were said to believe that her behaviour, attitude and psychological disposition had remained unchanged since the commission of the offences for which she had been imprisoned. It is important to record that AB and CD strongly challenge a number of important factual statements in this report.

On 21 January 1997 the applicants were arrested and briefly detained when it came to the notice of the NWP that they were driving a stolen car. It was not suggested to us that the applicants were responsible for the theft and no charge was preferred. But, in the course of questioning, the applicants indicated their intention to remain in the Wrexham area, and Det Sgt Lewis, of the NWP Child Protection Team, became concerned: he was by this time aware of the applicants' previous record and of the Northumbria Police report, and was concerned at the risk that the applicants might present if they remained at the caravan site during the forthcoming Easter holidays when a large number of young children were expected to be there. With this concern in mind, he convened a meeting on 28 January 1997.

This meeting was attended by Det Sgt Lewis, Mr John Roberts, Child Protection Team Manager in the Social Services department, and David Price and David Christie of the North Wales Probation Service. At the meeting Det Sgt Lewis reported on the contents of the report received from the Northumbria Police, and drew attention to the statement that the applicants had resisted all forms of therapy and intervention. This statement was challenged as incorrect: Mr Price said that both applicants had asked to attend more courses than they had actually attended but had been turned down, and he said that CD had done a lot

of 'one to one' work with probation officers. However, both probation officers agreed that from the information in their possession the applicants had to be considered an extremely high risk, and their potential to reoffend was regarded as limitless. There was discussion of the applicants' links with the area and of their current employment, and the question was raised whether they should be encouraged to stay in the area. It was agreed that for the time being at least it was preferable that all agencies knew where they were living and were able to monitor their activities. Det Sgt Lewis stated that the applicants had told him that they would be willing to consider voluntary co-operation with the probation service or similar agencies, and it was agreed that he and Mr Christie should approach the applicants to ask whether they would agree voluntarily to attend on a forensic psychiatrist at the local hospital. Mr Roberts pointed out that any multi-agency support of the applicants should be conditional on their continued working with the forensic psychiatrist, and this was agreed. Mr Roberts also said that he would research the prospect of the local authority providing permanent accommodation for the applicants and Mr Christie said he would do the same in relation to the National Association for the Care and Resettlement of Offenders (NACRO). Det Sgt Lewis expressed his concern that the Easter holidays were approaching with the likelihood that the caravan site on which the applicants were staying would soon be full of children on holiday. All parties agreed that the applicants should be encouraged to move to a place where they would come into less direct contact with children, but it was agreed that this issue should be reconsidered when inquiries had been made of the housing authorities. It was agreed that Det Sgt Lewis and Mr Christie should make an initial approach to the applicants and that those attending the meeting should meet again on 6 February 1997 to discuss progress.

Det Sgt Lewis and Mr Christie met the applicants on 6 February 1997 and asked them if they would co-operate with the forensic psychiatrist; the applicants were somewhat distrustful, but agreed to attend at least one session with her. AB observed that if anything went wrong and they were unhappy with the situation, they would 'go to ground' and 'never be found'. Det Sgt Lewis told the applicants that he was concerned about their presence on the caravan site during the school holidays, and AB said that it was his intention to move elsewhere before then, so that it was not thought that he was staying because of the children likely to be there.

Det Sgt Lewis made contact with Dr Hope Borland, a consultant forensic psychologist at the local hospital, and she agreed to take the applicants as patients on a voluntary referral basis. On 6 February 1997 a further meeting was held, attended by those who had been present on 28 January 1997 and in addition Det Chief Insp Wayne Williams of the Wrexham Police and Ms Jo Tobler, a senior probation officer. Mr Christie reported on the willingness of Dr Hope Borland to see the applicants with a view to producing a risk assessment report and possibly a programme of 'concerned involvement', and Det Sgt Lewis reported on his recent meeting with the applicants. The situation was discussed, and it was agreed by those attending the meeting that the owner of the caravan site should be made aware of the applicants' background, in the interests of public safety. It was further agreed that Mr Christie would tell the applicants that it was the intention to inform the site owner, but to allow them a period of time to find an alternative location for their caravan before actually doing so. This course was agreed by all present.

Mr Christie had by this time received the files on the applicants from the Northumbria Probation Service, and confirmed that the applicants had been willing to co-operate voluntarily with that service after their release. It was known by this time that the applicants were not eligible for housing assistance from NACRO. The prospect of the Wrexham County Borough housing the applicants had not yet been established, but it was agreed to wait until the applicants officially applied to be housed before pursuing the matter.

On 13 February 1997 the probation service informed the NWP that they considered it appropriate that the NWP should inform the site manager, if necessary, of the applicants' past history, and it was decided that Det Sgt Lewis should speak to the applicants at the site in order to give them an opportunity to move of their own accord before the beginning of the Easter holidays. On that day Det Sgt Lewis spoke to the applicants' solicitor (Mr Michael Purdon) and voiced his apprehensions. He impressed Mr Purdon by his obvious desire to help the applicants find employment and accommodation, to reduce the risk of reoffending. On 20 February Det Sgt Lewis visited the applicants at the site and informed them that, because of the forthcoming Easter holidays (due to begin on Friday, 28 March 1997) and the expected influx of a large number of young children, consideration was being given to informing the site owner of their background. The applicants indicated to Det Sgt Lewis that they did not wish disclosure to be made to the site owner, and that they would move to prevent this happening. Det Sgt Lewis reported the effect of this conversation to Mr Purdon and indicated that the NWP wished the applicants to leave the site.

The applicants remained in their caravan on the site. On 26 March 1997 their solicitor (Mr Michael Purdon) telephoned Supt Williams, the Divisional Commander of the NWP at Wrexham; he explained the difficulties that the applicants had been experiencing in relocating and asked, in the light of the detriment caused to their rehabilitation and resettlement by the conduct of the local media, that the NWP should refrain from informing the site owner of the applicants' presence on the site. Mr Williams told Mr Purdon of the concerns of the NWP, and said that the matter was under consideration and that a decision would shortly be taken as to whether the site owner should be informed.

On the following day, 27 March 1997, Supt Williams attended at the headquarters of the NWP at Colwyn Bay to discuss the issue of disclosure with the assistant chief constable, Mr Cooke. It was agreed after discussion that the decision taken at the meeting on 6 February had been correct, and that the owner of the caravan site should be informed of the applicants' background.

Pursuant to this agreement, a detective sergeant was instructed to visit the site owner and show him material which had appeared in the press, this material being chosen because the contents were already in the public domain. This visit was duly made; the site owner was shown an article from the newspaper published in Colwyn Bay; and having seen it he told the applicants that they would have to move on. This they did, at once.

Since leaving the site the applicants have lived in their caravan in different places. On one occasion they had to move because their identity became known to local inhabitants and they feared violence. On another their car was vandalised. When these proceedings began they were living in a caravan on a lay-by off a public road, where we understand they remain.

THE POLICY

Towards the end of 1995 there was serious concern in North Wales at the risk of reoffending by convicted paedophiles following their release from prison after serving their sentences. This concern was heightened by the tragic death of a child in 1995 and the later conviction of her murderer. It was further heightened when a convicted paedophile was seen loitering near a school in North Wales, and questions were raised about the lawful and proper response of public agencies, including the police, in such a situation. The NWP had not at this time formulated any policy to guide its own response, and the need for such a policy was appreciated. Two senior NWP officers were accordingly detailed to prepare such a policy, and they did so, seeking the help of the Chief Constable of Gloucestershire, who was investigating the practice of a number of forces on behalf of the Association of Chief Police Officers with a view to drawing up a code of best practice.

The NWP policy was finalised in written form on 19 March 1997 and then circulated. It reviewed the statutory and common law provisions thought to affect disclosure in such circumstances, and stated in para 2.04:

> 'In essence, where an Officer acts in the honest belief that his/her disclosure of certain information is necessary for the protection of an individual who may otherwise become the victim of crime that disclosure would be defensible. *The disclosure must only be made on a need to know basis.* The Police have an obvious duty to protect the public and would no doubt be subject to adverse publicity were they to fail to do so.' (Policy's emphasis.)

Attention was drawn to Home Office circular 45/1986, which read in part:

> 'The general principle governing disclosure remains that Police information should not be disclosed unless there are important considerations of public interest to justify departure from the general rule of confidentiality. The 3 areas in which the exceptions are made are: (1) Protection of vulnerable members of society ...'

Most of the policy document was directed to the release of information to schools and education authorities. The document concluded (para 6.03):

> 'In any situation where it is considered that the release of a person's name or any personal details should be made known to the public either by circulation to statutory bodies such as Education Authorities or the media, the rationale being that it is in the public interest then:—1) A report must be submitted prior to any decision being made to Headquarters CID (Detective Superintendent Operations) for the advice of the Force Solicitor to be obtained. 2) Agreement by the Force Solicitor is received before further action is taken.'

THE CHALLENGE TO THE NWP POLICY

This case illustrates, in an acute way, the tension which may arise between the interests of a former sex offender and the interests of the community. The offender has served his sentence. He has, as it is often said, paid his debt to society. He has regained his freedom. He wishes to resume living a normal life, with a job, with settled accommodation, with access to any medical and therapeutic services he may need. He wants to put the past behind him, living

peaceably and anonymously in his habitation. These are aims which an offender is entitled to pursue and which, during what may be a long term of imprisonment, he will be encouraged to pursue. It is in his interest that he should be enabled to reintegrate himself into the ordinary life of the community.

But there is a darker side to the picture. Some of those who commit serious sex offences against the young have an incurable propensity to act in that way. Despite imprisonment, despite treatment, despite (it may be) a resolve to avoid the commission of further offences, the pattern of previous offending may be repeated or even more serious offences may be committed. It is in the interest of the community that those who might be the victims of further offences should be protected against that risk. Parents in particular will understandably expect their children to be afforded all reasonable protection.

This case does not call for consideration of issues of policy as to whether, or when, or on what terms, serious sex offenders should be released from prison. The case raises more practical issues: what should the police do, if anything, on learning that a convicted paedophile has been released into the local community and, more specifically, what should the NWP have done in the circumstances of this case? But we must remind ourselves that these questions arise in the context of judicial review. Our task is not to devise a code of practice to guide the police in such circumstances, or to consider whether the handling of this case by the NWP could in any way have been improved upon. It is to decide whether the policy which the NWP adopted or its conduct on 27 March 1997 was contrary to law.

The Secretary of State submits, with the support (as we understand) of the NWP and NACRO, that a policy adopted by the police to guide its conduct when problems of this sort arise should observe three important principles.

(1) There is a general presumption that information should not be disclosed, such a presumption being based on a recognition of (a) the potentially serious effect on the ability of the convicted people to live a normal life; (b) the risk of violence to such people; and (c) the risk that disclosure might drive them underground.

(2) There is a strong public interest in ensuring that police are able to disclose information about offenders where that is necessary for the prevention or detection of crime, or for the protection of young or other vulnerable people.

(3) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender; the vulnerability of those who may be at risk; and the impact of disclosure on the offender. In making such assessment, the police should normally consult other relevant agencies (such as social services and the probation service).

I accept the first of these principles as an important and necessary principle underlying such a policy. When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty. This principle would not prevent the police making factual statements concerning police operations, even if such statements involved a report that an individual had been arrested or charged, but it would prevent the disclosure of damaging information about individuals acquired by the police in the course of their operations unless there was a specific public justification for

such disclosure. This principle does not in my view rest on the existence of a duty of confidence owed by the public body to the member of the public, although it might well be that such a duty of confidence might in certain circumstances arise. The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce.

It is, however, plain that the general rule against disclosure is not absolute. The police have a job to do. That is why they exist. In *Glasbrook Bros Ltd v Glamorgan CC* [1925] AC 270 at 277, [1924] All ER Rep 579 at 582 Viscount Cave LC said:

> 'No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury ...'

Lord Parker CJ spoke to similar effect in *Rice v Connolly* [1966] 2 All ER 649 at 651, [1966] 2 QB 414 at 419 when he said:

> 'It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.'

It seems to me to follow that if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper for them to make such limited disclosure as is judged necessary to achieve that purpose.

I regard the third principle set out above also as being necessary and important. It would plainly be objectionable if a police force were to adopt a blanket policy of disseminating information about previous offenders regardless of the facts of the individual case or the nature of the previous offending or the risk of further offending. While it is permissible for a public body to formulate rules governing its general approach to the exercise of a discretion (see *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165, [1971] AC 610), it is essential that such rules should be sufficiently flexible to take account of particular or unusual circumstances, and in a situation such as the present, where the potential damage to the individual and the potential harm to members of the community are so great and so obvious, it could never be acceptable if decisions were made without very close regard being paid to the particular facts of the case. The consultation of other agencies, assuming that time permits, is a valuable safeguard against partial or ill-considered conclusions.

It seems to me that these principles are consistent with the statutory policy expressed in s 28(1) of the Data Protection Act 1984 and with the policy recognised by the court in *R v Brown (Gregory)* [1994] QB 547 and *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804.

Judged against these tests, the policy adopted by the NWP is not in my judgment open to legal challenge. The policy recognised the general principle that police information about former paedophile offenders should not be

disclosed unless the public interest required it. It acknowledged that disclosure could only be justified for the protection of a member of the public who might otherwise become the victim of crime and who might be in need of protection. It was implicit in the policy that each case would be considered on its merits, and explicit that clearance at the highest level should be obtained before disclosure was made. I detect no legal flaw in the policy.

It is plain from his affidavit that Mr Purdon, from his conversation with a detective inspector of the child protection unit of the Wrexham Police on 26 March 1997, understood that the NWP had a blanket policy of always releasing information about paedophiles in their area. This may, for all one knows, have been a fair inference from what the police officer said; but it is plain from the policy document itself and from all the evidence in the case that the NWP did not have such a blanket policy and did not in fact disclose information about the applicants without careful consideration of the consequences of doing so and not doing so. Had the NWP operated a blanket policy as Mr Purdon inferred, it would have been legally objectionable. As it is, this ground of challenge must in my judgment fail.

THE SECOND GROUND OF CHALLENGE

For the applicants it was argued that the conduct of the NWP was unlawful on a number of grounds.

(1) *Harassment contrary to s 3 of the Caravan Sites Act 1968*

Section 3(1) of the 1968 Act, so far as relevant, provides:

> 'Subject to the provisions of this section, a person shall be guilty of an offence under this section ... (c) if, whether during the subsistence or after the expiration or determination of a residential contract, with intent to cause the occupier—(i) to abandon the occupation of the caravan or remove it from the site ... he does acts calculated to interfere with the peace or comfort of the occupier or persons residing with him ...'

It was argued that the conduct of the NWP on 27 March 1997 in disclosing press material to the owner of the caravan site amounted to an offence under this provision.

There are in my judgment two conclusive reasons why this complaint fails. First, Pt I of the 1968 Act, in which s 3 appears, only applies to licences or contracts under which a person is entitled to station a caravan on a protected site. The meaning of the expression 'protected site' is defined in s 1(2). That definition excludes land in respect of which the relevant planning permission or site licence is so expressed or subject to such conditions that there are times of the year when no caravan may be stationed on the land for human habitation. The licence issued for this site shows that it only permitted caravans to be occupied on the site from 16 March to 31 October in each year. It follows that, although caravans were in fact stationed on the site during the close season, this was not a protected site. *Hooper v Eaglestone* (1977) 34 P & CR 311, on which the applicants relied, is not authority to the contrary: the site in that case was one for which a licence was required, even though no such licence had been granted; it did not fall within the exception just noted. Secondly, the NWP did no act calculated to interfere with the peace or comfort of the applicants. They showed the site owner a newspaper article. That was all. What he did, or whether he did anything, was a question for him. Although he indicated to the applicants that they would have to move, the evidence does not show that he determined their residential contract on less

than the full notice required by s 2 of the 1968 Act, even though the applicants chose to leave at once. It was argued that, if the site was not a protected site within the 1968 Act, the NWP may have been guilty of unlawful harassment under s 1 of the Protection from Eviction Act 1977. If, which I question, that Act applies where an occupier is not evicted from premises which he occupies, it remains an insuperable objection to the applicants' argument that the NWP did nothing to interfere with the peace or comfort of the applicants as residential occupiers.

(2) *Breach of confidence*

It was accepted for the applicants, perhaps inevitably in the light of *Elliott v Chief Constable of Wiltshire* (1996) Times, 5 December, that the applicants' convictions and sentences, formally announced in open court, were information in the public domain and as such subject to no duty of confidence in the hands of the police. Furthermore, the site owner knew that AB and CD (whose real names he knew) were living in a caravan on the site. What the site owner did not know, and what the applicants did not wish him to know, was that they were the subject of the convictions and sentences which had previously been recorded; in other words, he was not in a position to connect the applicants with their previous history. It was argued that by giving the site owner the information which enabled him to make this connection the NWP were in breach of a duty of confidence owed to the applicants.

I have great difficulty in accepting that the information which the NWP held which enabled them to disclose this connection was the subject of any duty of confidence owed to the applicants. But even if it was, it seems to me clear that the circumstances were such as to entitle the NWP to make such disclosure. It is hard to imagine circumstances in which the police could acquire information subject to a duty of confidence which would not entitle them to disclose that information when the public interest required them to do so. This was, as they judged, such a situation, and nothing suggests to me that their judgment was unlawful.

(3) *Misfeasance in public office*

The ingredients of this tort were the subject of extended consideration and a most helpful summary by Clarke J in *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558. The first two propositions which he accepted were (at 582):

> '(1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in [*Northern Territory v Mengel* (1995) 69 ALJR 527], it has some similarities to them.
>
> (2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously (see *Mengel* (1995) 69 ALJR 527 at 554 per Deane J).'

It is unnecessary to list the other ingredients of this tort, since it cannot be suggested that in the present case the NWP acted with a deliberate and dishonest intention to abuse their powers and with an intention to injure the applicants or

with knowledge that they had no power to disclose information to the site owner. All the evidence shows that they acted in a bona fide belief that disclosure was necessary, to the extent made, in the public interest.

(4) *The European Convention on Human Rights*

Reliance was placed on art 8 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)), which provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Counsel for the applicants accepted that this article forms no part of English law, but he submitted that the conduct of the NWP was a flagrant violation of the applicants' fundamental right to privacy and he argued, in reliance on the statement of principle approved in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554, that the court should require very substantial justification for such conduct.

We were referred to no authority on the application or interpretation of art 8, but I am prepared to accept (without deciding) that disclosure by the NWP of personal details concerning the applicants which they wished to keep to themselves could in principle amount to an interference by a public authority with the applicants' exercise of the right protected by the article. It would, however, seem to me plain that the disclosure which the NWP made was within the exception specified in the article, provided that the disclosure was made in good faith and in the exercise of a careful professional judgment, and provided that the disclosure was limited to that reasonably judged necessary for the public purpose which the NWP sought to protect. As already indicated, I consider that these conditions were met.

Reliance was also placed on arts 3 and 5 of the convention, but these can in my judgment have no application on the present facts.

More general criticisms were made of the police conduct. It was, for example, argued that instead of making disclosure to the site owner the NWP should have mounted a surveillance operation, so that a team of police officers would monitor the applicants' movements night and day and so put themselves into a position to intervene if any criminal conduct was in train. I regard this as a far-fetched suggestion. It is for the police to judge how they meet the operational demands upon them. They must of course act lawfully. On the facts of this case, in my judgment, they did. This second ground of challenge also fails.

Although I consider that the policy and the conduct of the NWP in this case fell well within the bounds of legality, the applicants have drawn attention to a pressing social problem. It is not acceptable that those who have undergone the lawful punishment imposed by the courts should be the subject of intimidation and private vengeance, harried from parish to parish like paupers under the old Poor Law. It is not only in their interest but in the interest of society as a whole that they should be enabled, and if need be helped, to live normal, lawful lives.

While the risk of repeated offending may in some circumstances justify a very limited measure of official disclosure, a general policy of disclosure can never be justified, and the media should be slow to obstruct the rehabilitation of ex-offenders who have not offended again and who are seriously bent on reform.

BUXTON J. I agree. Only because of the importance of the matters raised by this application I venture to add something on three points.

First, I agree with Lord Bingham CJ that the ability of this court to review the very difficult decision faced by the police authority in this case cannot be grounded in the (private) law of breach of confidence. I accept that the police's knowledge that the persons, AB and CD, had committed serious crimes was not something that the police were free to impart to others without any restraint. It does not however follow that that restraint springs from the law of *confidence*. In this particular case, the police did not acquire the information in any of the circumstances that are normally thought to impart a duty of confidence: the information did not come to the police through any private relationship with AB and CD; was not imparted to them by AB and CD; and was not acquired by the police subject to any express obligation of confidence; and if it had been sought to impose any such obligation, for the reasons given below that obligation would not have been effective to prevent disclosure in the circumstances of this case.

More generally, however, information acquired by the police in their capacity as such, and when performing the public law duties that Lord Bingham CJ has set out, cannot be protected against disclosure in the proper performance those public duties by any private law obligation of confidence. That is not because the use and publication of confidential information will not be enjoined when such use is necessary in the public interest, though that is undoubtedly the case. Rather, because of their overriding obligation to enforce the law and prevent crime the police in my view do not have the power or vires to acquire information on terms that preclude their using that information in a case where their public duty demands such use.

The foregoing analysis applies only to the acquisition and use of information by the police, or other public bodies, in the proper performance of their duties as such public bodies. If such bodies acquire information of a potentially confidential nature outside the ambit of their public obligations, or use or disclose such information, however acquired, other than in proper performance of their duties, whether that disclosure were by culpable accident or by design, the situation would, potentially, be different: see Sir Richard Scott V-C in *Elliott v Chief Constable of Wiltshire* (1996) Times, 5 December. Even then, however, the information concerned would have to be confidential judged by the private law rules of confidence, and it does not become such just because it is collected by a public body that is subject to public law obligations: see Sir Richard Scott V-C in *Elliott*'s case.

Just as the police obtain this protection, if protection is the right way to characterise it, to facilitate their public law duties, equally they are limited by their public law obligations. As Lord Bingham CJ has said, those obligations include observance of the fundamental rules of good public administration, which this court will if necessary enforce. Another way of looking at the matter, though it may in practice produce the same results, is to say that the police only act in their public capacity, and thus can only claim to be using information in the public interest, when they observe those rules of good public administration. Those rules therefore not only constrain how administrators may act but also

define when administrators are performing their public duties and when they are not.

Second, counsel for the Secretary of State and also, I think, counsel for the police authority were disposed to argue that issues of disclosure of confidential or private information could not arise in any event on the facts of this case, because the fact of AB and CD's convictions were by concession and self-evidently neither confidential nor private, and the identity of AB and CD and their presence on the caravan site was already known to the person to whom disclosure was made. I do not think that the matter can be turned away so easily. What in this case might at least be argued to have the basic attribute of inaccessibility (see Gurry *Breach of Confidence* (1984) p 70; cited in *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545 at 624, [1990] 1 AC 109 at 215) was the *conjunction* of those various facts. It was that conjunction that the police deliberately brought to the attention of the site-owner, when otherwise he would not, or probably would not, have found it out. As I have said, I very much doubt whether the subject of even that conjunction of information can claim confidence in it, because none of that information has come into the possession of its holder in circumstances that impart an obligation of confidence. I do however consider that a wish that certain facts in one's past, however notorious at the time, should remain in that past is an aspect of the subject's private life sufficient at least potentially to raise questions under art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); though, for the reasons that Lord Bingham CJ has given, I am clear that in the event no breach of art 8 has even arguably occurred.

Third, granted that the police were entitled to disclose the information, the form in which they chose to make that disclosure is essentially an operational matter, which the court has only a very limited ability to review. I do, however, venture to make one comment, mainly because I think that the police in this case may have been unduly cautious.

The disclosure was made by showing the site-owner one, or possibly more, of the recent newspaper articles about AB and CD. According to the police authority's evidence, the articles were used, rather than other information from police files, since the information in the press articles was already in the public domain. It is possible, though we have no evidence to that effect, that the police were concerned that use of information from their files might be open to objection under the Data Protection Act 1984. By s 28 of that Act, however, use of that data for the purpose of preventing or detecting crime falls outside the non-disclosure principles under the Act: see *Elliott's* case. The police could therefore, in my view, have used the material in their files, including (subject to the principles recognised in the judgments in this case) material that was not already in the public domain. I suggest that it is a matter for consideration, should similar circumstances arise in the future, whether it might not more clearly mark the official nature of the disclosure, and help to ensure that irrelevant matter was not included in that disclosure, if the police themselves set out the relevant information, drawing on their files, rather than rely on what may be the adventitious availability of newspaper articles.

Application dismissed. Leave to appeal to the Court of Appeal granted.

Dilys Tausz Barrister.

Swindle and others v Harrison and another

COURT OF APPEAL, CIVIL DIVISION
EVANS, HOBHOUSE AND MUMMERY LJJ
10, 11 FEBRUARY, 25 MARCH 1997

Equity – Fiduciary duty – Remedy for breach of duty – Solicitor's firm offering bridging loan secured by first charge over hotel to enable client to purchase hotel partially paid for by mortgage on client's house – Hotel unsuccessful and firm commencing possession proceedings – Client losing equity in house and counterclaiming for compensation for breach of fiduciary duty – Recorder holding that firm breached fiduciary duty but no compensation due as damage not caused by breach – Whether client entitled to compensation equivalent to lost equity in house – Whether client required to show causal link between breach and loss in respect of which compensation sought.

In June 1991, in order to finance the purchase of a hotel intended to be run as a family restaurant business, the second defendant, H, borrowed £80,000 from NHL on the security of a mortgage of her house. A further substantial sum was required to pay the balance of the purchase price and, on the basis that that could be raised by a loan from a brewery, H instructed her solicitor, S, to exchange contracts for the purchase of the hotel. In the event, the brewery loan was not received and H was unable to obtain finance from any other source. On the day prior to the date fixed for completion, however, the plaintiffs, S's firm, offered H a bridging loan of £75,000 secured by a first charge on the hotel, which she accepted, and the following day the purchase was completed. S failed to disclose to H that the firm was making a hidden profit on the loan or that he had known that the brewery loan would not be forthcoming. The restaurant business was unsuccessful, and in October 1992, after H had defaulted on her mortgage, NHL took possession of her house. At that time the market value of the house was considerably less than the sum owing under the mortgage. In September 1993 H transferred the hotel to the first defendant, who was her son, subject to the charge in favour of the plaintiffs. In 1994 the plaintiffs issued proceedings against the defendants claiming possession of the hotel. H counterclaimed for, inter alia, breach of fiduciary duty and sought to recover as damages or equitable compensation the value of the equity she had formerly held in her house. The recorder dismissed the counterclaim, holding that, although the plaintiffs had breached their fiduciary duty by not disclosing their profit from the loan, H was not entitled to compensation as that breach had not caused her loss. H appealed, contending that it was not necessary for her to prove a causal relationship between the plaintiffs' breach of fiduciary duty and the loss she had suffered, and that the plaintiffs were liable to restore her financially to the position she was in when their breach of duty occurred.

Held – In order to recover compensation for breach of fiduciary duty, a plaintiff had to show that the loss he had suffered had been caused by the defendant's breach of duty. Furthermore, (per Evans LJ) unless the breach could properly be regarded as the equivalent of fraud, he was not entitled to be placed financially in the same position as he was in before the breach occurred but only in the same position as he would have been in if the breach of duty had not occurred. In the instant case, there had been no allegation or finding that the breach of fiduciary

duty was the equivalent of fraud. Moreover, the loss suffered by H did not flow from the plaintiffs' breach of fiduciary duty in relation to their loan, but from her own decision to take the risk involved in mortgaging her home, since she would have accepted the loan and completed the purchase of the hotel even if full disclosure had been made. It followed that she would have lost the value of the equity in her home in any event and therefore that that loss was not recoverable. Accordingly, the appeal would be dismissed (see p 717 *a b*, p 718 *f* to *j*, p 719 *b c*, p 722 *c* to *e*, p 726 *g* to p 727 *d*, p 732 *f g*, p 733 *h j*, p 734 *a* and p 735 *a* to *e*, post).

Target Holdings Ltd v Redferns (a firm) [1995] 3 All ER 785 and *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 applied.

Notes

For solicitor's equitable obligations towards his client, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 148–151.

Cases referred to in judgments

Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310, NSW CA.

Armstrong v Jackson [1917] 2 KB 822, [1916–17] All ER Rep 1117.

Brickenden v London Loan and Savings Co [1934] 3 DLR 465, PC.

Bristol and West Building Society v May May & Merrimans (a firm) [1996] 2 All ER 801.

Bristol and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698, [1997] 2 WLR 436, CA.

Canson Enterprises Ltd v Boughton & Co (1991) 85 DLR (4th) 129, Can SC.

Chesterfield (Earl of) v Janssen (1750) 2 Ves Sen 125, 28 ER 82.

CIBC Mortgages plc v Pitt [1993] 4 All ER 433, [1994] 1 AC 200, [1993] 3 WLR 802, HL.

Clark Boyce v Mouat [1993] 4 All ER 268, [1994] 1 AC 428, [1993] 3 WLR 1021, PC.

Downs v Chappell [1996] 3 All ER 344, [1997] 1 WLR 426, CA.

Doyle v Olby (Ironmongers) Ltd [1969] 2 All ER 119, [1969] 2 QB 158, [1969] 2 WLR 673, CA.

Galoo Ltd (in liq) v Bright Grahame Murray (a firm) [1995] 1 All ER 16, [1994] 1 WLR 1360, CA.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq) [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.

National Westminster Bank plc v Morgan [1985] 1 All ER 821, [1985] AC 686, [1985] 2 WLR 588, HL.

Nelson v Larholt [1947] 2 All ER 751, [1948] 1 KB 339.

Nocton v Lord Ashburton [1914] AC 932, [1914–15] All ER Rep 45, HL.

Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769, [1997] AC 254, [1996] 3 WLR 1051, HL.

South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.

Spector v Ageda [1971] 3 All ER 417, [1973] Ch 30, [1971] 3 WLR 498.

Target Holdings Ltd v Redferns (a firm) [1995] 3 All ER 785, [1996] AC 421, [1995] 3 WLR 352, HL.

Cases also cited or referred to in skeleton arguments

Allan (J M) (Merchandising) Ltd v Cloke [1963] 2 All ER 258, [1963] 2 QB 340, CA.
Arbuthnot Leasing International Ltd v Leasing Havelet Ltd (No 2) [1990] BCC 636.
Cockburn v Edwards (1881) 18 Ch D 449.
Cranston, Re, ex p Cranston (1892) 9 Morr 160.
Eyre v Hughes (1876) 2 Ch D 148.
Fisher v Bridges (1854) 3 E & B 642, 118 ER 1283.
Leitch (William C) Bros Ltd, Re [1932] 2 Ch 71, [1932] All ER Rep 892.
Lloyds Bank Ltd v Marcan [1973] 3 All ER 754, [1973] 1 WLR 1387, CA.
Macleod v Jones (1883) 24 Ch D 289.
Patrick & Lyon Ltd, Re [1933] Ch 786, [1933] All ER Rep 590.
R v Ghosh [1982] 2 All ER 689, [1982] QB 1053, CA.
R v Grantham [1984] 3 All ER 166, [1984] QB 675, CA.
R v Landy [1981] 1 All ER 1172, [1981] 1 WLR 355, CA.
R v Richman (1910) 4 Cr App R 233, CCA.
R v Rowlands (1882) 8 QBD 530.
R v Sinclair [1968] 3 All ER 241, [1968] 1 WLR 1246, CA.
Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 341, HL.
Welham v DPP [1960] 1 All ER 805, [1961] AC 103, HL.

Appeal

By notice dated 1 April 1996 the second defendant, Mary Agnes Harrison, appealed with leave of Hirst J from the decision of Recorder Sir Andrew Watson at the Warwick County Court on 6 November 1995 whereby he dismissed her counterclaim in the action for possession of the premises known as The Aylesford Hotel brought against her and the first defendant, Miles Justin Harrison, by the plaintiffs, Stephen Swindle, Timothy Fillmore, Tony Cox and Rosalind Rowett, a firm of solicitors practising as Alsters, for equitable compensation for breach of fiduciary duty in respect of a loan of £75,000 made by Alsters to her on 7 August 1991. The facts are set out in the judgment of Evans LJ.

Edward Bannister QC and *Isabel Hitching* (instructed by *Hall Reynolds*, Bidford-on-Avon) for the second defendant.

Duncan Matheson QC and *Stephen Neville* (instructed by *Alsters*, Leamington Spa) for the plaintiffs.

Gregory Stone QC and *Adam Oyebanji* (instructed by *Wright Hassall & Co*, Leamington Spa) for the first defendant.

Cur adv vult

25 March 1997. The following judgments were delivered.

EVANS LJ. The plaintiffs are a firm of solicitors, Alsters, practising in Leamington Spa. The defendants, who are mother and son, were their clients from about April 1991. The second defendant, who is the mother, has three other children, one of whom, Mark, plays a leading part in the story although he is not a party to the action. It is the tale of two properties, one the mother's home and the other a restaurant which the family planned to buy.

The second defendant's home was at 13 Warwick Place, Leamington Spa, which she owned. It was worth £175,000 and was subject to small incumbrances totalling £8,500.

Mark, her oldest son, had the idea of purchasing a restaurant in Warwick known as The Aylesford where he and the rest of the family could carry on the business. The intended price for the property and the business was £240,000. In short, he persuaded his mother to mortgage her home to secure a loan of £180,000 (more than what it is now agreed was its value) from the National Home Loans Corp (NHL), which could be used to pay part of the price and other costs associated with the venture. A further £100,000 was proposed to be raised by a loan from Banks' Brewery, to be secured by a first charge on the restaurant premises.

The second defendant instructed the plaintiffs to carry out these various proposed transactions. The purchase of The Aylesford was to be in her name, as was of course the mortgage loan secured by a first charge on her home. She consulted a legal executive, Mr David Mills, and thereafter the senior partner, Mr Swindle, in about May.

The mortgage was completed and the loan of £180,000 was duly received. Contracts of purchase and sale were exchanged for The Aylesford at a reduced price of £220,000, but the second defendant as purchaser was required to pay a 20% deposit, £44,000, which she duly did when contracts were exchanged on 1 July. There was no confirmation then that the proposed further loan from the brewery would be forthcoming.

The agreed completion date for the purchase and sale of The Aylesford was 5 August but it was extended to 2 pm on 8 August. The events of those few days give rise to the second defendant's first and primary claim against the plaintiffs. The brewery loan was not received, and no form of bridging finance was available from Barclays, the second defendant's bank, or from any other source. She could not complete the purchase of The Aylesford without a further advance of £75,000. Mr Swindle on behalf of the plaintiffs offered to lend this sum to her for a two-month period and on terms which are not and cannot be criticised as uncommercial or unduly onerous for her (interest at 5% over base rate, with an 'arrangement fee' of £1,000), to be secured by a first charge on The Aylesford when it was purchased. She accepted this offer. £75,000 was made available by the Royal Bank of Scotland (RBS), with whom the plaintiffs had the loan facility which they utilised, and the second defendant became the owner of The Aylesford, subject to the charge in the plaintiff's favour.

The results of proceeding with the purchase of The Aylesford proved to be disastrous for her. The restaurant business did not prosper and she had no other source of income or assets with which to pay interest on the substantial (£180,000) mortgage loan which was secured on her home. The amount due to NHL increased by October 1992 to £199,000 and they took possession of the house. Its market value by then was considerably less than this figure. The shortfall was estimated by the judge as £55,000 though it is not clear how he calculated it. So her equity in the property was extinguished, whereas on 7 August 1991 before completing the purchase of The Aylesford its value could be assessed as follows:

market value	£175,000
less balance of £180,000 loan	£74,500
	£100,500

The figure of £74,500 is that part of the £180,000 received from NHL which the second defendant had already spent and therefore could not repay to them if she

decided not to go ahead with the purchase of The Aylesford. It was made up as follows:

previous incumbrances	£8,500
deposit on The Aylesford	£44,000
expenditure on The Aylesford	£22,000
	£74,500

The second defendant claims that she lost the value of her equity in consequence of the plaintiffs having enabled her, by making the loan of £75,000, to complete the restaurant purchase. Mr Bannister QC submits on her behalf that the plaintiffs were in breach of their fiduciary duties towards her and that she is entitled to recover as equitable compensation the amount of the asset, namely the then value of her equity in her home, which she has lost.

Her second claim is made in the alternative and is for a lesser amount, namely the value of her equity in The Aylesford in December 1992 when a further transaction was embarked on, although not formally completed until many months later, in September 1993. This involved the transfer by the second defendant of her freehold interest in The Aylesford to Miles, her son who is the first defendant. The transfer was subject to the first charge in favour of the plaintiffs, which secured their £75,000 loan, and to a second charge in favour of RBS. The price was £140,000 in accordance with a valuation which Mr Swindle obtained from a local valuer. The balance payable by the first defendant as purchaser to the second defendant as seller, after taking account of the securities for which he assumed responsibility and certain other sums, was £24,185, but the payment obligation was spread over ten years.

In this way, the second defendant was deprived, Mr Bannister submits, of the value of the equity which she then had in The Aylesford property, which was of the order of £55,000. She claims damages from the plaintiffs accordingly on the ground that they, and Mr Swindle in particular, acted negligently and in breach of the duty of skill and care which they owed her.

The proceedings

In March 1994 the plaintiffs claimed possession of The Aylesford pursuant to their charge. The proceedings were brought against the first defendant as the current owner of the freehold. He asserted in his defence as he did at the trial that the transfer to him from his mother was void or voidable, and in consequence of this she was made the second defendant. Her claims, as summarised above, were made by way of counterclaim. The proceedings came on for trial before Recorder Sir Andrew Watson at the Warwick County Court in November 1995.

The judgment

The judge made detailed findings as to the history of events from 1 July, when contracts for the purchase and sale of The Aylesford were exchanged, until completion which finally took place on 8 August. The completion date originally fixed was 5 August. Mr Swindle informed the second defendant by letter dated 22 July that he would require to be put in funds by Friday, 2 August at the latest. The second defendant and her son, Mark, had their own financial advisers, who changed from time to time. In July it was Peter Davis, but by 7 to 8 August, a Mr Stuffins was also on the scene. The further funds which they required were expected to be provided by the hoped-for brewery loan. On the morning of 7 August Mark Harrison went to the brewery at Wolverhampton in order to

collect the loan offer himself. This was forthcoming, its terms being set out in a letter 'subject to contract' dated 7 August, addressed to Mark. The offer was expressly made subject to a 'satisfactory bank reference', presumably for him.

There had been much concern as to whether funds would become available from the brewery or, if they did so, whether they would be received in time. According to Mr Swindle's witness statement, the second defendant telephoned him a number of times and by 7 August she was desperate for finance. There was talk of a bridging loan which could be made available by a contact of Mr Davis' at the rate of 1% per day. Apparently, however, even if this offer was acceptable, the proposed lender was away on holiday by 7 August and this source could not be pursued. The second defendant's bankers, Barclays (Bedworth branch), were asked to provide a bridging loan, but on the morning of 7 August, according to his evidence, or 8 August, according to his attendance note, Mr Swindle was informed that no offer would be made—the bank was 'unhappy with the client', presumably referring to Mark Harrison, although this is not clear. Who gave Mr Swindle this information is also unclear. His attendance note refers to Mr Stussins, who was the manager of the Barclays branch, whereas the judge's finding was that he spoke to Mr Stuffins, the defendants' financial adviser. The difference could be important, because Mr Stussins was an independent third party whereas Mr Stuffins might be regarded as the second defendant's agent whose knowledge of these matters could be attributed to her, but ultimately, in my judgment, it is not. What is clear is that Mr Swindle knew then, if not before, that no bridging loan would be offered by the bank and that Barclays, who were the second defendant's and Mark Harrison's bankers, would apparently be unwilling to give the satisfactory reference which the brewery required.

It was in these circumstances that Mr Swindle indicated to the second defendant that a bridging loan could be made available to her by the plaintiffs themselves. He said in his witness statement that she asked him if he had any other source of funds. This led to him discussing the matter with his partner, Mr Fillmore (whom the judge found 'a compelling witness'), on 7 August, when 'Mr Swindle was confident the brewery loan would be forthcoming'. The judgment continues:

> 'The plaintiffs had bridging facilities with the Royal Bank of Scotland up to a limit of £50,000. He, Mr Swindle, was confident that as in fact proved to be the case, his bank would enlarge the facility for a 1% arrangement fee which was to be split between them. In due course that same day, [7 August 1991], bridging facilities were offered. An arrangement fee of £1,000 with interest at 5% above base rate was offered. They were not over-generous terms and it was not a purely philanthropic gesture but nobody suggests that a better offer was obtainable elsewhere. So far as the partnership of Alsters was concerned, it was an act of extreme indiscretion. Mr Swindle never bothered to enquire at Barclays as to their reservations over their client. He either did not know of Mark's creditworthiness or chose to disregard what he did know. Mr Fillmore was extremely reluctant, and the junior partners were not even consulted. He knew the brewery loan depended on satisfactory references from the bank and he knew by now that they were unlikely to be forthcoming. But is his offer actionable at the suit of the apparent beneficiary, Mrs Harrison? There was now a self-evident conflict of interest between the plaintiffs and Mrs Harrison. She was advised to seek

a independent advice but there was in reality very little time in which to obtain it.'

After referring to the Law Society *Guide to the Professional Conduct of Solicitors* (7th edn, 1996), the judge continued:

> 'In my judgment, the plaintiffs were acting in plain breach of their fiduciary b duty. They were making as it were, a hidden profit, the details of which would have been available if independent advice could have been sought ... Secondly, I believe the solicitors were also negligent in failing to advise the second defendant that Banks' Brewery might not make the loan. After speaking to Mr Sharples [of the brewery] ... that Mark Harrison's c creditworthiness was a critical issue, yet he plainly did not, and did not take any steps to, ascertain the risk or warn the second defendant of the nature of the risk. The plaintiffs should have ensured separate representation'.

In holding that the plaintiffs acted in breach of fiduciary duty, the judge referred to the judgment of Megarry J in *Spector v Ageda* [1971] 3 All ER 417, [1973] d Ch 30, which he said sets 'undoubtedly a high standard and a counsel no doubt of perfection'.

Having thus held that the plaintiffs were in breach of fiduciary duty and were negligent, he proceeded to consider 'What, if any, damages flow from these breaches?'. He asked himself, first, what advice another solicitor would have given the second defendant, if she had been able to consult one in the time e available. He said:

> 'I can only imagine that they would have been astounded at the offer being made by the plaintiffs in the circumstances and that with full knowledge of the circumstances they would have said "Grab it". It was, after all, a lifeline f for them. There is no evidence that a better offer could have been obtained elsewhere. The alternative was to forfeit the deposit.'

He therefore concluded:

> 'Realistically, she had no choice. There is certainly no evidence before me, even with the benefit of hindsight, that Mrs Harrison has necessarily been g worse off. She was in fact, and possibly correctly, extremely grateful, as she conceded in evidence. Accordingly, in my judgment no damages flow from these breaches. The terms were duly accepted. A note from Mr Fillmore indicated that the terms were discussed with Mr Stuffins which satisfied Mr Fillmore that Mrs Harrison had taken professional, if not legal, independent h advice.'

Another of the judge's findings should be noted, although it is not challenged by the second defendant in her appeal. This related to her decision to purchase The Aylesford in June, when contracts were exchanged. The mortgage of her home was then agreed, but no finance was available to fund the balance of the j purchase price, and Mr Swindle was clearly under a duty to warn her of the possible consequences of doing so, and that she should exercise caution. He gave this advice, but as the judge found the second defendant was determined to proceed with the purchase, being content with the financial projections that had been prepared by Mr Stuffins, and 'she seemed happy with financial arrangements made by Peter Davis'. He also found:

'I am satisfied Mr Swindle attempted to deter Mrs Harrison from proceeding. I am also satisfied that she would not have been deflected by anything Mr Swindle said. She was being advised by Peter Davis and, after 21 June, Peter Stuffins, and she had confidence in them.' *a*

She signed, at the plaintiff's request, a disclaimer letter dated 21 June which should be quoted in part: *b*

'*Re: The Aylesford Restaurant*

With regard to my proposed purchase of the above property I hereby instruct you to proceed and exchange contracts notwithstanding the fact that: (a) ... (b) The proposed finance from Banks' Brewery is based on a verbal assurance only and no contract for the loan of the money has yet been issued by it. (c) ... (d) that the deposit payable at 20% is non-returnable in the event of my failing to complete.' *c*

She alleged at the trial that the plaintiffs should have advised her not to proceed and that they were negligent in failing to do so. Mr Swindle accepted that he did not go so far as to give her that advice, but he denied that that was negligent or in breach of duty in the circumstances, where she was receiving separate professional advice on the financial implications. The judge rejected the second defendant's allegation, and he added: *d*

'If I were wrong about that, I nevertheless believe that Mrs Harrison would have been undeterred and would have ignored any greater discouragement.' *e*

These findings, as stated above, are not challenged in this appeal. They are relevant, however, to the issues raised by the appeal, because the second defendant asserts that the plaintiffs were at fault in permitting her to proceed to complete the purchase on 8 August, when it was their offer of a loan which enabled her to do so. *f*

The subsequent history, shortly, was as follows. The family took over the restaurant and cafe business, though with limited success. This was partly, perhaps largely, due to the fact that they failed to obtain a full restaurant licence. Money ran short and the second defendant defaulted in her mortgage obligations to NHL, who took possession of her house. She had other creditors and it was feared that bankrupt proceedings might be started against her. Her remaining asset was her equity interest in The Aylesford property, where she now lived. This would be at risk of being realised if she was made bankrupt, and if that occurred she would lose her home and the family would lose the business. Mr Swindle was consulted. He advised that The Aylesford should be sold at a proper market value to her son Miles, the first defendant, subject to the first charge in favour of the plaintiffs and a further charge held by the Royal Bank of Scotland. A valuation was obtained from a reputable local estate agent, Mr Hawkesford, but at £140,000 the judge found that it was 'an extremely low valuation, some 10% to 15%, in my judgment, below the true open market value'. *g* *h*

The transfer took place, and the first defendant undertook the second defendant's obligation to repay the plaintiffs' loan with accumulated interest to the plaintiffs. The balance remaining due to the second defendant, approximately £24,000, was to be paid over a ten-year period. *j*

By this means, the second defendant's remaining equity interest in the Aylesford was replaced by the debt owed to her by the first defendant, which has to be regarded as worthless. The second defendant alleges that Mr Swindle acted

negligently towards her in relation to this transaction also and that her loss should be assessed as the value of her lost equity, say £55,000. The judge rejected this contention. He said:

> 'At the time the agreement was signed I suppose in an ideal Chancery world each member of the family should have been separately represented but in the circumstances prevailing this would have been totally impracticable. The vultures were circling. There was, I believe, a united—save for Guy who was not consulted—family desire to preserve the building and the business by whatever means they could ... the truth is that in Mr Swindle the Harrisons discovered a compliant solicitor prepared to go to the very limits in promoting his clients' desires. As matters have turned out, I do not consider that it lies in either of their mouths to complain of his, on occasions, improper conduct for I am not satisfied that either has suffered in consequence.'

He therefore rejected this allegation, it seems, on the grounds both of 'no breach' and 'no causation'.

The appeal

(1) The second defendant, as appellant, submits that the judge was wrong to hold that no damages flowed from the plaintiffs' breaches of duty and negligence which he held had occurred in relation to the making of the loan. Mr Bannister QC on her behalf does not dispute the correctness of the finding that 'realistically, she had no choice' but to complete the purchase, nor does he suggest that the judge was wrong to find that the second defendant, both in June and in August, was determined to make the purchase if she possibly could, acting on the financial advice received from other professional advisers. He submits that these findings are irrelevant as a matter of law. It is sufficient, he says, that the plaintiffs' breach of duty in making the loan enabled her to proceed to completion; 'but for' the loan, she would not have been able to do so. He accepts that this question of law was not raised, or at least was not formulated in this way, at the trial.

(2) Alternatively, the judge was wrong not to award damages of about £55,000 for breach of duty and negligence in relation to The Aylesford transfer.

First ground of appeal—the loan transaction

The issue here is the amount of damages or compensation which the second defendant is entitled to recover from the plaintiffs on the basis of the judge's findings that they were in breach of the fiduciary duties which they owed her when they offered to make the bridging loan. The breach essentially was their failure to inform her of two material facts—first, that Barclays apparently was unwilling to provide a reference for Mark, which could mean that the brewery loan would not be forthcoming, and secondly, that they would themselves profit from the loan transaction.

The plaintiffs by their cross-appeal challenge these findings, but in order to consider Mr Bannister's submission I shall assume that they are justified and correct. The submission raises some complex issues of fact and law.

The best starting point in my view is the historical fact that the courts in certain circumstances have awarded damages sufficient to restore the plaintiff, in financial terms, to the position in which he was when the defendant committed a legal wrong against him. This measure of damages might appear to be the same as the general measure, which is the 'sum of money which will put the party who

has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn), but it is not. The difference arises because the position 'he would have been in if he had not sustained the wrong' is not necessarily the same as his situation when the wrong occurred. It might have deteriorated, or for that matter improved, during the same period, by reason of independent, extraneous events.

The most obvious example of this is where the market value of property is lower than it was when the legal wrong occurred. The property is worth less to the plaintiff than it was when the wrong was suffered, but it does not follow that that he is worse off than he would have been in any event, independently of the legal injury which he has suffered.

The same basic example shows that the difference can be expressed in terms of causation. The value of the plaintiff's property has fallen, due to a general decline in market values. That fall would have occurred in any event, regardless of any injury inflicted by the defendant, and so it cannot be said to have been caused by anything that the defendant did or failed to do—unless the defendant in some way caused him to acquire the property in question, in which case he can say that he did suffer a loss representing the fall in market value in consequence of the defendant's wrong. In such circumstances, he would not have suffered that loss, 'but for' whatever the defendant, in breach of duty, did or failed to do.

But then, suppose that the plaintiff, if he had not acquired that property, would have bought some other property, in any event? This is the usual situation with a mortgage lender, because he hopes to make loans in the course of his business to the full extent of the available funds, and a general fall in property values will affect him, regardless of its effect in any individual case. Should this factor be taken into account when deciding what were the legal consequences of, say, the careless provision of inaccurate information or wrong advice in relation to the particular acquisition which in the result has shown a loss?

There is also a temporal aspect. To restore a person to the position that he was in when the wrong was committed against him involves present financial restitution to that former state of affairs. Compensation, on the other hand, which is necessary to put him to the position he would have been in, if he had not sustained the wrong, is not strictly restitution at all. It is a measure of the difference between his present situation and what his situation would have been.

These different concepts have surfaced in different areas of the law, and the inquiry is complicated by the fact that it is still necessary to take account of the distinction between common law and equity, even though the procedural reforms introduced by the Supreme Court of Judicature Acts 1873 and 1875 are now well over a century old. The reason is, of course, that the origins of both common law and equitable rules are always relevant to their scope, although we should endeavour now to identify the underlying common principles. As Denning J said in a different context in *Nelson v Larholt* [1947] 2 All ER 751 at 752, [1948] 1 KB 339 at 343:

> 'This principle has been evolved by the courts of law and equity side by side ... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect.'

Not surprisingly, the abrupt fall in property values during the past decade has led to a spate of authorities in which these principles or rules for assessing damages have been explored, pre-eminently the House of Lords judgments referred to below (though *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, [1997] AC 254 arose out of a fall in the value of shares). The language used may be that of causation, or of remoteness of damage, or of the scope of duty, but as was observed in the note on *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191 in the Law Quarterly Review (see Jane Stapleton, 'Negligent Valuers and Falls in the Property Market' (1997) 113 LQR 1 at 7):

> 'A line must be drawn between types of foreseeable "but for" consequences. Once arrived at, it can be packaged in duty or remoteness terms but the central problem is the line drawing.'

This is essentially the common law approach. Other recent authorities have also considered the parallel approach of equity to the same problem.

At common law, damages on what may be called the restitutionary basis are awarded when the plaintiff was induced to enter into a transaction by the defendant's fraud. This is the rule in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119, [1969] 2 QB 158, now approved and restated by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*. In cases where the breach of duty consists of negligence rather than fraud, the defendant is liable to pay compensation for the consequences of the breach, and this makes it necessary to define the breach, or rather the scope of the duty which was broken (see *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365, [1997] AC 191). If the plaintiff seeks compensation for the consequences of entering into a transaction, then he must prove that he would not have done so, if the breach had not occurred, and that the breach was a cause of his doing so.

Regarding this solely as a question of causation, the same approach was adopted in *Galoo Ltd (in liq) v Bright Grahame Murray (a firm)* [1995] 1 All ER 16, [1994] 1 WLR 1360 and by the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310. The defendant's breach may have afforded an opportunity for the loss suffered by the plaintiff to occur, but the breach, having regard to the scope of the duty, cannot be said to have been the cause of the loss. Negligent advice given by a company's auditors may result in the company continuing to trade, but this does not mean that the negligence was the cause of all subsequent trading losses—unless perhaps the auditors were in breach of a duty to advise the company whether to continue trading, or not.

Similar principles have been developed by the courts of equity, and the authorities show that similar results have been achieved. When the breach of duty falls within the rather wider category of inequitable conduct which equity regards as fraud, then the defendant's liability in damages is measured in the same way as if fraud was proved at common law. He is liable to restore the plaintiff to the situation he was in when the defendant did him wrong. Thus:

> 'Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right. No case decided before [*National*

Westminster Bank plc v Morgan [1985] 1 All ER 821, [1985] AC 686] was cited (nor am I aware of any) in which a transaction proved to have been obtained by actual undue influence has been upheld nor is there any case in which a court has even considered whether the transaction was, or was not, advantageous. A man guilty of fraud is no more entitled to argue that the transaction was beneficial to the person defrauded than is a man who has procured a transaction by misrepresentation. The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice.' (See *CIBC Mortgages plc v Pitt* [1993] 4 All ER 433 at 439, [1994] 1 AC 200 at 209 per Lord Browne-Wilkinson.)

The same stringent test of causation, or measure of damages, has been said to apply when the defendant was in breach of fiduciary duty. In *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465 at 469 Lord Thankerton said:

'When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other fact, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.'

It is now well established that a solicitor owes his client a general duty of skill and care, though its scope is always subject to the terms of his retainer in the particular case (see *Clark Boyce v Mouat* [1993] 4 All ER 268, [1994] 1 AC 428).

Equity has also recognised duties going beyond the common law duties of skill and care which may be undertaken by individuals, depending on 'the circumstances in which they were acting' (see *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145 at 205 per Lord Browne-Wilkinson.) These are the duties of fidelity and loyalty which are described as 'fiduciary' and which exist independently of, though often in conjunction with, a duty of care. There is no doubt that a solicitor owes his client these duties also:

'The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith: he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list ...' (See *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 712, [1997] 2 WLR 436 at 449 per Millett LJ.)

In the present case, Mr Bannister submits that *because* the plaintiffs were in breach of duty, *therefore*, applying *Brickenden v London Loan and Savings Co*, they are liable to restore the second defendant financially to the position she was in when their breach of duty occurred. It is not relevant, he says, to inquire whether

or not she would have completed the purchase in any event. It is enough that she did in fact do so, and was enabled to do so by the plaintiffs' loan.

I would reject this argument, because the authorities also show, in my judgment, that what I have called the stringent rule of causation or measure of damages does not apply as regards breaches of equitable duties unless the breach can properly be regarded as the equivalent of fraud. In other cases the plaintiff is entitled to be placed in the same position financially as he would have been in if the breach of duty had not occurred—not necessarily the same as he was in before it occurred.

These propositions seem to me to be established by *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, [1997] 2 WLR 436. The defendant had not breached his duties of loyalty and fidelity to his principal and so he could not be held to be liable for losses suffered as the result of entering into the transaction, as distinct from the consequences of the particular breach. Those were likely to be minimal (because, in short, the principal would have made the mortgage loan in any event) and they did not include the intervening market loss. The consequent need to identify the scope of the particular duty which has been breached is entirely consistent, in my view, with the approach to common law damages set out in Lord Hoffmann's *South Australia* speech.

It is also consistent, in my judgment, with the House of Lords decision in *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785, [1996] AC 421. The defendants had committed a breach of trust, but the default was remedied and therefore they were not liable to 'reconstitute the fund'. They remained liable to pay compensation, but the amount had to be assessed at the date of judgment rather than the date of breach. The plaintiffs had obtained precisely what they would have acquired had no breach occurred, and therefore they appeared to have suffered no compensatable loss.

Lord Browne-Wilkinson noted ([1995] 3 All ER 785 at 793–794, [1996] AC 421 at 434)—

> 'the basic rule ... that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate (see *Nocton v Lord Ashburton* [1914] AC 932 at 952, 958, [1914–15] All ER Rep 45 at 51, 55 per Viscount Haldane LC). If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed ... Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach ...'

This is what I have called the stringent test of causation, or measure of loss. Lord Browne-Wilkinson continued, however ([1995] 3 All ER 785 at 794, [1996] AC 421 at 435):

> '... in the ordinary case ... the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, ie the difference between what

the beneficiary has in fact received and the amount he would have received but for the breach of trust.' a

This summarises, in my judgment, what is essentially the common law rule, in the absence of fraud. Moreover, Lord Browne-Wilkinson approved the view of the majority of the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 which held that 'damages for breach of fiduciary duty fell to be measured by analogy with common law rules of remoteness'. Even when the stringent test applies, the chain of causation can be broken by some independent and untoward event, as in the *Canson* case. The test of causation remains one of common sense, on whatever basis it has to be applied (see [1995] 3 All ER 785 at 797, [1996] AC 421 at 438, 439). b c

The concept of compensation which has the effect of restoring the plaintiff to the position he occupied before the wrong was done to him, rather than place him in the same present situation as if the breach had not occurred, appears consistent with the basic principle that equity permitted the innocent party to rescind a contract when sufficient grounds eg misrepresentation were shown, but it would be beyond the scope of this judgment to pursue that aspect further. Similarly, it is unnecessary to consider whether a plaintiff who proves that he entered into a contract in reliance on negligent advice, or on wrong information negligently given, can recover damages on the same stringent basis as if he was induced to enter into it by fraud (see *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426 and *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 705, [1997] 2 WLR 436 at 442). d e

I return therefore to Mr Bannister's submission in the present case. There is no finding and no allegation of fraud or of any breach of fiduciary duty which might be regarded as the equitable equivalent of fraud. Nor was the plaintiffs' loan itself inconsistent with the duties which they owed her. Their breach of duty consisted in failing to disclose material facts to the second defendant, as the judge held, and it can be assumed that she would be entitled to claim rescission of the loan agreement, if recission was possible, and that she is now entitled to recover damages, or compensation, for the consequences of that breach. But the prima facie measure of such loss is the amount by which she is worse off now than she would have been if those breaches had not occurred. The failure to disclose cannot be said to have led to the making of the loan, even on a 'but for' basis, precisely because disclosure of the true facts would not have affected her decision to accept it. Since she would have accepted the loan and completed the purchase, even if full disclosure had been made to her, she would have lost the value of the equity in her home in any event. She cannot recover damages or compensation for that loss, in my judgment, except on proof *either* that the plaintiffs acted fraudulently or in a manner equivalent to fraud *or* that she would not have completed the purchase if full disclosure had been made ie if the breach of duty had not occurred. She can do neither, and in my judgment her claim for damages must fail. f g h j

Second ground of appeal—the 1993 transfer

I agree with Mummery LJ that this appeal should be dismissed, for the reasons given by him and by the recorder.

Costs

I agree that this appeal also should be dismissed, again for the reasons given by Mummery LJ.

The first defendant's appeal

The first defendant's contention that the agreement transferring The Aylesford to him in 1993 was invalid and of no effect, on various grounds, was maintained until the opening of this appeal. It was then agreed between counsel that the appeal should not proceed, and it was dismissed by consent.

For the reasons given above, as well as those given by Hobhouse and Mummery LJJ, I would dismiss the second defendant's appeal.

HOBHOUSE LJ. I agree with the orders proposed by Evans and Mummery LJJ. The only aspect of this case on which I wish to add anything is the claim of Mrs Harrison for damages for breach of fiduciary duty in connection with the loan made by Mr Swindle's firm to her in August 1991.

In August 1991 Mr Swindle was acting as the solicitor of Mrs Harrison. His retainer was not specifically limited. It is the fact that Mrs Harrison and her sons had also been receiving advice from a succession of financial advisers, at the material time in August from a chartered accountant, Mr Stuffins. Mr Swindle was retained generally in relation to the purchase of the Aylesford Hotel. It was undoubtedly part of his retainer that he should advise her about the legal implications of any transactions which she should enter into. At the time of the exchange of contracts in June he had advised her of the lack of prudence in so doing and required her to sign the letter of disclaimer dated 21 June 1991. She had nevertheless entered into a contractual commitment to buy the hotel by a contract which required a deposit of 20% and made time of the essence when she did not have the funds to enable her to complete nor any firm assurance that such funds would be forthcoming.

By 7 August, after a one-week extension of the time for completion the anticipated situation had come about. She had to complete the following day. She had to have £180,830 to enable her to do so but all she had was about £110,000, being the remaining balance from the £180,000 which she had raised in June by taking out a second mortgage of her home at 13 Warwick Place to National Home Loans. She did not have the balance of about £71,000 necessary to enable her to complete and she and her sons had failed to obtain any binding commitment from anyone willing to lend them that sum. She was about to lose her deposit of £44,000 and be exposed to a liability for breach of contract (though there was no evidence that the vendors' losses would have exceeded the £44,000). She believed that she would be losing the benefit of a contract that would be advantageous to her and her sons; in addition, she had already spent a further £13,500 or thereabouts carrying out improvements to the hotel with the consent of the vendors in anticipation of completion. It was in these circumstances that Mr Swindle offered to step into the breach and provide a bridging loan of £75,000. By so doing, he came under additional responsibilities and obligations to Mrs Harrison, his client.

The relationship of Mr Swindle to his client was a fiduciary one. It was a relationship of trust and confidence: it was also a relationship in which he had influence over her. To quote Millett LJ in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 711–712, [1997] 2 WLR 436 at 449–450:

> 'The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal ... (In this survey I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of negotiations he made full disclosure of all facts material to the transaction. Even inadvertent failure to disclose will entitle the principal to rescind the transaction. The rule is the same whether the fiduciary is acting on his own behalf or on behalf of another ...)'

By offering to lend money to Mrs Harrison and then making with her the loan contract evidenced by the letter of 7 August 1991, Mr Swindle was dealing with his principal. He, therefore, was under an additional fiduciary duty to prove affirmatively that the transaction was fair and that, prior to the making of the contract, he made 'full disclosure of all facts material to the transaction'. This fiduciary duty is additional to his contractual duty to exercise skill and care in advising Mrs Harrison and, within the scope of his retainer, protecting her interests.

The judge held that both the fiduciary and the contractual obligations were broken. He implicitly found, in terms which I will quote below, that the loan transaction was fair. But he also found that, in breach of his fiduciary obligation to make full disclosure, he did not disclose that his firm were making a 'hidden profit' in that on the arrangement fee of £1,000 the firm were making a profit of £625 and on the interest rate they were making a profit of 2·5%. He also found that Mr Swindle was in breach of his fiduciary duty in not disclosing to Mrs Harrison that he knew that the brewery loan depended on satisfactory references from the bank and that they were unlikely to be forthcoming and that he was in breach of his contractual duty in negligently failing to advise her that the brewery might not make the loan. I do not consider that it is right to reject these findings of the trial judge. But it must be observed that on any view the breaches were marginal.

As regards the element of profit to Mr Swindle's firm, it was clear from the offer letter dated 7 August which Mr Swindle gave to Mrs Harrison at the time and which set out the terms of the offered loan that although the offer emanated from discussions which Mr Swindle had had with the firm's bankers it was a bridging facility which was being offered to her by the firm. It therefore was a situation where the firm were entering into contractual relations as principals with Mrs Harrison and where on the face of the contract the firm was to receive financial benefit from the transaction—the payment of the £1,000 arrangement fee, the payment of interest at the bank's base rate plus 5%. It was made clear to her that the firm were dealing with her as principals and that they were obtaining contractual rights against her. The element of non-disclosure was confined to the failure to disclose the terms on which the firm had borrowed from the bank.

Similarly, as regards the state of the negotiations between her son and the brewery for the brewery loan, Mrs Harrison had other more obvious sources of information, namely her son and the accountant who was also involved, and she did not have to rely, nor is it clear that she was relying, on Mr Swindle to keep her

informed about those negotiations. There was no evidence which would have supported a finding that she believed that Mr Swindle was better informed than she was.

Thus, although there were breaches of both classes of obligation, the breaches are ones which might well not (and in the event did not) have any impact on the events that followed although they were material to a fully informed decision by Mrs Harrison whether or not to accept the offer of the loan by Mr Swindle's firm. It is to be noted that the breaches relate to the loan transaction and not to the purchase transaction. The judge having rejected Mrs Harrison's allegations and claim in respect of what had happened in June and July, there was no claim that in August he should have advised her to resile from her contract to purchase the hotel.

There is a further related aspect, that of neutralising the influence which Mr Swindle had over Mrs Harrison by reason of his being her solicitor. Mr Swindle did arrange that Mrs Harrison should see his partner Mr Fillmore and he formally advised her to take independent legal advice. But they all knew that this was not a practical proposition. A decision whether or not to accept the loan had to be made then and there. She had no prospect of obtaining informed legal advice from any independent source within the time that was available to her. Therefore the transaction was one which was entered into between parties in a fiduciary relationship where the one had influence over the other and that influence was not neutralised or nullified by Mrs Harrison receiving any independent legal advice.

The judge's finding about the significance in practical terms of all this was expressed in the following words:

> 'What, if any, damages flow from these breaches? To answer this question I feel I must endeavour to place myself in the position of another solicitor consulted to advise Mrs Harrison assuming one could have been found to advise in the available time, which effectively was 9 am to 2 pm the following day. I can only imagine that they would have been astounded at the offer being made by the plaintiff in the circumstances and that with full knowledge of the circumstances they would have said "Grab it". It was, after all, a lifeline for them. There is no evidence that a better offer could have been obtained elsewhere. The alternative was to forfeit the deposit. As Mr Bannister [for Mrs Harrison] conceded in argument, together with the building works already undertaken and other expenditure, having to place the property on what we now know to have been a falling property market, Mrs Harrison would have been facing an immediate and certain loss of at least £66,000. In addition, she would not have had the means from the restaurant proceeds to service the loan on her own home. Realistically she had no choice. There is certainly no evidence before me, even with the benefit of hindsight, that Mrs Harrison would necessarily have been worse off. She was in fact, and possibly correctly, extremely grateful as she conceded in evidence. Accordingly, in my judgment no damages flow from these breaches. The terms were duly accepted.'

The judge's reference to £66,000 was an error since it included the sum of £8,500 which Mrs Harrison had expended on paying off debts secured on 13 Warwick Place, the benefit of which was not affected by the outcome of the hotel transaction.

On this appeal, we are not concerned with any question of the rescission of the obligation of Mrs Harrison to repay the loan to the firm nor of the discharge of the security. By reason of what took place in 1993 she was released from all personal liability in respect of the loan. The property which secured the loan (the freehold title to the hotel) was transferred to her son Miles. She does not challenge the validity of that charge or the right of the firm to enforce it against the property and obtain possession of the property from Miles. Whether or not she might have had grounds for doing so is not a matter which has been raised on this appeal. Nor was the action concerned with any claim to recover any profits, secret or otherwise, made by the firm. Therefore the direct equitable remedies for breach of fiduciary duty—rescission, account and restitution—are not claimed. The claim which we have to consider is a claim for damages or 'equitable compensation' of the character of damages for breach of duty.

In so far as the claim is a contractual one, Mrs Harrison is unable to prove any loss flowing from any breach of contract at this point in the story. The finding of the judge is that even if Mr Swindle had told her all that he knew about the status of the brewery's offer it would not have made any difference to Mrs Harrison's decision to accept the loan from Mr Swindle's firm nor to her intention to complete the purchase of the hotel. Further, if she had been able to take independent advice from another solicitor, in addition to the financial advice which she was already receiving from Mr Stuffins, this again would have made no difference. It would have merely confirmed her decision to accept the loan and complete the purchase. She did not act in reliance on Mr Swindle in relation to any respect in which he was in breach.

Similarly, the judge's finding, by necessary implication, finds that the offer was a fair one which Mrs Harrison would properly have been advised to accept. The terms were fair and reasonable notwithstanding that they involved an element of profit to Mr Swindle's firm. Mr Swindle's firm were accepting the risk of the transaction with Mrs Harrison. The creditworthiness of Mrs Harrison was not the same as that of Mr Swindle's firm. The terms were appropriate for somebody lending to Mrs Harrison. The only element which might have been negotiated differently is the arrangement fee which potentially involved an element of double charging by Mr Swindle's firm and which it could be said should have been confined to the firm's disbursement (the fee paid to the bank) and a proper charge at the appropriate rate for solicitors' work for the actual work done by Mr Swindle's firm in arranging the loan and preparing the relevant documents. To what extent (if at all) this would have resulted in a net saving to Mrs Harrison is not covered by the evidence and is in any event in the context of the relevant transactions very marginal.

The submission advanced by Mr Bannister QC on behalf of Mrs Harrison and developed more fully in this court than it was before the judge at the trial is that for a breach of a fiduciary duty it is not necessary for the claimant to prove a causal relationship between the breach and the loss. The claimant is entitled to say that the transaction with him was one which the fiduciary was not entitled to enter into without having first fully performed his fiduciary duty: if the fiduciary nevertheless enters into the transaction, he then becomes liable to the claimant for all the consequences of the transaction which would not have occurred if the claimant had not entered into it in the same way as if he, the fiduciary, had induced that transaction by his express fraud. He submits that the judge applied the wrong test. He was wrong to say that Mrs Harrison was not worse off. He

submits that as a result of entering into the loan transaction with Mr Swindle's firm she was indeed financially worse off and suffered a loss.

This loss, he submits, came about in the following way. Mrs Harrison had on 21 June mortgaged her own house in which she was living at 13 Warwick Place to National Home Loans. They had lent her £180,000 on a second mortgage. She had used £44,000 to fund the payment of the deposit on the contract for the purchase of the hotel, £8,500 to pay off other liabilities and £13,500 on funding the improvements which her son was carrying out at the hotel prior to completion. She was intending to, and did in the event, use the balance of £110,000 as part of the sum to be paid to the vendors of the hotel on completion. It had been hoped that the brewery loan would provide the balance. As it was, failing any other source of finance, the loan from Mr Swindle's firm was used in conjunction with the £110,000. If Mr Swindle's firm had not lent Mrs Harrison £75,000 she would not have been able to complete and would not have done so. She would therefore not have been in a position to spend the £110,000 on the purchase of the hotel and would have been able to repay that sum to National Home Loans. This would have reduced her liability under the mortgage and increased her equity in 13 Warwick Place. Contrary to what the judge said she would have been better off. It is this difference of £110,000 which Mrs Harrison seeks to recover from Mr Swindle and his firm as damages for breach of fiduciary duty.

Mr Bannister's legal submissions are based on combining two lines of reasoning. The first line is founded on *Nocton v Lord Ashburton* [1914] AC 932, [1914–15] All ER Rep 45. He submits that a breach of a fiduciary duty is, in equity, the equivalent of fraud. The breach of a fiduciary duty is therefore to be equated with the tort of deceit. The tort of deceit is actionable and damages may be recovered notwithstanding that it cannot be shown that if the plaintiff had known the truth he would have acted differently. In support of this proposition he cites *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119, [1969] 2 QB 158 and *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, [1997] AC 254. Therefore, he submits that it is not necessary for him to prove that Mrs Harrison would have acted differently. All the losses which she would not have suffered if she had not entered into the loan transaction are recoverable as damages.

The second line of reasoning is that where a breach of fiduciary duty has occurred the plaintiff is entitled to set aside the transaction. It is not open to the fiduciary to say that his breach of duty did not cause the plaintiff to enter into the transaction. It follows, he submits, that the plaintiff may recover as damages for breach of a fiduciary duty all losses which the plaintiff has suffered as a result of entering into the transaction. In support of this line of reasoning he cites what was said by Lord Thankerton in giving the opinion of the Privy Council in *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465 at 469:

> 'When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.'

The combination of these two lines of reasoning means, he submits, that Mr Swindle is liable for any loss suffered by Mrs Harrison which she can show she would not have suffered but for having taken the loan from Mr Swindle's firm.

Nocton v Lord Ashburton involved a dispute between a solicitor and his client in relation to a benefit which the solicitor had gained to the detriment of his client when, on the advice of the solicitor, the client released a security that he held in respect of the liability of a third party. The relevant property was also charged with a liability to the solicitor and the effect of the release was not only to deprive the client of adequate security but also to advance and increase the value of the security held by the solicitor. The action was started in the Chancery Division of the High Court. The statement of claim alleged fraud and claimed damages. At the trial the action was treated as an action in the tort of deceit and the claim was dismissed for want of proof of actual dishonesty on the part of the solicitor. The Court of Appeal reversed that decision on the facts. It gave judgment in favour of the client. In the House of Lords a different approach was adopted. The House decided that when fraud was pleaded in an action in the Chancery Division it should be understood to be an allegation of equitable fraud (sometimes called constructive fraud) not fraud as understood by the common law (sometimes called express fraud). The House considered that the Court of Appeal should not have reversed the judge's finding on fact that express fraud had not been proved. But they concluded that both the trial judge and the Court of Appeal had been mistaken in their approach. The allegation was an allegation of equitable fraud. This had been proved and judgment should be given for the client, Lord Ashburton, against the solicitor, Mr Nocton.

The passages on which Mr Bannister relies are directed to the understanding of the claim which was being made in the action. Viscount Haldane LC said ([1914] AC 932 at 951–952, [1914–15] All ER Rep 45 at 51–52):

> 'My Lords, it is known that in cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times. For some of these cases the greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a Court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury. But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in [*Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125, 28 ER 82].'

He said ([1914] AC 932 at 953, [1914–15] All ER Rep 45 at 52):

> 'In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction.'

He was referring to what he described as the ordinary jurisdiction of the Chancery courts to deal with transactions 'in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained'. He recognised that it must be taken to be settled that 'nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit': he contrasted that with the exclusively Chancery jurisdiction ([1914] AC 932 at 954, [1914–15] All ER Rep 45 at 52–53):

> 'A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.'

The equitable jurisdiction of the Chancery Court which Lord Haldane LC is recognising is one which, as he emphasised, relates to the equitable remedies which the Chancery Court grants. Thus, he says that a Court of Equity has always assumed jurisdiction to scrutinise the action of a solicitor who has had financial transactions with his client. He continues ([1914] AC 932 at 956–957, [1914–15] All ER Rep 45 at 54):

> 'It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.'

This exclusive jurisdiction of the Court of Chancery applied particularly when a person in a confidential relationship had got the property of another into his hands. Since the Judicature Acts, the courts were empowered to give both common law and equitable remedies.

He concluded ([1914] AC 932 at 958, [1914–15] All ER Rep 45 at 54–55):

> '... this action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill ... The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events, Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now.'

Consequently, the House of Lords held that the award of damages for the tort of deceit was sufficiently close in money terms to the equitable compensation which the court should have awarded for breach of fiduciary duty not to require the House of Lords to substitute a different order. (See also [1914] AC 932 at 965, [1914–15] All ER Rep 45 at 58 per Lord Dunedin.)

Nocton v Lord Ashburton does not establish the proposition for which Mr Bannister contends. Breach of fiduciary duty is not to be equated with common law deceit. It simply gives rise to a personal equity which is to be recognised by a court having Chancery jurisdiction so as to lead to a grant of an equitable remedy. It does not, itself, give rise to a right to damages. It relates to the transaction between the fiduciary and the person to whom he owes the duty. The remedy is essentially restitutionary in its character. The fiduciary may be restrained from enforcing the transaction. It may be rescinded. Accounts and restitution may be ordered. But, if a plaintiff seeks to recover common law damages, he must discharge the same burden of proof as would be required by a court applying the common law.

This leads on to the reliance by Mr Bannister on what Lord Thankerton said in *Brickenden*'s case. Once there has been a breach of a fiduciary duty in relation to a transaction, the fiduciary is not allowed to enforce that transaction. Equity does not allow him to benefit from the improper transaction and can require him to rescind the transaction and make restitution (*Armstrong v Jackson* [1917] 2 KB 822, [1916–17] All ER Rep 1117). It is no answer for the fiduciary to say that the other party would still have entered into the transaction had he made full disclosure. One can see the same reasoning being adopted in relation to the doctrine of uberrimae fidei (e g s 17 of the Marine Insurance Act 1906); the transaction is voidable. The principle is not a principle relating to the recovery of damages nor does it give rise to common law rights. It is essentially a principle which precludes the fiduciary from enforcing his common law rights. It will thus be seen that this principle cannot be used to enable a claimant to recover common law damages without establishing a causal connection between the relevant loss and the relevant wrong. (See also *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801.)

The two ways in which Mr Bannister puts the claim of Mrs Harrison are both mistaken. She cannot combine a mere breach of fiduciary duty with a claim to common law damages. She cannot use a breach of fiduciary duty to obtain a remedy in respect of a transaction other than that in relation to which the fiduciary was dealing with his client. Mrs Harrison is not making any complaint as such about any loss in relation to the loan transaction. That transaction has been rescinded by agreement. She is under no further liability in respect of it. She does not seek an account from Mr Swindle's firm. She does not seek to recover any sums which she paid to Mr Swindle's firm pursuant to that transaction. What she seeks to do is something different. She says that 'If I had not entered into the loan transaction with Mr Swindle I would not have spent the money I thereby obtained and other money which I already had on a different and distinct transaction (the purchase of the hotel) in respect of which Mr Swindle owed me no relevant fiduciary duty and which has turned out to be a loss-making transaction.' This is not reasoning which equity recognises. It is not restitutionary. It does not relate to the breach of fiduciary duty complained of. It elides a remedy in respect of the relevant transaction with a remedy in respect of a different transaction which involved no breach of duty by Mr Swindle. Further,

the reasoning provides a clear example of the failure to distinguish between an event which has merely provided an opportunity for a loss and one which has caused a loss.

This conclusion is confirmed by the other authorities to which we have been referred. The *Smith New Court* case [1996] 4 All ER 769, [1997] AC 254 reviewed the right to recover damages in the tort of deceit. The starting point is that the plaintiff must prove that his participation in the relevant transaction was induced by the fraudulent misrepresentation (see *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426). This proved, the fraudulent defendant 'is bound to make reparation for all the damage directly flowing from the transaction' (see [1996] 4 All ER 769 at 778, [1997] AC 254 at 267 per Lord Browne-Wilkinson; see also [1996] 4 All ER 769 at 794–795, [1997] AC 254 at 284–285 per Lord Steyn). Thus, two successive causative criteria have to be applied. The first is that the fraud induced the transaction. The second is that the loss complained of must have directly flowed from that transaction. Neither of these criteria was Mrs Harrison able to satisfy. On the findings of the judge, she was not induced to enter into the loan transaction by any misrepresentation or non-disclosure by Mr Swindle or his firm, nor did the loss which she now seeks to recover directly flow from that transaction.

In *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785, [1996] AC 421 the House of Lords considered the remedies for breach of trust. Lord Browne-Wilkinson expressly addressed the implications of the rule of strict liability for breach of trust. He said ([1995] 3 All ER 785 at 792, [1996] AC 421 at 432):

> 'At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation" (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn). Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as in common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such a wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.'

In the following pages Lord Browne-Wilkinson analyses the principles on which equitable remedies for breach of trust have been granted. He says ([1995] 3 All ER 785 at 794, [1996] AC 421 at 434):

> 'Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the *breach* of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the *breach*.' (My emphasis.)

Although he uses the *but for* test, he specifically relates it to the actual breach of trust. This is inconsistent with the argument of Mr Bannister seeking to recover, as damages for breaches of duty, losses which would have occurred whether or not there had been such breaches. Mrs Harrison would have borrowed the money from Mr Swindle's firm even if he had fully discharged his duty of disclosure to her. An honest breach of a fiduciary duty is certainly not to be viewed any more seriously than an honest breach of trust.

Lord Browne-Wilkinson confirms his view of the law in his adoption of what was said by McLachlin J in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 163:

> '"In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, *i.e.*, the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, *on a common sense view of causation*, were caused by the breach." ([Lord Browne-Wilkinson's] emphasis.) In my view this is good law. Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.' (See [1995] 3 All ER 785 at 798, [1996] AC 421 at 438–439.)

The *Canson* case is, in my judgment, unhelpful to Mr Bannister whether one looks at the majority or minority reasons for the decision of the court; on either view the causative relevance of the breach to the loss had to be shown. (The helpful discussion of this case and the related problems concerning remedies against fiduciaries in Glover *Commercial Equity, Fiduciary Relationships* (1995) ch 6 also confirms the views which I have expressed.)

In conclusion, I would add a footnote about the statement in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 705–706, [1997] 2 WLR 436 at 443 that *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426 was authority for the proposition, and bound them to hold, that it was sufficient to succeed in the tort of negligence for a plaintiff to prove that the defendant had made a negligent misrepresentation on which he, the plaintiff, had relied and that it was irrelevant what representation the defendant would have made if he had been careful. This was not in fact the decision in *Downs v Chappell*. In that case, the negligent accountant had purported to verify figures for a business at a time when he had no basis to confirm any figures at all (see [1996] 3 All ER 344 at 349, [1997] 1 WLR 426 at 431). The accurate figures were then unknown and the accountant should have said so. If he had said so, the plaintiff would not have purchased the business. The figures used by the judge were not produced for at least another 16 months, by which time the plaintiff had long since bought the business and become committed to the losses which formed the subject matter of the action. The court in *Downs v Chappell* reversed the judge on this point because he had based his decision on the later, irrelevant, figures (see [1996] 3 All ER 344 at 351–352, [1997] 1 WLR 426 at 433).

MUMMERY LJ. There is only one point of substance in this appeal: whether Mrs Mary Harrison ought to have been awarded equitable compensation on her counterclaim against her former solicitors, Alsters, for breach of fiduciary duty in connection with a bridging loan of £75,000 by them to her on 8 August 1991.

Mrs Harrison, a widow since 1977, lived at and owned 13 Warwick Place, Leamington Spa. She was not in good health. On 21 June 1991 she mortgaged her home to the National Home Loans Corp in order to raise £180,000. A small part of that sum was used to redeem existing mortgages (£8,500). The balance was used to finance the purchase of and to pay the cost of repairs and alterations to the Aylesford Hotel, 1 High Street, Warwick. Since January 1991 Mark, her eldest son, who had some catering experience, had been negotiating with receivers of the previous owners for the purchase of the Aylesford Hotel, which he planned to run as a restaurant. But his attempts, assisted by an independent financial advisor, Mr Peter Davis of County Brokers, to raise the necessary finance were unsuccessful. Mrs Harrison agreed to remortgage her home to assist in the purchase of the hotel in her own name as an investment. She saw it as a family enterprise. An application to National Home Loans made on 24 May 1991 resulted in an offer of a mortgage on 29 May 1991. It was hoped that the projected income from the restaurant would cover the mortgage repayments.

Alsters, whose practice is based in Leamington Spa, were instructed by Mrs Harrison in April 1991 to act for her and Mark in the conveyancing aspects of the transaction. Mrs Harrison and Mark hoped to raise the rest of the purchase price by a loan of £100,000 from Banks' Brewery. They obtained financial and commercial advice from other quarters: Mr Davis of County Brokers and Mr Peter Stuffins, a chartered accountant. Alsters were not retained to advise on the prudence of the enterprise.

On 1 July 1991 contracts for the purchase of the Aylesford Hotel for £220,000 were exchanged. A non-refundable deposit of 20% of the purchase price (£44,000) was paid on exchange. Completion was fixed for 5 August 1991. Time was to be of the essence. Access was given to the hotel for making alterations and carrying out repairs. Mrs Harrison had signed a 'disclaimer' letter on 21 June 1991, stating that she instructed Alsters to proceed and exchange contracts notwithstanding the fact that—

> 'b) The proposed finance from Bank's Brewery is based on a verbal assurance only and no contract for the loan of the money has yet been issued by it. c) [That] the deposit payable of 20% is non-returnable in the event of my failing to complete.'

It was necessary to raise over £70,000 for the balance of the purchase price in time for the completion date. Efforts to raise money from various sources were unsuccessful. The brewery money was not forthcoming. Under threat of forfeiture of the deposit, Alsters negotiated a postponement of the completion date till 2 pm on 8 August 1991. On the day before postponed completion, Wolverhampton & Dudley's Brewery made a loan offer of £100,000, but it was subject to contract and to bank references which were unlikely to be provided. Other attempts to obtain bridging finance from Mr Peter Davis and from Barclays Bank (Bedworth Branch) failed.

In those circumstances, Alsters offered a bridging loan to Mrs Harrison on 7 August to enable completion to take place as arranged. The loan was for £75,000, repayable on 8 October 1991, secured by a first charge on the Aylesford Hotel. The agreed rate of interest was 5% above the base rate of the Royal Bank of

Scotland. Alsters borrowed the necessary money from that bank at a rate of 2·5% above base rate. The £75,000 covered not only the balance needed to pay the purchase price, but also the legal costs amounting to £5,000 and a £1,000 arrangement fee. The Royal Bank of Scotland, who charged an arrangement fee of £750 (1%), agreed to split the fee with Alsters. Mrs Harrison was advised by Alsters of her right to take independent legal advice, but there was no time for that to be done.

Completion took place on 8 August 1991. Later events explain why litigation arose between Mrs Harrison, her younger son, Miles Harrison, and Alsters, though the details are not directly relevant to the claim by Mrs Harrison against Alsters for breach of fiduciary duty. It is, however, necessary to complete the history in order to understand the arguments advanced on the claim for equitable compensation.

The restaurant and tea room business carried on at the Aylesford Hotel failed. Mark Harrison faded from the picture in mid-1992, when his youngest brother, Miles, took over the running of the business. The repayments under the mortgage of 13 Warwick Place fell into arrears in 1992. National Home Loans obtained a possession order on 15 December 1992. They sold the property in 1993, leaving about £30,000 owing under that mortgage. Mrs Harrison moved into the Aylesford Hotel. On 13 March 1993 she transferred the hotel to her son Miles for the sum of £24,185. The transfer was subject to the first charge in favour of Alsters, who had not been repaid, and to a second charge made in favour of the Royal Bank of Scotland on 30 September 1991 to raise working capital. Payments promised by Miles to Alsters were not kept up. They started proceedings for possession and repayment against Miles in January 1994. Mrs Harrison was joined as a defendant in March 1994. Both Mrs Harrison and Miles Harrison raised counterclaims against Alsters. Mrs Harrison's counterclaim was for breach of the duty of care and for breach of fiduciary duty.

Alsters were successful in their claim for possession. Both counterclaims were dismissed by the recorder on 6 November 1995 after an 11-day trial. Both Mrs Harrison and Miles appealed with the leave of this court. Alsters served a respondent's notice. Early in the course of the hearing an agreement was reached between Miles and Alsters on his appeal.

The recorder held that (a) Alsters were not in breach of their duty of care to Mrs Harrison in relation to her entering into the contract for the purchase of the Aylesford hotel (there is no appeal on this point); but that (b) they were in breach of their duty of care and (c) in breach of fiduciary duty in relation to the bridging loan and charge. Mrs Harrison had not, however, suffered any recoverable loss in respect of those breaches of duty. No loss flowed from those breaches: another solicitor would have advised Mrs Harrison to take the offer of the bridging loan. She had no choice. There was no evidence of a better offer elsewhere. The alternative was to forfeit the deposit and place the property on a falling market.

Mrs Harrison's submissions

Mrs Harrison claims about £100,000 for breach of duty on the bridging loan. Mr Bannister QC put her case with attractive simplicity.

(1) The recorder had rightly held that Alsters were in breach of their duty of care and in breach of fiduciary duty. Alsters were in a fiduciary relationship with Mrs Harrison. They were her solicitors. They had not disclosed to her all the material facts which they should have disclosed, namely the split of the arrangement fee with the bank from whom they raised the money to lend Mrs

Harrison, the differential in the rate of interest which they were charging Mrs Harrison and information possessed by them that the brewery were unlikely to make a loan, because the bank would not provide the references required by the brewery. Alsters had placed themselves in a position where their duty to Mrs Harrison, as a client, conflicted with their own interests. They were making an undisclosed profit from the loan transaction with her. She had entered into a bridging loan with them without full information and without independent legal advice. Alsters should have insisted on Mrs Harrison taking separate advice. They were under a fiduciary duty not to lend money to Mrs Harrison. They had acted in breach of that duty on 8 August 1991.

(2) But for that breach of duty, Mrs Harrison would have been unable to complete the purchase of the Aylesford Hotel. There was no other source of finance available. She would not have incurred a liability to repay them £75,000. More important, she would not have applied the balance of the advance from the National Home Loans Corporation in the purchase of the Aylesford Hotel. Although inability to complete the contract through lack of finance would have meant that she lost the £44,000 deposit and the money already spent on repairs and alterations to the Aylesford Hotel, she would have retained her equity in 13 Warwick Place. That was worth over £100,000. Instead, she lost her home and she still owes a substantial sum to National Home Loans.

(3) Alsters were liable to pay her equitable compensation for breach of duty. As a result of that breach of duty she had lost the opportunity to say No to the bridging loan after receiving the independent legal advice she should have received. Alsters had made the choice for her. That was a breach of fiduciary duty for which she was entitled to a restitutionary remedy. The loss of her equity in her home flowed directly from that breach of duty. Alsters were liable for all the consequences of whatever decision Mrs Harrison took without the benefit of independent legal advice. It is irrelevant to the quantum of equitable compensation that her loss was unforeseeable; or that she would not have acted differently on being fully informed of all material facts known to Alsters and after taking separate advice and would still have said Yes to the offer of the bridging loan; or that another firm of solicitors would have advised her to proceed with the loan from Alsters. No other solicitor knew as much as Alsters did about the circumstances of the transaction. In brief, Mrs Harrison had suffered losses which she would not have suffered but for Alsters' breach of duty. Those losses were a direct consequence of their breach of duty in making the loan to her.

The law

The relevant principles governing liability to pay equitable compensation for breach of fiduciary duty are expounded in the following cases which have been cited: *Nocton v Lord Ashburton* [1914] AC 932, [1914–15] All ER Rep 45, *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, [1997] 2 WLR 436, *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801 at 817–818, *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785, [1996] AC 421, *Clark Boyce v Mouat* [1993] 4 All ER 268, [1994] 1 AC 428 and *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191.

The decision of the House of Lords in *Nocton v Lord Ashburton* is the seminal case, although, as Lord Devlin observed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 604, [1964] AC 465 at 520, 'it is not at all easy to

determine exactly what it decided'. That is a common characteristic of pathbreaking cases: it may take a generation or more to work out the ramifications of broad statements of legal principle. It is possible to extract from the speeches the following principles relevant to this appeal. (1) A solicitor stands in a fiduciary relationship with his client. (2) A solicitor who enters into a financial transaction with his client is under a fiduciary duty, when advising his client, to make full disclosure of all relevant facts known to him. (3) Liability for breach of fiduciary duty is not dependent on proof of deceit or negligence. Equity imposes duties in special relationships above and beyond the minimal legal duties to be honest and to be careful. Fiduciary duties rest on the idea of trust and of conduct offensive to conscience. (4) The equitable remedies available for breach of fiduciary duty are 'more elastic' than the sanction of damages attached to common law fraud and negligence. (Remedies include rescission where restitutio in integrum is possible; replacement of property improperly acquired from the person to whom the duty is owed; accounting for profits and benefits acquired in breach of duty.) Payment of compensation may be ordered to put the plaintiff 'in as good a position pecuniarily as that to which he was in before the injury'. The measure 'may not always be the same as in an action for deceit or for negligence' (see [1914] AC 932 at 952, 958, [1914–15] All ER Rep 45 at 51, 55). It is instructive to examine the remedy granted by the House of Lords in *Nocton v Lord Ashburton*. The claim against the solicitor alleged fraud. The trial judge found that fraud was not proved and dismissed the action. The Court of Appeal, in what Lord Haldane LC described as a 'rash proceeding' ([1914] AC 932 at 945, [1914–15] All ER Rep 45 at 48), reversed the judge, found fraud and directed an inquiry as to what damage, if any, had been sustained by the plaintiff *'by reason of'* the defendant's wrongdoing, as identified in the terms of the inquiry. Although the House of Lords held that the Court of Appeal were wrong to reverse the judge, they upheld the order for an inquiry as to damages on the basis that the defendant, though not fraudulent, was liable to pay compensation for breach of fiduciary duty. The terms of that inquiry already quoted made it clear that a causal link had to be established between the defendant's wrongdoing and the loss suffered by the plaintiff.

On applying the relevant principles to the facts of this case, I conclude that the recorder was right to reject Mrs Harrison's claim for substantial equitable compensation for breach of fiduciary duty by Alsters. I would dismiss the appeal on that point.

In my judgment, the legal position is as follows.

Fiduciary duties

As solicitors for Mrs Harrison, Alsters owed her, in addition to a common law duty of care, fiduciary duties in equity. In making the bridging loan to her, while she was still their client, Alsters had placed themselves in an actual conflict situation: they were under a duty to disclose to her all material facts known to them in connection with the bridging loan. They were under a duty not to prefer their own interests and make a profit for themselves out of the transaction. They were bound to act towards her with loyalty and good faith in their dealings with her.

Breach of duty

The recorder was entitled to hold, on the facts found by him, that Alsters were not only negligent in failing to advise Mrs Harrison that the brewery might not

make the loan and of the nature of the risk, but had also acted in breach of their fiduciary duties. They continued to act for Mrs Harrison in a situation of actual conflict of duty and interest. Mrs Harrison had not had the benefit of independent legal advice on the bridging loan. Alsters had not disclosed to her the fact that the rate of interest they were charging was 2·5% higher than the rate of interest that the Royal Bank of Scotland were charging them for the loan of the money; and they had not disclosed the fact that the arrangement fee was equally split between them and the Royal Bank of Scotland. They did not disclose the fact that they knew that the brewery loan was not likely to be forthcoming, as the bank would not provide the necessary references.

It is no defence to a breach of fiduciary duty that Alsters were motivated by a wish to help their client out of a difficulty or that compliance with the duty would not have altered the decision of Mrs Harrison to proceed with the bridging loan. It was stated by Lord Thankerton in the Privy Council in *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465 at 469:

> 'When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.'

Extent of liability and causation

Equitable compensation may be awarded for breach of fiduciary duty. As observed in a number of the cases cited, the restitutionary obligation imposed on those who owe trustee or fiduciary duties is more strict than the common law obligation to pay damages for contractual or tortious negligence.

In considering the extent of liability for breach of fiduciary duty, it is not always necessary to consider all the matters which may be relevant in determining the extent of liability to pay damages for negligence. Foreseeability and remoteness of damage are, in general, irrelevant to restitutionary remedies for breach of trust or breach of fiduciary duty. The liability is to make good the loss suffered by the beneficiary of the duty. It is, however, necessary to address the issue of causation. Although equitable compensation, whether awarded in lieu of rescission or specific restitution or whether simply awarded as monetary compensation, is not damages, it is still necessary for Mrs Harrison to show that the loss suffered has been caused by the relevant breach of fiduciary duty. Liability is not unlimited. There is no equitable by-pass of the need to establish causation. As was said by Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785 at 798, [1996] AC 421 at 439:

> 'Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.'

Although that was said in the context of a claim for breach of trust, the same considerations apply to a claim for breach of fiduciary duty: fiduciary duties are equitable extensions of trustee duties.

Lord Browne-Wilkinson approved as good law passages in the minority judgment of McLachlin J in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 to the effect that, although foreseeability of loss is not a concern in assessing equitable compensation, compensation is limited to the loss flowing from the breach of the relevant equitable duty. The exercise is one of restoration to the plaintiff of the value of what has been lost 'through the breach' or 'as a result of the breach'.

In questions of causation it is important to focus on the relevant equitable duty. The recent decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191 is in point. That was a case on the measure of damages for breach of contract and tort (negligent over-valuation). It explains the correct approach for determining whether the loss suffered is attributable to the relevant breach of duty. As appears from Lord Browne-Wilkinson's comments in *Target Holdings* [1995] 3 All ER 785 at 792, [1996] AC 421 at 432, the same principles ought to be adopted in cases of breach of fiduciary duty:

> '... the defendant is only liable for the consequences of the legal wrong he had done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong.'

He added that, although equity and common law differ in their detailed rules, the underlying principles are the same.

In one sense it true that, 'but for' the acquisition of the Aylesford Hotel, Mrs Harrison would not have mortgaged her home and she would not have subsequently suffered the loss of her equity in it. The recorder held that there was no breach of duty of care by Alsters to Mrs Harrison in relation to the acquisition of the hotel. There is no appeal on that point. Further, it was never alleged that there was any breach of fiduciary duty by Alsters to Mrs Harrison in connection with the acquisition of the hotel. The fiduciary duties which have been held to have been breached were solely in connection with the bridging loan. What loss has Mrs Harrison suffered as a result of breach of fiduciary duty in connection with the bridging loan? It is asserted by Mr Bannister, on Mrs Harrison's behalf, that she has suffered substantial loss as a result of that breach of duty. She could not have acquired Aylesford hotel without Alsters' bridging loan; Alsters were in breach of fiduciary duties in making that loan; they are liable for the loss of her equity in her home, even if that was unforeseeable and even if another firm of solicitors would have advised Mrs Harrison to take up Alsters' offer of assistance.

That argument is flawed by the fallacy identified by Lord Hoffmann in the *South Australia* case ie not starting from the correct point. The correct starting point is to identify the relevant cause of action ie the relevant wrong. That involves identifying the scope of the duty breached and the purpose of the rule imposing the duty. In the *South Australia* case, for example, Lord Hoffmann drew a distinction, in the context of a negligent valuation, between a duty to provide information for the purpose of enabling someone else to make a decision on a course of action and, on the other hand, a duty to advise someone as to what

course of action he should take. The extent of liability for loss suffered would not be the same in each case. A wrongdoer is only liable for the consequences of his being wrong and not for all the consequences of a course of action. In the present case, there was no fiduciary duty on Alsters to abstain from lending money to Mrs Harrison in all circumstances or to prevent her from completing the purchase of Aylesford Hotel in accordance with the contract to purchase. Alsters' duty was to make full disclosure of material facts relevant to the bridging loan to enable her to make a fully informed decision about it. They were in breach of that duty; but, as found by the judge, the probabilities are that Mrs Harrison would still have entered into the bridging loan, even it that breach of duty had not occurred, because she was intent on completing the purchase of the Aylesford Hotel, whatever independent legal advice she received. The loss which she suffered did not flow from that breach of fiduciary duty. It flowed from her own decision to take the risk involved in mortgaging her own home to finance her son's restaurant business at the hotel. Alsters were not under a duty to decline to act for Mrs Harrison on the purchase or to stop her from going ahead with the purchase, if that is what she wanted to do.

In brief, the loss of the equity in 13 Warwick Place was not a result of Alsters' breach of fiduciary duty in relation to the bridging loan which enabled Mrs Harrison to complete the contract for the acquisition of the Aylesford Hotel. It would be contrary to common sense and fairness to put on Alsters the whole risk of the purchase transaction on the basis that they had failed to make full disclosure in a related loan transaction, when disclosure would not have affected the client's decision to proceed with the purchase. Mrs Harrison's position would have been the same even if there had been no breach of duty.

As to the remaining points in the appeal my conclusions are as follows.

The 1993 transfer point

In my judgment, Alsters are not liable to Mrs Harrison for breach of duty in respect of the transfer of the Aylesford Hotel to Miles in March 1993. The recorder was right to dismiss Mrs Harrison's counterclaim for negligence under this head.

Mr Bannister submitted that, as an alternative to compensation for loss of the equity in her home, Mrs Harrison should have been awarded the value of the loss of her equity in the Aylesford Hotel, which was between £44,000 and £55,000. He argued that she had suffered loss as a result of the transfer, which had been presented to her for signature and by which, for a stated price of £24,185, she had parted with her only remaining asset of significance at a deliberate undervalue to another client of Alsters, Miles, who was unable to pay (and did not in fact pay) the purchase price, payable by half-yearly instalments over ten years. He emphasised that the calculation of that sale price was based on a figure (£140,000) reached by Mr Malcolm Hawkesford FRICS, instructed by Alsters, on the basis of a forced sale. His report is dated 17 December 1992. The result was a valuation 10% to 15% below the open market value. Mrs Harrison was not, as she ought to have been, advised independently of Miles and of Alsters, who were negligent in advising her to transfer the hotel to Miles.

The recorder was right to reject Mrs Harrison's claim on this point. The facts were that Mrs Harrison was faced with a severe crisis at the end of 1992. National Home Loans had obtained an order for possession of her home. About £200,000 was secured by their charge on 13 Warwick Place. Bailiffs had entered into walking possession of the furniture in the Aylesford Hotel on 13 December 1992.

There was a real risk of bankruptcy to Mrs Harrison and a real threat that she would lose her home through a forced sale of the hotel. She was suffering from ill-health. The price for the transfer of the hotel was fixed as on an arm's length sale. It was found as a fact that she would not have accepted independent legal advice to place the hotel on the open market for sale. There was, therefore, no need for independent advice and there was no breach of a duty of care by Alsters.

I would add that I do not agree with the recorder that the evidence established a 'tacit agreement' between Mr Hawkesford and Alsters to mislead as to the value of the Aylesford Hotel. Mr Hawkesford agreed to make a valuation on the instructions of Alsters after a discussion about the seriousness of the situation with Mrs Harrison. That valuation was not an undervalue. The fact was that, if the hotel was not transferred to Miles, Mrs Harrison would lose the property to her creditors. The transfer was of benefit to her, as she was released from her personal liability under the two mortgages.

The costs order

The recorder ordered that Miles should pay Alsters' costs of their claim against Mrs Harrison, even though that claim failed. Mr Bannister submitted that Alsters should have been ordered to pay the costs of their unsuccessful claim. It was unsuccessful because Alsters had released Mrs Harrison from liability under the charge when the hotel was transferred by her to Miles in 1993.

It was submitted by Mr Matheson QC, on behalf of Alsters, that it was in consequence of the counterclaim by Miles to set aside the transfer that Alsters joined Mrs Harrison as a defendant. If the transfer was set aside, as Miles sought, Mrs Harrison would not have been released from her liability under the bridging loan charge. The rescission of the transfer would have resulted in the Aylesford Hotel and the burden of Alsters' mortgage on it reverting to Mrs Harrison. The fact that Miles had failed in his claim for rescission meant that he, rather than Alsters, ought to pay the costs of the unsuccessful claim against Mrs Harrison.

In my judgment, the recorder was entitled to make the order for costs that he did in the exercise of his discretion. Alsters made no claim against Mrs Harrison until Miles served his counterclaim. They joined her as a defendant in case Miles succeeded in his counterclaim. He failed. The recorder was not obviously wrong in directing that Miles should pay Alsters' costs of the claim.

Appeal dismissed.

L I Zysman Esq Barrister.

R v Emmett and another

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN AND LORD CLYDE

8, 9 OCTOBER, 13 NOVEMBER 1997

Drugs – Drug trafficking – Confiscation order – Proceeds of drug trafficking – Amount to be confiscated agreed by defendant – Whether defendant can appeal confiscation order – Jurisdiction of Court of Appeal – Whether statutory provision relating to statement agreed by defendant for the purpose of proving benefit received from drug trafficking excluding right of appeal against order made – Burden of proof – Whether defendant's mistake induced him to accept correctness of statement – Drug Trafficking Offences Act 1986, s 3(1).

The defendants were two of four principal organisers of a drug smuggling enterprise. The defendants were charged with and pleaded guilty in the Crown Court to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug contrary to s 170(2) of the Customs and Excise Management Act 1979. Thereafter, the prosecution tendered to the court a statement under s 3(1)[a] of the Drug Trafficking Offences Act 1986 stating the amount of the benefits accruing to the defendants from drug trafficking, and counsel for the defendants, acting on instructions, agreed that amount and invited the judge to make agreed confiscation orders. The judge made the agreed confiscation orders and sentenced the defendants to $12\frac{1}{2}$ years' imprisonment. The defendants appealed against their sentences and the confiscation orders. The Court of Appeal quashed the custodial terms and substituted in each case a term of nine years' imprisonment and, subsequently, quashed the confiscation orders. The Crown appealed to the House of Lords contending, inter alia, that the general right to appeal against a confiscation order had been excluded by s 3(1) of the 1986 Act in respect of a defendant's acceptance of any allegation in a statement tendered by the prosecution and acted on by the court, on the basis that s 3(1) provided that the court could treat the defendant's acceptance as 'conclusive of the matters to which it relates'.

Held – On its true construction, s 3(1) of the 1986 Act did not expressly or by necessary implication exclude the right of appeal, since it was merely a procedural provision designed to facilitate proof that a defendant had benefited from drug trafficking and to establish what the value of the proceeds were, and was capable of meaning no more than that the Crown Court might treat the defendant's acceptance as proof of the matters to which it related. Nor did the section exclude an appeal on the ground that the defendant's acceptance was based on a mistake of law or fact. However, a defendant who asserted such a mistake had the burden of showing that his assertion was correct. In the instant case the defendants had not established that they had agreed to the confiscation orders as a result of a mistaken view of the law.

a Section 3(1) is set out at p 740 *g h*, post

Accordingly, since they had agreed to the orders, which were in any event justified on the evidence, it followed that the Court of Appeal had erred in quashing them. The appeals would therefore be allowed and the confiscation orders restored (see p 739 *a* to *c*, p 741 *j* to p 743 *e* and p 745 *a e* to *g j* to p 746 *b*, post).

R v Tredwen (1994) 99 Cr App R 154 overruled.

Notes

For confiscation orders under the Drug Trafficking Offences Act 1986, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1305–1308, and for cases on the subject, see 15(2) *Digest* 386–388, *21834–21838.2*.

For the Customs and Excise Management Act 1979, s 170, see 13 *Halsbury's Statutes* (4th edn) (1996 reissue) 337.

As from 3 February 1995 s 3(1) of the Drug Trafficking Offences Act 1986 was replaced by ss 11(1), 13(11), 14(8), 15(3) and 19(6) of the Drug Trafficking Act 1994. For ss 5, 11, 13, 14, 15 and 19 of the 1994 Act, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1501, 1506, 1509, 1510, 1511, 1516.

Cases referred to in opinions

R v Akengin (1995) 16 Cr App R (S) 499, CA.
R v Boal [1992] 3 All ER 177, [1992] QB 591, [1992] 2 WLR 890, CA.
R v Cain [1984] 2 All ER 737, [1985] AC 46, [1984] 3 WLR 393, HL.
R v Crutchley (1994) 15 Cr App R (S) 627, CA.
R v Dickens [1990] 2 All ER 626, [1990] 2 QB 102, [1990] 2 WLR 1384, CA.
R v Forde [1923] 2 KB 400, [1923] All ER Rep 477, CA.
R v Johnson [1991] 2 All ER 428, [1991] 2 QB 249, [1990] 3 WLR 745, CA.
R v Lee [1984] 1 All ER 1080, [1984] 1 WLR 578, CA.
R v Thacker (1995) 16 Cr App Rep (S) 461, CA.
R v Tredwen (1994) 99 Cr App R 154, CA.

Appeals against sentence

The Crown appealed with leave of the Appeal Committee of the House of Lords given on 2 December 1996 against the decision of the Court of Appeal (Schiemann LJ, Morland and Collins JJ) delivered on 16 February 1996 allowing the appeals of Brian Emmett and Michael John Emmett against, inter alia, confiscation orders made against them under the Drug Trafficking Offences Act 1986 by Judge Neville in the Crown Court at Exeter on 20 December 1994 in the sums of £1,000 and £20,705·21 respectively following their conviction on pleas of guilty of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to s 170(2) of the Customs and Excise Management Act 1979. The Court of Appeal certified that two points of law of general public importance (see p 740 *j* to p 741 *d*, post) were involved in the decisions. The facts are set out in the opinion of Lord Steyn.

Paul Garlick QC and *Nigel Lickley* (instructed by the *Solicitor for the Customs and Excise*) for the Crown.

Sir Ivan Lawrence QC and *Anthony Wilcken* (instructed by *Ralph Haeems & Co*) for the Emmetts.

Their Lordships took time for consideration.

13 November 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives I would allow this appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speech of my noble and leaned friend Lord Steyn. For the reasons he gives, with which I agree, I would allow this appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would allow this appeal.

LORD STEYN. My Lords,

The drugs enterprise

On 7 November 1993, after months of preparations in England and Spain, a group of men started to unload a cargo of four metric tons of cannabis resin at Bideford Quay. Customs and Excise officers arrested the men as well as others engaged in the enterprise. The respondents in the present appeals, Brian Emmett and Michael Emmett, were two of the four principal organisers of the enterprise. The other two, who are not before the House, were Bracken and Lemonnier. The street value of the cannabis was some £13m. The outlay for the whole operation was probably of the order of £3m.

The proceedings in the Crown Court

On 25 October 1994 in the Crown Court at Exeter a number of accused including Brian Emmett and Michael Emmett pleaded guilty to the offence of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug contrary to s 170(2) of the Customs and Excise Management Act 1979. The Drug Trafficking Offences Act 1986 was applicable. (Subsequently the 1986 Act was substantially repealed and replaced by the Drug Trafficking Act 1994.) The trial judge had first to consider whether the accused had benefited from drug trafficking and, if so, to make appropriate confiscation orders under the 1986 Act. In the result counsel for the four principal organisers, acting on instructions, invited the trial judge to make agreed confiscation orders. At the start of his sentencing observations the judge stated:

> '... it was agreed between counsel, so I was not invited to carry out a trial on this, but the benefits accruing to Bracken, Lemonnier and both Emmetts amounted to £100,000. It was agreed that a confiscation order in the sum of £1,000 should be made against Peter Bracken, in the sum of £37,484·32 in the case of Lemonnier, £1,000 in the case of Brian Emmett, and £20,705·21 in relation to Michael Emmett.'

The judge made the agreed confiscation orders and imposed sentences of imprisonment in default. The judge then sentenced all the accused to lengthy terms of imprisonment. In the cases of Bracken, Lemonnier, Brian Emmett and Michael Emmett he imposed terms of 12½ years' imprisonment.

The proceedings in the Court of Appeal

With the leave of the single judge these four defendants appealed to the Court of Appeal against their sentences and the confiscation orders. On 5 February 1996 the Court of Appeal allowed the appeals of the four men against sentence to the extent that the court quashed the custodial terms and substituted in each case a term of nine years' imprisonment. On the same day the Court of Appeal also heard argument on the appeals against the confiscation orders. The court reserved judgment on that aspect. On 16 February in a clear and careful judgment on behalf of the court Collins J upheld the confiscation orders made in respect of Bracken and Lemonnier but quashed the confiscation orders of Brian Emmett and Michael Emmett. The Court of Appeal refused an application by the Crown for leave to appeal against the orders quashing the confiscation orders made against the Emmetts but certified that points of law of general importance were involved in the relevant decisions. Those certified questions were the basis on which the Appeal Committee granted leave to appeal.

The 1986 Act and the certified questions

In order to render the certified questions intelligible I must briefly refer to the relevant provisions of the 1986 Act. Section 1(1) provides that the sentencing judge shall first determine whether the drug trafficker has benefited from drug trafficking. A person who has received any payment or other reward in connection with drug trafficking carried on by him has benefited from drug trafficking: s 1(2). If he has benefited, the court must determine the amount to be recovered: ss 1(4) and 4. Under the 1986 Act the burden was on the Crown to prove according to the criminal standard that the defendant had benefited from drug trafficking and what the value of his proceeds of drug trafficking was: see *R v Dickens* [1990] 2 All ER 626, [1990] 2 QB 102. But the Crown's burden was eased by assumptions which the court was entitled to make unless it was inappropriate to do so: s 2(2). The assumption on which the Crown relied was that contained in s 2(3)(b), namely that any expenditure of his in the statutory period was met out of payments received by him in connection with drug trafficking carried on by him. Section 3 deals with the service of statements relating to drug trafficking. For present purposes sub-s (1) is the critical provision. It reads:

> 'Where—(a) there is tendered to the Crown Court by the prosecutor a statement as to any matters relevant to the determination whether the defendant has benefited from drug trafficking or to the assessment of the value of his proceeds of drug trafficking, and (b) the defendant accepts to any extent any allegation in the statement, the court may, for the purposes of that determination and assessment, treat his acceptance as conclusive of the matters to which it relates.'

Section 4(1) then provides that the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of the drug trafficking.

Against this statutory background I now set out the certified questions:

> '1. Where: (i) a defendant has accepted an allegation made in a statement tendered to the court by the prosecution under section 3(1)(a) of the Drug Trafficking Offences Act 1986 ("DTOA"); (ii) the Crown

Court has treated his acceptance of the allegation as conclusive of the matters to which it relates; and (iii) the Crown Court has made a determination in accordance with section 4 of the DTOA of the amount to be recovered from the defendant by virtue of section 1 of the DTOA ("the section 4 determination"), whether it is open to the defendant to appeal to the Court of Appeal (Criminal Division) against the section 4 determination on the grounds either: (a) that his acceptance of the allegation was based upon a mistake of law; or (b) that his acceptance of the allegation was based upon a mistake of fact.

2. If it is open to the defendant to appeal as aforesaid: (i) Is there any legal or evidential burden upon the defendant to prove that the mistake of law or mistake of fact was the reason which caused him to accept the allegation? (ii) Is the Court of Appeal (Criminal Division) entitled to vary or quash the section 4 determination made by the Crown Court before receiving and considering evidence from the defendant as to the reasons why he accepted the allegation?'

It will be observed that the certified questions assume that Brian Emmett and Michael Emmett acted under a mistake of law or a mistake of fact. They further implicitly assume that the mistakes in question were causally relevant. My Lords, for reasons that I will explain I am satisfied that these assumptions were not justified on the materials before the Court of Appeal. Strictly therefore the certified questions do not arise on the present appeals. Nevertheless, it is necessary to remove, as far as it is possible to do so, uncertainty about the narrow points of law which have been raised in the certified questions.

Certified question no 1: ouster of right of appeal

The Crown rightly accepts that with leave an appeal does lie against a confiscation order as part of a sentence: see ss 11 and 50(1) of the Criminal Appeal Act 1968 and *R v Johnson* [1991] 2 All ER 428, [1991] 2 QB 249. But the Crown submitted that the general right to appeal against a confiscation order has been excluded by s 3(1) in respect of a defendant's acceptance of any allegation in a statement tendered by the prosecutor which has been acted on by the court. The foundation of this submission is that s 3(1) provides that the court may treat the defendant's acceptance as 'conclusive of the matters to which it relates'. The submission is that 'conclusive' means conclusive for all purposes including an appeal to the Court of Appeal. Counsel for the Crown pointed out that this is precisely what Glidewell LJ, giving the judgment of the Court of Appeal in *R v Tredwen* (1994) 99 Cr App R 154, held that s 3(1) of the 1986 Act means. Moreover, in *R v Crutchley* (1994) 15 Cr App R (S) 627, Glidewell LJ reiterated this view. Counsel also pointed out that after the decision in *R v Tredwen* Parliament re-enacted the provision in s 3(1) in substantially similar terms: see s 11(7) of the 1994 Act. Counsel suggested that Parliament indorsed the principle enunciated in *R v Tredwen*. Finally, counsel said that if the law were otherwise the position would be wide open to defendants to manipulate the system by accepting s 3 statements tendered by the prosecutor in order to avoid being cross-examined and then challenging the statements on appeal.

The Court of Appeal felt constrained to deal with the precedent of *R v Tredwen* rather gingerly but Collins J did express the tentative view that the

word 'may' indicates that the trial court has a discretion and that the discretion might be reviewable. I would approach the matter rather differently. There is a strong presumption that except by specific provision the legislature will not exclude a right of appeal as of right or with leave where such a right is ordinarily available: see *R v Cain* [1984] 2 All ER 737 at 741–742, [1985] AC 46 at 55–56 per Lord Scarman. The starting-point is that, unless s 3(1) of the 1986 Act expressly or by necessary implication excludes a right of appeal, there is as a matter of jurisdiction a right of appeal against a confiscation order in all cases. There is plainly no express ouster of the right of appeal. Does the use of the word 'conclusive' warrant a necessary implication to oust the right of appeal? It is significant that neither s 3 nor any other part of the 1986 Act contains any express provisions dealing with appeals to the Court of Appeal. Section 3(1) is a procedural provision designed to facilitate proof that a defendant has benefited from drug trafficking and to establish what the value of his proceeds of his drug trafficking was. The focus of the section is on the Crown Court, and it then provides that the Crown Court may treat the defendant's acceptance as conclusive of the matters to which it relates. In the context that is capable of meaning no more than that the Crown Court may treat the acceptance as proof of the matters to which it relates. In these circumstances no necessary implication ousting the jurisdiction of the Court of Appeal is justified. The language of the section is not apt to deal with the jurisdiction of the Court of Appeal to hear an appeal against confiscation orders even if uncontested and arising from a decision under s 3(1). It cannot, therefore, oust the jurisdiction of the Court of Appeal in any respect. The right of appeal to appeal with leave under the Criminal Appeal Act 1968 Act is as a matter of jurisdiction untouched: see ss 11 and 50(1). It is of course true that if there is an appeal the Court of Appeal may have to take account of the fact that a judge had decided to treat an acceptance of an allegation in a prosecution statement as conclusive and the Court of Appeal may have to give proper and due weight to the consideration. That is, however, an altogether different matter from saying that s 3(1) of the 1986 Act operates pro tanto as an exclusion of the right of appeal. It does not detract from what I have said about the jurisdictional issue.

So far I have principally concentrated on the wording of s 3(1) of the 1986 Act and concluded that as a matter of language it contains no ouster of any right of appeal. Broader considerations point in the same direction. The submission of the Crown is that s 3(1) precludes the Court of Appeal from considering an argument that a defendant's acceptance of a s 3(1) statement was initiated by a fundamental mistake of law or fact. Here it is instructive to consider the analogous position of the jurisdiction of the Court of Appeal to hear an appeal following an unequivocal and informed plea of guilty. Earlier in this century it may not have been possible to put forward as a ground of appeal that the plea of guilty arose from a mistake of law or fact of the defendant: *R v Forde* [1923] 2 KB 400 at 403, [1923] All ER Rep 477 at 479 per Avory J. Nowadays it is clear that as a matter of jurisdiction the Court of Appeal has power in such a case to consider an argument that the plea of guilty was induced by a fundamental mistake of law or fact: see *R v Boal* [1992] 3 All ER 177, [1992] QB 591 (a mistake of law), *R v Lee* [1984] 1 All ER 1080 at 1084, [1984] 1 WLR 578 at 583 (a mistake of fact) and *Blackstone's Criminal Practice* (7th edn, 1997) D 22.12. Given that the powers of the Court of Appeal extend

to cases when a plea was entered on a mistaken view of the law or fact, it is difficult to see what rational basis there could be to exclude such a right of appeal under s 3(1) of the 1986 Act. Even drug traffickers have rights and they too are entitled to justice.

The matters that I have outlined were not put before the Court of Appeal in *R v Tredwen* (1994) 99 Cr App R 154. I conclude that Glidewell LJ's observations about the meaning and effect of s 3(1) of the 1986 Act are incorrect. And it is implausible to say that Parliament intended to indorse that decision when it passed the Drug Trafficking Act 1994. The Crown's submissions in the support of *R v Tredwen* must be rejected. And, as I will attempt to show in the discussion of the second certified question, the Crown's fears that the overruling of *R v Tredwen* will enable defendants to manipulate the system are exaggerated.

In my view the answer to the first certified question is Yes.

Certified question no 2: burden

The answer to the second certified question is self-evident: the burden rests on an appellant, who asserts that his acceptance of any allegation in a s 3 statement was the result of a mistake of law or fact, to persuade the Court of Appeal that his assertion is correct. Strictly, nothing more need be said about the certified question.

At the hearing of the appeal before the House counsel debated how a defendant must discharge such a burden and how the Court of Appeal should deal with such an assertion eg by receiving information from counsel, affidavits or oral evidence. That will be a matter for the Court of Appeal to consider and I will not presume to express a view on what procedure the Court of Appeal should adopt.

Lest it be thought, however, that my observations are some kind of open sesame to such appeals I would mention four matters. First, the question in such cases will be not what mistake counsel made but what mistake the defendant made. Secondly, and particularly in regard to matters peculiarly within the knowledge of a defendant, the burden on a defendant of proving a mistake may not easily be discharged. Thirdly, the focus in such cases will be on a material and causatively relevant mistake, viz a material mistake which in fact induced the defendant to accept the correctness of a s 3 statement. Fourthly, even if the defendant can persuade the Court of Appeal on these three points, the Court of Appeal may still have to consider whether, absent a material mistake, the particular confiscation order would nevertheless have been inevitable. If that is the case, the appeal may have to be dismissed on the ground that on a global view of the case no injustice can be shown.

The mistake put forward

The mistake relied on is that counsel for the respondents, and the respondents, allegedly assumed at the time of the hearing before the trial judge that the drugs seized by the customs officers at Bideford could by themselves amount to a benefit received by the respondents under the 1986 Act. It was common ground that such an assumption would have been wrong. The subsequently reported decisions in *R v Akengin* (1995) 16 Cr App R (S) 499 and *R v Thacker* (1995) 16 Cr App Rep (S) 461 make that clear.

Counsel appearing for both the respondents before the House submitted, albeit somewhat tentatively, that the judge acted on such a mistaken view and therefore misdirected himself. There is nothing to support this argument. The judge was never called upon to consider the legal position. And nobody knows what view he would have taken on the point of law. He simply recorded the agreement of counsel that the benefits accruing to the four principal conspirators amounted to £100,000 each and he made the orders of £1,000 in the case of Brian Emmett and £20,705 in the case of Michael Emmett pursuant to the agreement of counsel. I would therefore reject this part of the argument of counsel for the defendants.

Counsel for the respondents also submitted that counsel for the Crown acted upon the mistaken view of the law. How this fact, if established, could help the respondents was never clarified. But this argument is also without foundation. The Crown's position was that there was sufficient circumstantial evidence to trigger the assumption in s 2(3)(b), viz that the principal organisers must have incurred expenditure in respect of the purchase of the drugs. For this contention the Crown relied on the roles of the Emmetts and all the circumstances of the case which, of course, included possession of the drugs. Later in this speech I will examine the merits of that contention. At this stage I merely make clear that the Crown did not rely on the seized drugs as by themselves constituting a benefit to the respondents. I would therefore also reject this part of the argument of counsel for the respondents.

That leads to the major point of counsel for the respondents, viz that junior counsel acting on behalf of the Emmetts laboured under such a mistaken view of the law. Junior counsel who appeared for Michael Emmett at first instance informed the Court of Appeal that he was unhappy about the proposed agreement. The judgment of the Court of Appeal records:

> 'He was concerned that the cannabis could not be regarded as the proceeds of drug trafficking since he maintained none of the defendants, in particular his client, had paid anything toward the purchase of the cannabis or had any direct financial interest in it.'

Nevertheless, in the best interests of his client, he did agree to the making of the confiscation orders. In these circumstances the suggested mistaken assumption by counsel for Michael Emmett as to the law is not established. Brian Emmett was separately represented. It is not known on what basis counsel for Brian Emmett acted and advised. Given that in the case of Brian Emmett the confiscation order was only for £1,000 the legal position may not have loomed large in counsel's consideration of the case. In any event, it is not established that counsel for Brian Emmett acted under a mistake of law. Furthermore, there is no evidence whatever as to the basis on which the two respondents agreed to the confiscation orders. It is true that counsel for Brian Emmett told the Court of Appeal on instructions that 'none of the defendants, in particular his client, had paid anything toward the purchase of the cannabis or had any direct financial interest in it'. Such self-serving protestations by the principal organisers of the massive drugs operations, who were wholly unresponsive in police interviews and thereafter, carry no weight. All one knows is that the principal organisers must have known how the drugs operation was funded. But one simply does not know why the respondents agreed to the confiscation orders.

For these reasons I am satisfied that it has not been established that the respondents agreed to the confiscation orders as a result of a mistaken view of the law.

The state of the evidence

The Court of Appeal did not decide the appeals of the four principal organisers on the basis of an argument that each acted under a mistake of law. Instead the Court of Appeal considered whether the state of the evidence justified the confiscation orders. In the case of Bracken and Lemonnier the Court of Appeal concluded that on the facts the appeals against the confiscation orders must be dismissed. Turning to the Emmetts Collins J observed:

> 'The position of the Emmetts was different. In their cases, there was no evidence of large sums of cash, previous successful drug trafficking or of anything beyond their involvement in the importation of the cannabis. Naturally, there is a great suspicion that they may have put money up to purchase the cannabis, but that is not enough and we do not think that an inference could properly be drawn that they did put up any purchase money. In those circumstances, we have come to the conclusion that in the case of the Emmetts, Mr Wilcken is correct that *R v Akengin* makes clear that the cannabis cannot be regarded as the proceeds of drug trafficking.'

This conclusion fails to take into account that the Emmetts instructed their counsel to agree to the making of the confiscation orders. The judge acted upon that agreement. For my part I would regard the agreement of the Emmetts as an acceptance within the meaning of s 3(1) of the 1986 Act, which the judge treated as conclusive. But, if for some technical reason the agreement fell outside the scope of s 3(1), it was nevertheless in law a sufficient basis for the making of the order. Given that the agreement was freely made, on instructions, and that it was unaffected by any mistake of law, the conclusion follows that the Court of Appeal erred in deciding the case of the Emmetts as it did.

Since the state of the evidence, irrespective of the agreement on the confiscation order, was the subject of detailed submissions before the House, I propose to indicate briefly how in my view the matter should be approached. For this purpose I draw on the summary of the facts, which was common ground before the Court of Appeal. The Emmetts were among the four principal organisers of a massive drugs operation. Absent any explanation from them during police interviews, or subsequently, I take the view that it was legitimate in the circumstances to infer that they jointly incurred substantial expenditure in connection with their drug trafficking. That seems to me a commonsense inference in the circumstances of this particular drugs operation. On this basis the assumption contained in s 2(3)(b) comes in to play. If it were necessary to examine the state of the evidence, I would therefore have been inclined to conclude that the confiscation orders were, in any event, justified on the state of the evidence.

For these reasons I would differ from the view which prevailed in the Court of Appeal.

Conclusion

I would allow both appeals and restore the confiscation orders in respect of Brian Emmett and Michael Emmett.

LORD CLYDE. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Steyn. For the reasons he has given, I too would allow this appeal.

Appeals allowed.

Celia Fox Barrister.

Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council

COURT OF APPEAL, CIVIL DIVISION
LORD WOOLF MR, MORRITT AND PILL LJJ
8, 9, 31 JULY 1997

Statement of claim – Striking out – Private law action – Public law defence – Plaintiffs bringing action against local authority to recover sums due under improvement grants in respect of work to be carried out to houses to render them fit for human habitation – Local authority applying to strike out claims – Whether plaintiffs should have proceeded by way of judicial review – Whether claims should be struck out as an abuse of process – Housing Act 1985, s 189 – Local Government and Housing Act 1989, s 117(3).

The plaintiffs were served with a repair notice under s 189 of the Housing Act 1985 requiring work to be carried out to certain houses to render them fit for human habitation and thereafter applied to the council for improvement grants under the Local Government and Housing Act 1989. The council approved the applications, but subsequently refused to pay the grants on the grounds, inter alia, that the works had not been completed to its satisfaction as required by s 117(3)[a] of the 1989 Act. The plaintiffs commenced private law actions against the council claiming the sums due under the grants. The council contended that if the plaintiffs had any grounds of complaint (which it did not accept) the only appropriate procedure was an application for judicial review and not an ordinary action. It accordingly applied to strike out the plaintiffs' claims under RSC Ord 18, r 19 and the inherent jurisdiction of the court on the grounds that the proceedings were an abuse of the process of the court. The district judge struck out the claims; but the judge allowed the plaintiffs' appeal and dismissed the council's application. The council appealed to the Court of Appeal.

Held – When performing its role under the 1989 Act in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; however, once an application for a grant had been approved a duty to pay it arose on the applicant fulfilling the statutory conditions, and that duty would be enforceable by an ordinary action. In the instant case, although there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely of fact and did not require the special expertise of a Crown Office judge. Moreover, the remedy sought of the payment of a sum of money was not available on an application for judicial review. It followed that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiffs' actions were not an abuse of process. The appeal would therefore be dismissed (see p 752 *j*, p 753 *b*, p 756 *a* to *e*, p 757 *d e* and p 759 *h*, post).

O'Reilly v Mackman [1982] 3 All ER 1124 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 applied.

a Section 117(3) is set out at p 751 *j*, post

Notes

For general principles relating to judicial review, see 1(1) *Halsbury's Laws* (4th edn reissue) paras 64–65 and 37 *Halsbury's Laws* (4th edn) paras 568–583.

For the Housing Act 1985, s 189, see 21 *Halsbury's Statutes* (4th edn) (1997 reissue) para 226.

As from 17 December 1996 s 117(3) of the Local Government and Housing Act 1989 was replaced by s 37(4) of the Housing Grants, Construction and Regeneration Act 1996. For s 37 of the 1996 Act, see ibid 998.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

British Steel plc v Customs and Excise Comrs [1996] 1 All ER 1002; *rvsd* [1997] 2 All ER 366, CA.

Cocks v Thanet DC [1982] 3 All ER 1135, [1983] 2 AC 286, [1982] 3 WLR 1121, HL.

Mercury Communications Ltd v Director General of Telecommunications [1996] 1 All ER 575, [1996] 1 WLR 48, HL.

O'Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237, [1982] 3 WLR 1096, HL.

O'Rourke v Camden London BC [1997] 3 All ER 23, [1997] 3 WLR 86, HL.

Puhlhofer v Hillingdon London BC [1986] 1 All ER 467, [1986] AC 484, [1986] 2 WLR 259, HL.

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705, [1992] 1 AC 624, [1992] 2 WLR 239, HL.

Tower Hamlets London BC v Chetnik Developments Ltd [1988] 1 All ER 961, [1988] AC 858, [1988] 2 WLR 654, HL.

Cases also cited or referred to in skeleton arguments

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, CA.

Avon CC v Buscott [1988] 1 All ER 841, [1988] QB 656, CA.

Bugg v DPP [1993] 2 All ER 815, [1993] QB 473, DC.

Curran v Northern Ireland Co-ownership Housing Association Ltd [1987] 2 All ER 13, [1987] AC 718, HL.

Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544, [1949] AC 398, HL.

Doyle v Northumbria Probation Committee [1991] 4 All ER 294, [1991] 1 WLR 1340.

Equal Opportunities Commission v Secretary of State for Employment [1994] 1 All ER 910, [1995] 1 AC 1, HL.

Hague v Deputy Governor of Parkhurst Prison [1991] 3 All ER 733, [1992] 1 AC 58, HL.

Haringey London BC v Cotter (1996) Times, 9 December, [1996] CA Transcript 1573.

Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, HL

IRC v Rossminster Ltd [1980] 1 All ER 80, [1980] AC 952, HL.

McClaren v Home Office [1990] ICR 824, CA.

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, HL.

R v Lambeth London Borough, ex p Sarbrook Ltd (1994) 27 HLR 380.

R v Wicks (1995) 93 LGR 377, CA; *affd* [1997] 2 All ER 801, [1997] 2 WLR 876, HL.

Shah v Barnet London BC [1983] 1 All ER 226, [1983] 2 AC 309, HL.

Stovin v Wise (Norfolk CC, third party) [1996] 3 All ER 801, [1996] AC 923, HL.

Thornton v Kirklees Metropolitan BC [1979] 2 All ER 349, [1979] QB 626, CA.

Wandsworth London BC v Winder [1984] 3 All ER 976, [1985] AC 461, HL.

Wyatt v Hillingdon London BC (1978) 76 LGR 727, CA.

X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, HL.

Appeal

By notice dated 6 November 1996 the defendant, Sheffield City Council, appealed with leave from the decisions of Mance J on 6 December 1995 and 5 September 1996, whereby he allowed the appeal of the plaintiff, the trustees of the Dennis Rye Pension Fund and the trustees of the Dennis Rye 1992 Grandchildren Settlement Fund, from the order of District Judge Lambert striking out their actions for the payment of improvement grants pursuant to s 117 of the Local Government and Housing Act 1989. The facts are set out in the judgment of Lord Woolf MR.

Ian McLaren QC and *Tony Cranfield* (instructed by *King & Brook*, Chesterfield) for the council.

Ashley Underwood and *Lisa Giovanetti* (instructed by *Mark Webster*, Sheffield) for the plaintiffs.

Cur adv vult

31 July 1997. The following judgments were delivered.

LORD WOOLF MR. This appeal raises yet again issues as to the relationship between public and private law proceedings. It illustrates the fact that, despite the hopes to the contrary, a very substantial volume of the resources of the parties and the courts are still being consumed to little or no purpose over largely tactical issues as to whether the correct procedure has been adopted. This appeal is the third court and the fourth hearing to consider the issue in the present proceedings. I have little doubt that the amount of the costs already incurred far exceeds the sum in issue in the proceedings but the parties and the courts have yet to turn their attention to the merits of the dispute.

The appeal involves two separate actions raising identical issues. One is in respect of nine houses in relation to which the claim is for £67,147·28 and the other is in relation to three houses in respect of which the claim is for £31,846·77.

The claims against the council are for sums which it is alleged are due by way of improvement grants for work done on the houses by the plaintiffs following the service of a repair notice requiring work to be carried out to render the premises fit for human habitation under s 189 of the Housing Act 1985.

The appeal follows two judgments of Mance J, the first dated 6 December 1995 and the second dated 5 September 1996 on applications by the council to strike out the plaintiffs' claims under RSC Ord 18, r 19 and the inherent jurisdiction of the court. The grounds of the applications were that the proceedings disclosed no reasonable cause of action and are an abuse of the process of the court. The council's argument in support of the applications is that if the plaintiffs have any grounds of complaint (which the council does not accept), then the only appropriate procedure is an application for judicial review and not an ordinary action.

The judgments of Mance J were in relation to an appeal from the decision of District Judge Lambert, who struck out the claims. Mance J in his first judgment held that a local authority's refusal to pay improvement grants under the Local

Government and Housing Act 1989 was capable in appropriate circumstances of giving rise to private law rights which could be enforced by a writ action. Part of the reasoning of the judge for coming to this conclusion is summed up in this passage of his judgment:

> '... the application for and approval of a grant does, in my judgment, establish a one-to-one relationship which does have some contractual echoes. The local authority was thereby committing itself to pay the house or property owner upon the execution to its satisfaction of the specified works ... A property owner has in these circumstances, in my judgment, a legitimate expectation arising from a relationship established by the grant application and its approval that the grant moneys will be paid if the work is duly executed within the specified period.'

However, the judge was of the view that the statements of claim failed on their face to demonstrate any real claim and stood over the final determination to enable the plaintiffs to amend their pleadings to make additional allegations. When the matter came back before him again, Mance J gave his second judgment. He dismissed the application to strike out save in regard to subsidiary allegations based upon an alleged estoppel. There is no cross-appeal in relation to the last mentioned part of the judge's decision.

The legislation

The relevant statutory provisions play a significant role in determining the outcome of this appeal. The Housing Act 1985 enables a repair notice to be served by a local housing authority. So far as relevant it states (as amended):

> '... **189.**—(1) ... where the local housing authority are satisfied that a dwelling-house ... is unfit for human habitation, they shall serve a repair notice on the person having control of the dwelling-house ...
>
> (2) A repair notice under this section shall—(a) require the person on whom it is served to execute the works specified in the notice (which may be works of repair or improvement or both) and to begin those works not later than such reasonable date, being not earlier than the twenty-eighth day after the notice is served, as is specified in the notice and to complete those works within such reasonable time as is specified ...
>
> (4) The notice becomes operative, if no appeal is brought, on the expiration of 21 days from the date of the service of the notice and is final and conclusive as to matters which could have been raised on an appeal.'

The 1989 Act contains the provisions dealing with the payment of grants by the local housing authorities. Normally, where a repair notice has been served under s 189(1) of the 1985 Act then s 113 of the 1989 Act requires a grant to be paid. This is subject to the relevant provisions of the 1989 Act, which are as follows:

> '... **101.**—(1) In accordance with this Part, grants are payable by local housing authorities towards the costs of works required—(a) for the improvement or repair of dwellings ...
>
> **102.**—(1) No grant shall be paid unless an application for it is made to the local housing authority concerned in accordance with the provisions of this Part and is approved by them.
>
> (2) An application for a grant shall be in writing and shall specify the premises to which it relates and contain—(a) particulars of the works in

respect of which a grant is sought (in this Part referred to as "the relevant works"); (b) unless the local housing authority otherwise direct in any particular case, at least two estimates from different contractors of the cost of carrying out the relevant works; (c) particulars of any preliminary or ancillary services and charges in respect of the cost of which the grant is also sought; and (d) such other particulars as may be prescribed ...

113.—(1) Subject to section 112(3) and subsection (3) below, a local housing authority shall approve an application falling within section 110(1) above (in this section referred to as a "landlords application") if completion of the relevant works is necessary to comply with the notice or notices under one or more of the following provisions—(a) section 189 of the Housing Act 1985 (repair notice requiring works to render premises fit for human habitation) ...

(3) If, in the case of a landlord's application ... the local housing authority consider that the relevant works include works ("the additional works") in addition to those necessary to comply with a notice under section 189 ... they shall treat the application—(a) as an application to which this section applies in so far as it relates to works other than the additional works; and (b) as an application to which section 115 below applies in so far as it relates to additional works ...

115.—(1) Subject to the preceding provisions of this Part, a local housing authority may approve an application for a grant, other than a common parts grant, in any case where—(a) the relevant works go beyond or are other than those which will cause the dwelling to be fit for human habitation, but (b) the authority are satisfied that the relevant works are necessary for one or more of the purposes set out in subsection (3) below ...

(6) Subject to the preceding provisions of this Part, a local housing authority may approve an application falling within section 110(1) above (in this section referred to as a "landlord's application") if—(a) the relevant works are for the purpose of rendering the dwelling or house to which the application relates fit for human habitation ... and ... the authority are satisfied that the relevant works are necessary for the purpose concerned ...

116.—(1) A local housing authority shall, by notice in writing, notify an applicant for a grant as soon as reasonably practicable, and, in any event, not later than six months after the date of the application concerned, whether the application is approved or refused ...

117.—(1) Where the local housing authority have approved an application for a grant, they shall pay the grant, subject to subsection (3) below and to sections 133 and 134 below.

(2) The grant may be paid—(a) in whole after completion of the eligible works, or (b) in part by instalments as the works progress and the balance after completion of the works.

(3) The payment of a grant, or part of a grant, is conditional upon—(a) the eligible works or the corresponding part of the works being executed to the satisfaction of the authority; and (b) the authority being provided with an acceptable invoice, demand or receipt for payment for the works and any preliminary or ancillary services and charges in respect of which the grant or part of the grant is to be paid.

(4) For the purposes of subsection (3) above an invoice, demand or receipt is acceptable if it satisfies the authority and is not given by the applicant or a member of his family ...

118.—(1) In approving an application for a grant, a local housing authority may require as a condition of the grant that the eligible works are carried out in accordance with such specification as they determine.

(2) Subject to subsection (3) below, it is a condition of the grant that the eligible works are carried out within twelve months from the date of approval of the application concerned.

(3) The authority may, if they think fit, extend the period of twelve months referred to in subsection (2) above and may, in particular, do so where they are satisfied that the eligible works cannot be, or could not have been, carried out without carrying out other works which could not have been reasonably foreseen at the time the application was made ...

134.—(1) Where an application for a grant has been approved by the local housing authority, subsection (2) below applies in any case where—(a) the eligible works are not completed to the satisfaction of the authority within the period specified under subsection (2) of section 118 above, or such extended period as they may allow under subsection (3) of that section;...

(2) Where this subsection applies, the authority may—(a) refuse to pay the grant or any further instalment of grant which remains to be paid; or (b) make a reduction in the grant which, in a case falling within subsection (1)(b) above, is to be a reduction proportionate to the reduction in the estimated expense; and may demand repayment by the applicant forthwith, in whole or part, of the grant or any instalment of the grant paid, together with interest at such reasonable rate as the authority may determine from the date of payment until repayment ...'

The issues

The statutory provisions I have cited make it clear that the legislation contains a statutory code for the approval of grants. The rule is designed to give to the person entitled to the benefit of the grant a right to payment of the grant on compliance with the conditions contained in the legislation. When this has happened the authority has no justification for refusing payment. In this situation I can see no reason why the landlord cannot bring an ordinary action to recover the amount of the grant which is unpaid as an ordinary debt. Notwithstanding the statutory code, it would be disproportionate to seek a remedy, of say, mandamus or a declaration by way of judicial review to enforce payment. Any suggestion that there had been any abuse of process involved in bringing an ordinary action in the High Court or county court would be totally misconceived. Judicial review was not intended to be used for debt collecting.

In the present cases, however, there is a dispute as to whether the conditions have been fulfilled and in particular the council contends that the works have not been completed to its satisfaction as required, inter alia, by s 117(3) of the 1989 Act. At any trial of the actions one of the principal issues is likely to be whether the council was entitled to withhold its satisfaction.

Having examined the statutory provisions, I regard it as clear that in general when performing its role in relation to the making of grants the authority is performing public functions which do not give rise to private rights. This is so, even when, as here, improvement notices have been served so that the making of a grant is mandatory (s 113(1)). Even in this situation the refusal to approve an application for a grant gives rise to no right to damages and in the ordinary way the appropriate procedure will be judicial review.

Mance J, in his first judgment, made an admirable analysis of many of the numerous authorities which now exist on this subject. Having done so, he came to the conclusion that the issues in the present actions were sufficiently similar to those in the leading case of *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, [1992] AC 624 for him to decide that the action should be allowed to proceed. Lord Lowry's speech in *Roy*'s case is well known and Mance J having explained its relevance so clearly I do not consider that any purpose would be served in my trying to repeat the exercise. I will content myself by saying that, as in *Roy*, I would regard this as being a case where the plaintiffs' relationship with a public body whether statutory or contractual would confer on him conditional rights to payment so that the bringing of ordinary actions to enforce those rights was not in itself an abuse of process.

In coming to that conclusion I do not feel it is necessary to go quite so far as to regard the requirement that the authority should be satisfied as being in all situations no more than in the words of Mance J 'a matter of objective factual and technical assessment'. This in my view will usually, but not always, be the situation. I do accept there will be room in some cases for the authority to exercise a limited degree of judgment so that the standard which the council is entitled to insist on before it is satisfied is not always objective. Usually the work to be carried out will need to be detailed because of the requirements of s 101 for particulars and estimates to be given prior to an application being approved. There may also be a specification (see s 118(1)). If, then, the work is carried out in accordance with what would be an implied standard (ie in a good and workmanlike manner or in accordance with any specified standard), that will be the end of any ground for dissatisfaction on the part of the council. There may on the other hand, at least theoretically, be a situation where there is no express or implied standard to which the work is to be carried out. In such a situation the council will be entitled to set the standard and as long as they do not set a totally unreasonable requirement the work will need to be done to that standard. The standard will be only subject to a *Wednesbury* challenge (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223).

What, in my view, is more important when considering what is the correct procedure to adopt, is that in both situations any challenge to an authority's refusal to express satisfaction will depend on an examination of issues largely of fact which are more appropriately examined in the course of ordinary proceedings than on an application for judicial review. So far as the present actions are concerned there is no reason to think that when the quality of the work is examined against the particulars and estimates provided and any relevant specification, taking into account the actions of the council's inspectors, the question of whether the council could lawfully withhold its satisfaction will be resolved by a determination of the factual position. This is the class of issue, which if it cannot be resolved by mediation, is ideally resolved by a court with the assistance of a report from a surveyor jointly instructed by both parties. Such an approach would be infinitely more in the interests of the taxpayers of the authority, the landlord and the courts than an application for judicial review.

Notwithstanding Mance J's judgment the council says that to proceed other than by judicial review on the authorities is an abuse of process. I am afraid I cannot agree though I understand why on Mr Underwood's approach to the authorities he submits this must be the result. He contends that the plaintiff, even if the council had expressed satisfaction, would not have a cause of action and

could not bring a private law action. *Roy* he submits should be confined to cases where arguably a plaintiff had private law rights and if Lord Lowry goes further his comments are obiter and should not be followed.

For his approach Mr Underwood relies strongly on the recent decision of the House of Lords of *O'Rourke v Camden London BC* [1997] 3 All ER 23, [1997] 3 WLR 86 (in which he was counsel for the authority). I, however, do not regard Lord Hoffmann's speech in that case as providing him with any support. In *O'Rourke's* case it was held that Housing Act 1985 provisions as to the homeless gave rise to no private rights which would enable a private law action for damages or an injunction to be brought. In coming to this conclusion Lord Hoffmann (who gave the only reasoned speech) disapproved of Lord Bridge's reasoning in his speech in *Cocks v Thanet DC* [1982] 3 All ER 1135, [1983] 2 AC 286. Lord Bridge had suggested there could be such a private law right which gave rise to a right to damages which only came into existence after a decision had been reached by the authority that the right existed. Lord Hoffmann categorised this view as 'anomalous'. Lord Hoffmann was not dealing with a situation involving a claim for the recovery of a sum of money which would unquestionably be due under a statute if certain conditions had or should be taken to have been met.

As Lord Hoffmann came to the conclusion that there were no private law rights at stake he did not consider the consequences of his approach on a situation where there are private law rights which would come into existence if, but only if, a statutory decision of a public body was first impugned. However, his general approach suggests that the House of Lords has moved on from *Cocks*, which undesirably could cause the parties having to incur the expense of two sets of proceedings, a result which is directly opposite to that which Ord 53 was intended to achieve. In the light of the decision in *O'Rourke's* case a private right which only comes into existence in the circumstances the House of Lords imagined they were dealing with in *Cocks'* case is in the future going to be a rare animal indeed. The more usual situation will be that considered by the House of Lords in *Roy's* case where it can be appropriate to bring private law proceedings.

Well where does that leave *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and what can be done to stop this constant unprofitable litigation over the divide between public and private law proceedings? What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v Mackman*. This guidance involves recognising: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on an application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available in private law proceedings (namely the requirement of leave and the protection against delay). The proceedings will be heard by a High Court judge and will be managed by the Crown Office which has the necessary experience of public law proceedings to ensure that questions, such as expedition, are dealt with in a manner which is appropriate. (c) That for these reasons it is a *general rule* that it is contrary to public policy—

> 'and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities.' (See [1982] 3 All ER 1124 at 1134, [1983] 2 AC 237 at 285.)

Having established the foundation of the general rule it seems to me that there will be a reduction in the difficulties which are apparently being *experienced* at present by practitioners and the courts, if it is remembered that:

(1) If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary *for purely procedural reasons* to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

(2) If a case is brought by an ordinary action and there is an application to strike out the case, the court should, at least if it is unclear whether the case should have been brought by judicial review, ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at least an indication that there has been no harm to the interests judicial review is designed to protect. In addition the court should consider by which procedure the case could be appropriately tried. If the answer is that an ordinary action is equally or more appropriate than an application for judicial review that again should be an indication the action should not be struck out.

(3) Finally, in cases where it is unclear whether proceedings have been correctly brought by an ordinary action it should be remembered that after consulting the Crown Office a case can always be transferred to the Crown Office List as an alternative to being struck out.

In *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1134, [1983] 2 AC 237 at 285 Lord Diplock anticipated that the exceptions to the general rule which he pronounced would be worked out on case by case basis. To an extent that has happened but despite the efforts the courts have made to clarify the situation (see eg Laws J's judgment in *British Steel plc v Customs and Excise Comrs* [1996] 1 All ER 1002 at 1012–1013) the issue as to which procedure should be adopted has become increasingly complex and technical. It was for this reason that Lord Slynn advocated a more flexible approach in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575, [1996] 1 WLR 48. In this case Mr McLaren QC submitted the court should take this opportunity to reduce 'the complexity surrounding the situation'. This I am afraid it is not possible to achieve in the framework of a judgment on a single appeal. I hope, however, that the far from comprehensive pragmatic suggestions made above will be of some assistance. They do involve not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse. Here it is important to remember that there does not have to be an application to strike out even if it is considered that the wrong procedure has been adopted. Often the

interests of justice and the parties will be better served by getting on with the action. Certainly there should be no appeal unless there is some practical reason for doing so.

If this approach is adopted in this case it is obvious that the issues can be more conveniently dealt with in an ordinary action than on an application for judicial review. The case is one in which it could be said leave would be given apart from the question of delay. As to delay I found wholly unconvincing the suggestion which was made that in the circumstances of this case that the council could be embarrassed from an accounting point of view if entitlement to payment of grants was delayed from one year to another. It is not suggested that the council has a large number of cases in which it is being challenged in relation to the non-payment of grants. The issues are likely to be mainly ones of fact. The primary remedy which is being sought is the payment of a sum of money which requires a remedy which is not available on an application for judicial review. The case is not one which requires the special expertise of a Crown Office judge. It could more conveniently be heard in Sheffield.

If I had doubt as to what should be the outcome of this appeal without taking into account these practical considerations then they put the position beyond doubt. I would dismiss this appeal.

MORRITT LJ. I agree.

PILL LJ. The plaintiffs claim a declaration that they carried out the relevant works of renovation and repair in accordance with the defendants' specifications as varied or amended and that the defendants have unreasonably refused to express satisfaction with the work. Money claims are made in the sums of £67,147·28 and £31,846·77. I agree with Lord Woolf MR that the bringing of these claims by ordinary actions is not an abuse of process.

Lord Woolf MR has set out in his judgment the statutory code for the making and payment of grants. In the application for a grant, particulars of the works in respect of which a grant is sought shall be set out with at least two estimates from different contractors of the cost of carrying out the works and particulars of any preliminary or ancillary service charges (s 101 of the Local Government and Housing Act 1989). The local housing authority are under a duty to approve certain categories of application (ss 112 and 113 of the Act) and have a discretion whether to approve applications in any case where the relevant works go beyond or are other than those which will cause the dwelling to be fit for human habitation but the authority are satisfied that the relevant works are necessary for one or more of the purposes set out in s 115(3) of the Act. Those purposes are:

> '(a) to put the dwelling or building in reasonable repair; (b) to provide the dwelling by the conversion of a house or other building; (c) to provide adequate thermal insulation; (d) to provide adequate facilities for space heating; (e) to provide satisfactory internal arrangements; (f) to ensure that the dwelling or building complies with such requirements with respect to construction or physical condition as may for the time being be specified by the Secretary of State for the purposes of this section; and (g) to ensure that there is compliance with such requirements with respect to the provision or condition of services and amenities to or within the dwelling or building as may for the time being be so specified.'

Under s 118(1) the authority may require as a condition of the grant that the eligible works are carried out in accordance with such specification as they determine. Under s 117(3)(a) the payment of a grant is conditional on 'the eligible works or the corresponding part of the works being executed to the satisfaction of the authority'. Subject to that and other provisions, the authority 'shall pay the grant'. Under s 134(2) the authority may in certain circumstances 'demand repayment by the applicant forthwith, in whole or part, of the grant or any instalment of the grant paid, together with interest at such reasonable rate as the authority may determine from the date of payment until repayment'.

In their defences, the defendants contend that the plaintiffs have failed to complete the works in accordance with the defendants' specification (s 118(1)), that the plaintiffs have failed to complete the works in time (s 118(2)) and that the works have not been completed to the satisfaction of the defendants (s 117(3)). The disputes, not uncommon in building contracts, are as to whether the work was done in accordance with specification, was done in time and was of appropriate quality. Applying the tests expressed by Lord Lowry in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, [1992] 1 AC 624, I see every reason why the claim should proceed by an ordinary action. The plaintiffs have the statutory right to remuneration in accordance with the statutory provisions which right dominates the proceedings. An order for payment of money could not be granted on judicial review. The type of claim may involve disputed issues of fact and, since individual rights are claimed, there should not be need for leave or a special time limit, nor should the relief be discretionary.

In *Roy*'s case a general practitioner commenced an action against his family practitioner committee seeking payment of part of his basic practice allowance withheld following the committee's decision that he had failed to devote a substantial amount of time to general practice as required by the appropriate regulations. Lord Bridge stated ([1992] 1 All ER 705 at 709, [1992] 1 AC 624 at 630):

> 'I do not think the issue in the appeal turns on whether the doctor provides services pursuant to a contract with the family practitioner committee. I doubt if he does and am content to assume that there is no contract. Nevertheless, the terms which govern the obligations of the doctor on the one hand, as to the services he is to provide, and of the family practitioner committee on the other hand, as to the payments which it is required to make to the doctor, are all prescribed in the relevant legislation and it seems to me that the statutory terms are just as effective as they would be if they were contractual to confer upon the doctor an enforceable right in private law to receive the remuneration to which the terms entitle him. It must follow, in my view, that in any case of dispute the doctor is entitled to claim and recover in an action commenced by writ the amount of remuneration which he is able to prove as being due to him. Whatever remuneration he is entitled to under the statement is remuneration he has duly earned by the services he has rendered. The circumstance that the quantum of that remuneration, in the case of a particular dispute, is affected by a discretionary decision made by the committee cannot deny the doctor his private law right of recovery or subject him to the constraints which the necessity to seek judicial review would impose upon that right.'

In present circumstances, a refusal to approve an application for a grant gives rise to no right to damages. Discretions are also involved, for example s 115 (discretionary approval) and s 118 (determining a specification). However, once an application is approved a duty to pay it arises upon compliance by the applicant with the statutory requirements and the duty is in my view enforceable by an ordinary money claim. The repayment to the authority contemplated in s 134(2) would be enforced in the same way. As Mance J put it:

> 'The relationship is established in respect of a specific property or properties, and specifically defined works. It is a one-to-one relationship which would in another context quite readily be expressed in contractual terms. Whether works have been completed in accordance with the specification, and in the time specified, is a matter of objective, factual and technical assessment.'

Section 117(1) of the Act provides that the authority 'shall pay the grant' but it has to be recognised that by virtue of s 117(3)(a), the obligation is conditional on the works being executed 'to the satisfaction of the authority'. The question arises as to the extent of the discretion open to them on what appears to be a subjective test. Mance J stated:

> 'It is true, as I have emphasised, that the legislation here, as also in various contexts in relation to the original decision whether or not to approve a grant application, specifies that the authority be 'satisfied,' here as to the due execution of the works. But once a grant application has been made and approved, the authority's role in satisfying itself as to the due execution of works is one which it should perform and should be able to perform on an objective, factual and technical basis. It is not a decision into which policy or public considerations enter. No doubt there is a public interest and duty to see that grant is not paid in respect of works which have not, on an objective, factual and technical basis, been completed within the specified time, and so to protect the authority's purse, but that is merely the reason for requiring satisfaction.'

It may be argued that the s 117(3)(a) discretion is a broad one and, subject to unreasonableness in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), the authority may set their own standards as to whether the works have been executed and as to the quality of the work. Clearly, the authority have a duty to protect the money of taxpayers and to make a judgment as to whether the works are complete and satisfactory. The provisions are intended to make that clear but the nature of the discretion must be considered in the particular statutory context.

In *Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961, [1988] AC 858 the House of Lords considered the discretion granted to local authorities under s 9(1) of the General Rate Act 1967 to refund money paid in respect of rates. Lord Bridge stated, notwithstanding what appeared to be a general discretion, that 'Parliament must have intended rating authorities to act in the same high-principled way expected by the court of its own officers and not to retain rates paid under a mistake of law' (see [1988] 1 All ER 961 at 970, [1988] AC 858 at 877). Earlier in the same judgment Lord Bridge stated:

> 'Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they

a can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose.' (See [1988] 1 All ER 961 at 967, [1988] AC 858 at 873.)

b In the present context, I cannot read the requirement of satisfaction in s 117(3)(a) as serving the purpose of conferring a general power on the authority to set their own standards. Access to the courts is on any view possible under the provisions of the 1989 Act. If a claim for payment of grant is made under s 117(1), and there is disagreement as to whether the statutory conditions are satisfied, it is for the court to determine whether the specification is met, whether the work c is done in time and whether it is of an appropriate standard. The statute prescribes the particulars to be given with an application in much the same way as would an invitation to tender and the authority may lay down a specification. Moreover, upon a discretionary application, the authority may have regard to the purposes in s 115(3) which includes words such as 'reasonable', 'adequate', 'satisfactory', and 'requirements specified by the Secretary of State'. The scheme d contemplates, upon the making of a grant and execution of the works, and as between the authority and the grantee, an objective assessment of performance. Some claims by grantees will be debt collecting exercises but I do not regard the right of access to the courts as one appropriate only to a debt-collecting exercise.

These claims are made 'in respect of a specific property or properties, and e specifically defined works'. That being so, and in the statutory context, the satisfaction must be expressed if, on objective appraisal, the conditions have been met. The provisions of the statute appear to me to contemplate a court being able to determine whether, for the purposes of ss 117, 118(3) and 134(1)(a), the work is of an appropriate standard and within time. Upon analysis as in the *Chetnik Developments* case, these particular discretions can only validly be f exercised upon an objective appraisal of the points at issue. The authority can only be legally dissatisfied, in this context, upon evidence that the work viewed objectively was unsatisfactory. While considerable importance should of course be attached to the evidence of the authority's expert witness upon the relevant issues, this is not a situation in which his opinion is challengeable at the hearing g only if it is *Wednesbury* unreasonable, that is 'verging on an absurdity' (Lord Brightman in *Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467 at 474, [1986] AC 484 at 518). Whether the works have been carried out in accordance with the authority's specification (s 118(1)) is also susceptible to objective assessment. It will of course be desirable if disputes such as this one can be resolved by h mediation or with the assistance of a surveyor jointly instructed, as Lord Woolf MR contemplates in his judgment, but that aim would not be encouraged by the introduction of the *Wednesbury* test into the task to be performed.

I too would dismiss this appeal.

j *Appeal dismissed. Leave to appeal to the House of Lords refused.*

Kate O'Hanlon Barrister.

Taylor and another v Ribby Hall Leisure Ltd and another

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, HUTCHISON AND MUMMERY LJJ

12 MAY, 29 JULY 1997

Contempt of court – Committal – Application – Striking out – Abuse of process of court – Plaintiffs' action against defendants for breach of contract being compromised on terms contained in Tomlin order – Plaintiffs suspecting possible breaches of that order, but waiting several years before applying for orders to commit the defendants' solicitor to prison for contempt of court and for compensation under court's supervisory jurisdiction – Whether court having power to strike out proceedings on grounds of abuse of process.

In June 1989 the plaintiffs' action against the defendant companies for breach of contract was compromised on terms contained in a Tomlin order. In March 1990 the plaintiffs suspected that the defendants were in breach of that order. In 1995, following the death of the first plaintiff, the second plaintiff applied to the court for orders committing the defendants' solicitor to prison for contempt of court and for the payment of compensation under the inherent and supervisory jurisdiction of the court on the ground that the solicitor had aided and abetted breaches of the order made against the defendants and had also breached a personal undertaking given by him, as a solicitor, to the court. The solicitor applied for the motion to be struck out and/or dismissed as an abuse of process, on the basis of the delay in initiating proceedings against him. The judge duly struck out the proceedings, having found that there had been inordinate and inexcusable delay on the part of the plaintiff in making the application which had seriously prejudiced the solicitor and that although there was a prima facie case that the solicitor was in breach of his undertaking, the damage which the plaintiff claimed she had suffered had not flowed from that breach, so that she would not recover any compensation. The plaintiff appealed, contending that the court had no power to strike out the proceedings, since there was no limitation period for initiating them.

Held – The court had a discretionary power to strike out as an abuse of process proceedings for contempt of court or proceedings invoking the court's supervisory power over its own officers, notwithstanding the absence of any limitation period for initiating such proceedings. In deciding whether to exercise the power, the prospects of the court exercising its supervisory power at the substantive hearing to grant coercive or compensatory relief was a relevant consideration, as was the public interest in the maintenance of honourable standards of conduct by officers of the court, in the efficient administration of justice and in compliance with court orders and undertakings. However, as the exercise of the power was discretionary, the Court of Appeal would only interfere with the judge's exercise of discretion if there was an error of principle or if the decision was plainly wrong. In the instant case, the judge had taken full and careful account of all the relevant factors and, in view of the fact that there had been a long and inexcusable delay by the plaintiff, he had been entitled to

conclude that the plaintiff's application was an abuse of process. Moreover, to allow the application to proceed to a substantive hearing would serve no useful purpose, as it had no real prospect of success and would inflict serious prejudice on the solicitor without either serving the public interest or conferring any real benefit on the plaintiff. The appeal would therefore be dismissed (see p 767 *j*, p 768 *a*, p 769 *a* to *c f* to *h* and p 770 *a* to *c*, post).

Per curiam. It is, in general, preferable to make submissions on delay, prejudice, potential injustice and other factors relevant to the court's discretion in its contempt and supervisory powers at the substantive hearing, rather than by a pre-emptive move to strike out, which may be open to the objection that it increases the costs and delay that preliminary procedures are intended to avoid (see p 769 *h j*, post).

Notes

For striking out pleadings which are an abuse of process, see 37 *Halsbury's Laws* (4th edn) paras 434, 435.

Cases referred to in judgment

Birkett v James [1977] 2 All ER 801, [1978] AC 297, [1977] 3 WLR 38, HL.
Bray v Stuart A West & Co (1989) 139 NLJ 753.
Grey, Re [1892] 2 QB 440, CA.
Manlon Trading Ltd, Re [1995] 4 All ER 14, [1996] Ch 136, [1995] 3 WLR 839, CA.
Midland Marts Ltd v Hobday [1989] 3 All ER 246, [1989] 1 WLR 1143.
Myers v Elman [1939] 4 All ER 484, [1940] AC 282, HL.
Swan, Re (1846) 15 LJQB 402.
Tan v Cameron [1993] 2 All ER 493, [1992] 2 AC 205, [1992] 3 WLR 249, PC.
Udall v Capri Lighting Ltd [1987] 3 All ER 262, [1988] QB 907, [1987] 3 WLR 465, CA.

Cases also cited or referred to in skeleton arguments

A-G's Reference (No 1 of 1990) [1992] 3 All ER 169, [1992] QB 630, CA.
Biss v Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125, [1978] 1 WLR 382, CA.
D v M (minor: custody appeal) [1982] 3 All ER 897, [1983] Fam 33, CA.
Evans v Bartlam [1937] 2 All ER 646, [1937] AC 473, HL.
F (a minor) (wardship: appeal), Re [1976] 1 All ER 417, [1976] Fam 238, CA.
Fox (John) (a firm) v Bannister, King & Rigbeys (a firm) [1987] 1 All ER 737, [1988] QB 925, CA.
G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.
Garry v Wilks (1834) 2 Dowl 649.
Hilliard, Re (1845) 14 LJQB 225.
Jones v Downes (1812) 18 Ves 522, 34 ER 415, LC.
Keeber v Keeber [1995] TLR 411, CA.
Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221.
Marsh v Joseph [1897] 1 Ch 213, [1895–9] All ER Rep 977.
R v Stretch (1835) 3 Ad & El 503, 111 ER 505.
Shtun v Zalejska [1996] 3 All ER 411, [1996] 1 WLR 1270, CA.
Silver (Geoffrey) & Drake (suing as a firm) v Thomas Anthony Baines (t/a Wetherfield Baines & Baines (a firm)) [1971] 1 All ER 473, [1971] 1 QB 396, CA.
Spectravest Inc v Aperknit Ltd [1988] FSR 161.
Szczepanski v Szczepanski [1985] FLR 486, CA.

Thorpe v Graham (1825) 3 Bing 223, 130 ER 498, sub nom *Thorpe v Gisbourne* 11 Moore CP 55. a

United Mining and Finance Corp Ltd v Becher [1910] 2 KB 296, [1908–10] All ER Rep 876.

Appeal

By notice dated 10 July 1996 the second plaintiff, Margaret Taylor, appealed from b the decision of Collins J on 6 June 1996 striking out her motion dated 11 May 1995 for orders for the committal of Christopher Young (the solicitor to the defendants, Ribby Hall Leisure Ltd and North West Leisure Holdings Ltd, in relation to an action brought by Mrs Taylor and her late husband, Brian Arthur Taylor, for breach of contract) to prison for contempt of court, and for c compensation under the court's inherent and supervisory jurisdiction, in respect of breaches of an order made against the defendants. The facts are set out in the judgment of the court.

Andrew Rankin QC and *Malcolm McEwan* (instructed by *Banks Wilson*, Preston) for Mrs Taylor. d

Crawford Lindsay QC and *John Norman* (instructed by *Barlow Lyde & Gilbert*) for Mr Young.

Cur adv vult

29 July 1997. The following judgment of the court was delivered. e

MUMMERY LJ. The appeal is concerned with a novel point on the combined effect of three fundamental judicial powers developed to protect and promote the integrity of the orders, officers and processes of the court: (1) the punitive contempt power, exercisable against anyone in breach of a court order or f undertaking to the court; (2) the disciplinary supervisory power, exercisable against officers of the court, including solicitors of the Supreme Court; (3) the protective procedural power, exercisable against litigants for the prevention of misuse of the court's process.

All three powers are invoked on a motion in these proceedings for breach of g contract initiated as long ago as 16 December 1988 by Mr Brian Taylor (who has since died) and his wife, Margaret Taylor, against the defendant companies, Ribby Hall Leisure Ltd (RHL) and North West Leisure Holdings Ltd (NWHL).

This appeal is from the order of Collins J dated 6 June 1996 striking out, as an abuse of process, Mrs Taylor's motion dated 11 May 1995 against the respondent, Mr Christopher Young, a solicitor of the Supreme Court, for orders for committal h and for payment of compensation under the inherent and supervisory jurisdiction of the court. The basis of the motion is an alleged contempt of court by Mr Young in aiding and abetting breaches of an order against RHL and NWHL and in acting in breach of a personal undertaking given by him as a solicitor to the court on 27 June 1989.

j

Background facts

In November 1978 Mr and Mrs Taylor bought Ribby Hall, Kirkham, Lancashire to develop as a leisure complex. They later transferred Ribby Hall to RHL, their creature company incorporated on 17 June 1980. By 1987 the property had been substantially developed. On 7 November 1987 a conditional

agreement was entered into for the sale of Mr and Mrs Taylor's shares in RHL to NWHL for £360,000. Disagreements arising out of the contract led Mr and Mrs Taylor to issue a writ on 16 December 1988 against RHL and NWHL claiming £160,000 and to apply for and obtain on 19 December 1988 from Macpherson J an ex parte injunction restraining the disposal of Ribby Hall and of the shares in RHL. Mr Young came into the picture in his capacity as solicitor to RHL and NWHL with full knowledge of the order of 19 December 1988 and of later orders in the action.

On 5 June 1989 the Mareva injunction was varied by Pill J on the application of RHL and NWHL, supported by an affidavit sworn by Mr Young. A proviso was added to allow negotiations with a view to sale of the shares and the land. A Scottish company called Titaghar plc was interested in acquiring the shares in NWHL from RHL. It is claimed that Mr Young attended at the hearing; that his affidavit was misleading in failing to make disclosure of relevant matters (see a proposed reamendment of the motion dated 10 July 1996); and that he made no disclosure to the Taylors or to their advisors of the existence of agreements entered on 6 June 1989 by RHL and NWHL granting options to Shireview Ltd to acquire Ribby Hall for £6·5m and to acquire 51% of the share capital in RHL. On 27 June 1989 the action was compromised on terms contained in a Tomlin order made by Ian Kennedy J, before whom there was listed for hearing an application by RHL and NWHL to discharge or vary the Mareva injunction. The Mareva injunction was discharged on agreed terms, including the following:

> 'AND UPON the solicitors for the Defendants Christopher Young & Co of 35 Hill Street, London W1 undertaking by Counsel that they will hold the first £850,000 to be realised from the sale or realisation of Ribby Hall or any part or the shares of the First Defendant owned by the Second Defendant (the Shares) or any of them, after payment of existing mortgagees lawfully entitled, to be paid to the Plaintiffs in accordance with the terms of the Schedule
>
> AND UPON the Defendants and each of them whether by themselves or their officers servants agents or otherwise howsoever undertaking (1) That upon any sale or realisation at Ribby Hall or any part or the Shares, howsoever arising, the Plaintiffs shall receive the first £850,00 (2) Not without the written consent of the Plaintiffs or by leave of the Court to sell or realise or otherwise deal with Ribby Hall or the Shares or any part thereof so as to realise a sum less than £850,000 after payment of existing lawful mortgagees resulting therefrom after payment of the existing mortgagees lawfully entitled.'

On those undertakings the Mareva order of 19 December 1988, as varied, was discharged and all further proceedings in the action were stayed on the terms set out in the schedule. The scheduled terms provided that the defendants agreed to pay to the plaintiffs the sum of £850,000 in full and final settlement of all claims existing between them; that the defendants agreed to seek to negotiate sale or realisation of Ribby Hall or the shares to Titaghur plc to be completed as soon as practicable; that in default of agreement for sale or realisation to Titaghur plc the defendants agreed to seek to sell or realise Ribby Hall or the shares as soon as reasonably practicable; and the defendants agreed forthwith to give instructions to the firm of Christopher Young & Co to act for them in the sale or realisation of Ribby Hall or the shares, such instructions not to be withdrawn without the leave of the court. It was further agreed by the defendants that on any sale or

realisation of Ribby Hall or the shares, whether to Titaghur plc or otherwise, the plaintiffs should be entitled to receive the first £850,000 realised therefrom after payment of existing mortgagees lawfully entitled. 'Sale or realisation' was defined to mean realisation of money or like benefit from any dealing with Ribby Hall or any part or the shares unless and until the £850,000 is paid to the plaintiffs. Alleged breaches of those orders and undertakings implicating Mr Young form the basis of a motion for committal served on Mr Young on 12 May 1995. The notice of motion, as amended on 12 March 1996, sought an order that Mr Young be committed to prison and/or ordered to pay to Mrs Taylor and, if and so far as should seem appropriate, be ordered to pay to the trustee for the insolvent estate of Mr Taylor all or such part of the sum of £850,000 or such other sum as the court should think fit as compensation under the inherent and supervisory jurisdiction of the court over the conduct of the solicitors. The contempt of court alleged against Mr Young was in causing or aiding and abetting or failing to prevent breaches of the order of 19 December 1988, as varied on 5 June 1989, and of the undertakings given to the court on 27 June 1989 by RHL and NWHL; and in himself acting in breach of his personal undertaking to the court embodied in the order of 27 June 1989. It is contended that the Taylors relied on the undertaking and the integrity of Mr Young as a solicitor in consenting to the Tomlin order; that they would not have agreed to it otherwise; that they altered their position accordingly; and that they should be fully compensated for the loss of the opportunity to reassess and evaluate their prospects. Reliance is placed on a legal charge executed on 10 August 1989 by RHL charging Ribby Hall to Persimmon Homes (North West) Ltd (Persimmon) to secure repayment of £225,000 paid by Persimmon as a deposit under the terms of a conditional contract dated 10 August 1989 for the sale of Ribby Hall. It is claimed that the £225,000 was disposed of to a person other than the Taylors. Reliance is also placed on further charges over Ribby Hall to Shireview on 28 November 1989 to secure repayment by RHL of £1·1m. These transactions are alleged to have been carried out without the knowledge of the Taylors or their solicitors and to have constituted breaches of the undertakings and orders of which Mr Young had knowledge as solicitor for RHL and NWHL; yet he failed to inform the Taylors or their solicitors of these matters or to take adequate or continuing steps to prevent them from so acting or to advise RHL or NWHL against those steps or to ensure that they acted in accordance with their obligations.

The detailed grounds of the application are set out in the ensuing 23 paragraphs of the notice of motion dated 11 May 1995. The motion was supported by an 18-page affidavit sworn by Mr Taylor as long ago as 8 October 1991. There was also a 71-page affidavit sworn by Mr Rawkins, the Taylors' then solicitor, on 23 December 1994. The affidavits also related to other applications for the committal of directors, officers and agents of the two companies. In his affidavit Mr Taylor explained (para 35) why these matters were not brought before the court 'until now' (October 1991). He referred to the debilitating effect of his terminal illness and to proposals for repayment. He stated that he was of the view that, failing fulfilment of certain promises, 'proceedings must be commenced'. The affidavit of Mr Rawkins also gave reasons for the 'passage of time which has occurred between the discovery of the facts and matters giving rise to these applications and the present day' (para 158): correspondence between the parties and their solicitors in 1989 and 1990; taking the advice of Mr Rawkins and of junior and leading counsel (who all gave 'very firm advice' in December 1990 that 'applications of the kind now before the court should be

made without delay'); applying for and obtaining legal aid (full certificates issued on 30 January 1991); instructions from Mr Taylor not to proceed on account of the strain to his declining health and his continuing hope of repayment; and the complications following Mr Taylor's death in January 1992—legal aid problems and dealing with the creditors of his insolvent estate. The explanations for delay were updated in a 23-page affidavit sworn by Ms Webster on 9 May 1996, which also replied to Mr Young's affidavit.

On 6 October 1995 an application was issued on behalf of Mr Young for an order that the motion 'be struck out and/or dismissed as an abuse of process'.

Mr Young swore an affidavit in support of his application, denying that he had committed any breach of undertaking or other offence, asserting that he had acted in good faith and stating that he wished to deal with the substantive matters in further evidence, if the motion proceeded to a full hearing. He dealt in detail with the changes in the positions of the parties concerned in the events in 1989, with the loss of, and the difficulties in obtaining, documentary evidence; with the problems of identifying, tracing and obtaining the recollections of witnesses; and with himself recollecting the events of six years earlier in the absence of full contemporaneous notes. Threats of contempt proceedings were made against him as long ago as December 1990, when he was informed by the Taylors' solicitors that he would be served in January 1991 with process invoking the summary jurisdiction of the court for breach of the undertaking. The threats were repeated in 1992 and again in 1994. He had made his position clear. He had regarded the matter as 'effectively closed' and he had heard nothing more until mid-1995. No reason for any delay could be laid at his door, whereas the Taylors and their advisors had blown 'hot and cold' over a long period. The delay was of their making and was such that, at this distance, it was impossible for the court to deal with the motion justly. Mr Young amplified the prejudice occasioned by the delay in para 10 of his second affidavit (14 May 1996): unavailability of key witnesses; loss of recollection; difficulties and costs in preparing a proper response; problems in quantifying the compensation claimed; and increased costs caused by the delay.

The judgment

The strike out motion was heard by Collins J on 16/17 May 1996. He made an order on 6 June 1996 in the terms of the motion.

In brief, the reasons given by the judge for that order were as follows.

(1) There had been 'inordinate' and 'inexcusable' delay. Mr and Mrs Taylor had been aware since 1990 of the breaches relied upon to have Mr Young committed to prison and ordered to pay compensation. They had taken legal advice. They had made threats to start committal proceedings, but they had not issued the motion until May 1995. The excuses for the delay were unacceptable.

(2) Mr Young had been seriously prejudiced by the delay.

(3) Although there was a prima facie case that Mr Young was in breach of his undertaking in respect of the creation of two charges postdating the Tomlin order, the damage which Mrs Taylor claimed she has suffered could not be shown to have flowed from those breaches. In other words, she would not derive any benefit from the motion as she would not be awarded any compensation by the court.

An award of compensation against Mr Young is crucial to Mr Taylor. Neither she nor her husband's estate, which is being administered as an insolvent estate, have any chance of recovery from the defendants in the action who are alleged to

have broken the orders. On 7 January 1991 a winding-up order was made against RHL and in the same year NWHL was struck off the Register of Companies. It no longer exists. Ribby Hall was sold in circumstances which produced no money for Mrs Taylor or for the estate of Mr Taylor, who died after a long illness on 4 January 1992. Ribby Hall was subject to a legal charge to a Danish bank dated 9 December 1987. The indebtedness was in the region of £2·7m. In June 1990 the Danish Bank obtained an order for possession of Ribby Hall. It was sold for less than £1m. There was no equity for Mr or Mrs Taylor, even before account was taken of the two further charges created after the Tomlin order in alleged breach of its terms. Those charges were, as already noted, the charge dated 10 (or 11) August 1989 to Persimmon for about £225,000 and, secondly, the charge dated 28 November 1989 to Shireview to secure a loan of £1·1m. Shireview had also acquired an option on 6 June 1989 to purchase the property for £6·5m, but that option was never exercised.

In these circumstances, Mrs Taylor's only hope of obtaining compensation is against Mr Young. If the judge is right on the issue of causation, there is no prospect of Mr Young being ordered on this motion to make any payment of compensation in respect of the alleged breaches of undertaking.

Appellant's submissions

On the strike out application, the affidavit evidence filed was almost as voluminous as the evidence would be on the substantive motion. The main submission of Mr Rankin QC, on behalf of Mrs Taylor, was that there was no power to strike out, as an abuse of process, proceedings brought either under the contempt or under the supervisory jurisdiction of the court. There was no limitation period for initiating such proceedings. The power to strike out proceedings for want of prosecution on the ground of prejudice resulting from inordinate and inexcusable delay was not available in such a case. The basis of Mr Young's application was the delay in *initiating* the proceedings against him, for which there was no limitation period. This is different from the case of proceedings, properly brought within the prescribed limitation period, but not *prosecuted* in accordance with the rules. Nor was this a case of contumelious default in compliance with rules.

On the application to strike out the motion, so far as it relies on the supervisory jurisdiction, Mr Rankin made the following detailed submissions.

(1) Delays should never be a procedural bar to the investigation by the court of serious misconduct by one of its own officers.

(2) The court has a regulatory role over its own officers and different considerations apply to that role than apply in ordinary litigation between private parties.

(3) Solicitors, as officers of the court, occupy an important position of trust. They are expected to conform to higher standards of conduct than those applied by the law generally. There is a public interest in maintaining confidence in solicitors. That interest is not diminished in importance by the occurrence of delay in bringing the misconduct to the attention of the court.

(4) The delay in this case was not of a kind which could have constituted inordinate or inexcusable delay for the purpose of striking out a case for want of prosecution, because it was of a pre-writ quality, occurring before the institution of the proceedings.

(5) The abuse of process power exercised by the court in criminal proceedings was not analogous to supervisory proceedings. Criminal proceedings affected

matters between the state and its citizens. This is a distinct and special jurisdiction exercisable by the court only over its own officers.

(6) The proper stage at which to consider delay and its consequences, such as prejudice, was at the full hearing of the motion. The court could then exercise its discretion with regard to all the relevant factors to be weighed in the balance. The court would be in a position to protect the defendant from any prejudice or injustice.

(7) The special power to award compensation did not put the solicitor in a position of an ordinary litigant who could rely on delay as a procedural bar to a full hearing. It would be quite wrong for the court to allow one of its officers, against whom there was a powerful case of misconduct to answer, to go scot-free on a procedural ground without explanation or investigation of his conduct.

In brief, there was no misuse of process preventing the court from investigating Mr Young's conduct and from considering the imposition of sanctions, including an award of compensation.

Mr Rankin made additional detailed submissions on the facts of the case and on the decision of Collins J. He submitted as follows.

(1) The judge had found a substantial prima facie case of serious misconduct on the part of Mr Young in relation to breach of the undertaking given by him as a solicitor. On its face there was a powerful case against him, which, if established, was capable of amounting to contempt. The judge added that he would have given leave to amend the motion to make an allegation against Mr Young of lodging a misleading and untrue affidavit.

(2) The court ought to carry out a full investigation into Mr Young's conduct and order him to pay compensation for loss which Mrs Taylor had suffered as a result of his actions.

(3) If, contrary to the primary submission, delay caused the court to decline jurisdiction to investigate Mr Young's contempt and serious misconduct, the judge had wrongly adopted the approach applicable in want of prosecution cases, particularly in his references to inexcusable and serious delay and prejudice to Mr Young. The want of prosecution cases were distinguishable. The delay here had occurred prior to the issue of the motion. It could not have been relied on in a *Birkett v James* case (see [1977] 2 All ER 801, [1978] AC 297). There was no limitation period in proceedings of the present kind. The law had not restricted the time within which an application for contempt or under the supervisory jurisdiction could be brought.

(4) If the analogy with the inherent power of the court to regulate its own procedure were to be applied at all, it should only operate in exceptional cases.

(5) This was not an exceptional case. The delay relied on by the judge was not such as to prevent or prejudice a fair investigation by the court into the issues raised by the alleged contempt and misconduct. If the delay had any adverse consequences for Mr Young, the court could address those during the course of the investigation in the substantive proceedings.

Power to strike out

Our conclusion is that there is an inherent discretionary power in the court to strike out both contempt or supervisory proceedings as an abuse of process. The points made by Mr Rankin against the existence of such a power are more relevant to the proper exercise of the judicial discretion, which we shall consider later in this judgment.

The absence of the limitation period for initiating a proceeding does not preclude the power to strike out for abuse of process. There may exist a legal right to initiate proceedings at any time, but the exercise of that right must nevertheless be subject to the overriding power of the court to protect the integrity of its own processes.

Support for this approach is to be found in the cases of abuse of process relating to delay in the initiation of criminal proceedings for offences for which no limitation period is prescribed. Such criminal proceedings are not, for that reason, exempt from regulation by the court. The court has a residual discretion to prevent use of the process in a way which is unfair to a party to the proceedings. The power is most commonly exercised where there has been a lapse of time between the commission of an offence and the trial. The aim of criminal procedure is to secure a fair trial in the interests of both sides. Where it is no longer possible to have a fair trial because of unjustifiable delay, the court may exercise an exceptional power to stop the case. The power to stay a pending prosecution is very sparingly exercised. It is exercisable in a case where there has been such delay since the commission of the offence in instituting the proceedings that a fair trial is no longer possible. The longer the delay, the greater the risk of prejudice to a fair trial.

The proper approach to the exercise of this exceptional jurisdiction is explained by Lord Mustill in *Tan v Cameron* [1993] 2 All ER 493 at 507, [1992] 2 AC 205 at 225. The question is—

> 'whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round ...'

This formulation of abuse of process in criminal proceedings is relevant to the contempt and supervisory powers of the court. Unlike most civil proceedings, contempt and supervisory proceedings are not subject to any limitation period (as to contempt see *Bray v Stuart A West & Co* (1989) 139 NLJ 753). The principal purpose of both the contempt power and criminal proceedings is punitive. Their aim is to secure obedience to the law and to punish a person who has acted in breach of the law. A breach of a court order or of an undertaking to the court or aiding and abetting such a breach is a very serious matter. In the exercise of its jurisdiction the court may impose either a sentence of imprisonment or a fine.

The supervisory power over solicitors is also stands comparison with criminal proceedings. The power is essentially a summary disciplinary one exercised by the court over its own officers to ensure their observance of an honourable standard of conduct and to punish derelictions of duty. The court has the necessary powers of enforcement which extend, unlike the contempt power (cf *Midland Marts Ltd v Hobday* [1989] 3 All ER 246 at 250, [1989] 1 WLR 1134 at 1145) to the payment of compensation for loss suffered in consequence of misconduct of a solicitor in failing to implement an undertaking given to the court. The award of compensation is not, however, dependent on an enforceable civil law right on the part of the person who has suffered loss (see *Re Grey* [1892] 2 QB 440 at 443). Compensation is only available under this jurisdiction where the conduct of the solicitor is inexcusable and such as to merit reproof (see *Udall v Capri Lighting Ltd* [1987] 3 All ER 262 at 269, [1988] QB 907 at 917, where Balcombe LJ summarises the relevant principles and procedures).

The discretionary nature of the jurisdiction should be emphasised: see *Myers v Elman* [1939] 4 All ER 484 at 508, [1940] AC 282 at 318. The discretion extends both to procedure and substantive relief. It is flexible and unfettered by any absolute rules and is to be exercised according to the facts of the particular case.

In these circumstances it is relevant to consider, on a strike out application, the prospects of the court exercising this exceptional power at the substantive hearing to grant coercive or compensatory relief. While lapse of time does not always provide a complete answer to a claim for breach of an undertaking (see *Re Swan* (1846) 15 LJQB 402) it is a different matter when the circumstances of the particular case are such that the court is unlikely to exercise that power. In the exercise of the discretion the public interest is, of course, a factor to be taken into account. There is a real public interest in the maintenance and observance of honourable standards of conduct by officers of the court, in the efficient administration of justice and in compliance with court orders and undertakings. In *Re Manlon Trading Ltd* [1995] 4 All ER 14 at 29, [1996] Ch 136 at 169 the court regarded the public interest in relation to proceedings for the disqualification of directors as a consideration relevant to its discretion on an application to strike out for want of prosecution. The weight to be attached to public interest factors will depend on the facts of the particular case.

Discretion

Mr Rankin's submissions were made with force and clarity, but have not persuaded us that the judge was wrong to strike out the motion.

Our conclusions are as follows.

(1) The court may exercise its discretion to strike out proceedings as an abuse of process, even though they are for contempt of court or invoke the supervisory power of a court over its own officers.

(2) As the exercise of the power to strike out is discretionary this court will only interfere with the judge's exercise of discretion if there was an error of principle in the exercise of discretion or if the decision was plainly wrong.

(3) The judge took full and careful account of all the relevant factors; the length of the delay, the reasons for it, the special nature of the jurisdiction and the public interest.

(4) He was entitled to conclude that there was an abuse of the process in bringing the motion: there had been long and inexcusable delay and there was a genuine risk of prejudice to Mr Young. In those circumstances it would be an abuse of process for the motion to proceed to a substantive hearing, as there is no real prospect of the court exercising its discretion to grant the relief sought on the motion, either by way of committal or compensation.

In our judgment it is, in general, preferable to make submissions on delay, prejudice, potential injustice and other factors relevant to the court's discretion in its contempt and supervisory powers at the substantive hearing rather than by a preliminary pre-emptive move to strike out. That procedure may be open to the objection that it increases the costs and delay that preliminary procedures are intended to avoid.

We add for future guidance that proceedings of this kind should, in the absence of a good reason, be initiated within a reasonable time of a party obtaining knowledge of a breach of a court order or undertaking or other misconduct. In most cases the court is dependent on a party bringing a breach or a case of misconduct to its notice so that appropriate action can be taken.

In this case it was known as early as March 1990 that circumstances had occurred giving rise to a possible breach. By the end of January 1991 legal aid was available to take action, but no action was taken for over four years. No good reason has been advanced for failure to act at a much earlier stage. A deliberate decision had been taken not to proceed earlier, while the Taylors were attempting to improve their position by other means. To allow the motion now to proceed to a full hearing would serve no useful purpose, as it has no real prospect of success and would inflict serious prejudice on Mr Young without either serving the aspects of the public interest protected by the three judicial powers identified at the outset of this judgment or conferring any real benefit on Mrs Taylor.

For all those reasons this appeal is dismissed.

Appeal dismissed.

Kate O'Hanlon Barrister.

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD SLYNN OF HADLEY, LORD NOLAN, LORD HOFFMANN AND LORD CLYDE

3, 4 JUNE, 13 NOVEMBER 1997

Medical practitioner – Negligence – Test of liability – Conforming with practice accepted as proper by responsible members of the profession – Expert evidence of practice accepted as proper – Circumstances in which expert evidence not to be relied on as establishing proper level of skill and competence – Omission to intubate infant prior to respiratory failure resulting in cardiac arrest – Expert evidence both for and against intubation – Whether evidence for defendants reasonable and responsible – Whether evidence capable of withstanding logical analysis.

On 16 January 1984 a two-year-old boy, P, who had a past history of hospital treatment for croup, was readmitted to hospital under the care of Dr H and Dr R. On the following day he suffered two short episodes at 12.40 pm and 2.00 pm during which he turned white and clearly had difficulty breathing. Dr H was called in the first instance and she delegated Dr R to attend in the second instance but neither attended P, who at both times appeared quickly to return to a stable state. At about 2.30 pm P suffered total respiratory failure and a cardiac arrest, resulting in severe brain damage. He subsequently died and his mother continued his proceedings for medical negligence as administratrix of his estate. The defendant health authority accepted that Dr H had acted in breach of her duty of care to P but contended that the cardiac arrest would not have been avoided if Dr H or some other suitable deputy had attended earlier than 2.30 pm. It was common ground that intubation so as to provide an airway would have ensured that respiratory failure did not lead to cardiac arrest and that such intubation would have had to have been carried out before the final episode. The judge found that the views of P's expert witness and Dr D for the defendants, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts. He therefore held that Dr H, if she had attended and not intubated, would have come up to a proper level of skill and competence according to the standard represented by Dr D's views and that it had not been proved that the admitted breach of duty by the defendants had caused the injury which occurred to P. The Court of Appeal dismissed an appeal by P's mother and she appealed to the House of Lords.

Held – A doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was

not reasonable or responsible. The instant case was not such a situation since it was implicit in the judge's judgment that he had accepted Dr D's view as reasonable and although he thought that the risk involved would have called for intubation, he considered that could not dismiss Dr D's views to the contrary as being illogical. The appeal would, accordingly, be dismissed (see p 778 *b* to *g* and p 779 *e to g j* to p 780 *a e* to *j*, post).

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 and *Hucks v Cole* (1968) (1993) 4 Med LR 393 applied.

Notes

For standard of care required of medical practitioners, see 33 *Halsbury's Laws* (4th edn reissue) 621–623, and for cases on the subject, see 33 *Digest* (2nd reissue) 460–467, *2614–2649*.

Cases referred to in opinions

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 583.

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615, [1956] AC 613, [1956] 2 WLR 707, HL.

Hucks v Cole (1968) (1993) 4 Med LR 393, CA.

Joyce v Merton Sutton and Wandsworth Health Authority (1995) 27 BMLR 124, CA.

Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635, [1984] 1 WLR 634, HL.

Wilsher v Essex Area Health Authority [1988] 1 All ER 871, [1988] AC 1074, [1988] 2 WLR 557, HL.

Wong (Edward) Finance Co Ltd v Johnson Stokes & Master (a firm) [1984] AC 296, [1984] 2 WLR 1, PC.

Appeal

Valerie Margaret Holt (formerly Bolitho), as administratrix of the estate of Patrick Nigel Bolitho, appealed with leave from the decision of the Court of Appeal (Dillon and Farquharson LJJ; Simon Brown LJ dissenting) (13 BMLR 111) on 15 December 1992 dismissing her appeal from the decision of Hutchison J on 15 February 1991 whereby he dismissed a claim for damages for injuries suffered by the deceased allegedly caused by the negligence of a doctor employed by the respondent, City and Hackney Health Authority. The facts are set out in the opinion of Lord Browne-Wilkinson.

Daniel Brennan QC and *Deirdre Goodwin* (instructed by *Irwin Mitchell*, Sheffield) for the appellant.

Robert Owen QC and *Terence Coghlan QC* (instructed by *Bircham & Co*) for the respondent.

Their Lordships took time for consideration.

13 November 1997. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, this appeal raises two questions relating to liability for medical negligence. The first, which I believe to be more apparent than real, relates to the proof of causation when the negligent act is one of omission. The second concerns the approach to professional negligence laid

down in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 583.

The claim relates to treatment received by Patrick Nigel Bolitho at St Bartholomew's Hospital on 16 and 17 January 1984 when he was two years old. Patrick suffered catastrophic brain damage as a result of cardiac arrest induced by respiratory failure. The issues investigated at trial were wide ranging but as a result of the judge's findings I can state the relevant facts quite shortly.

On 11 January 1984 Patrick was admitted to St Bartholomew's suffering from croup and was treated under the care of the senior paediatric registrar, Dr Janet Horn, and the senior house officer in paediatrics, Dr Keri Rodger. On 15 January he was discharged home. No complaint is made about this episode in his treatment.

On the evening of 16 January his parents became concerned about his condition. He had not slept well and had been restless; further, he seemed to be having increasing difficulty in breathing and was wheezier. As a result he was readmitted to St Bartholomew's on the evening of 16 January. Dr Rodger examined him and was also concerned about his condition. At 8.30 pm she arranged for him to be nursed by a special nurse on a one-to-one basis. On the following morning, 17 January, the medical notes indicated that he was much better but that there was still reduced air entry on the left side. He was seen on the morning round by the consultant who carried out an examination (albeit not a full one) but he was not concerned about his condition. Patrick ate a large lunch.

At around 12.40 pm on 17 January there occurred the first episode. The nurse who was observing Patrick summoned Sister Sallabank, a skilled and experienced nurse. Sister Sallabank described his respiratory sounds as 'awful' but reported that surprisingly he was still talking. He was very white in colour. The sister was sufficiently concerned about his condition to bleep Dr Horn rather than to go through the usual chain of command by first contacting the senior house officer, Dr Rodger. She took this course because she felt something was acutely wrong. Sister Sallabank asked Dr Horn to come and see Patrick straight away as he was having difficulty in breathing and was very white. Dr Horn seemed alarmed that Patrick was in such distress when he had appeared perfectly well a short time before during the consultant's round. Sister Sallabank told Dr Horn that there had been a notable change in Patrick's colour and that he sounded as though something was stuck in his throat. Dr Horn said that she would attend as soon as possible. In the event, neither she nor Dr Rodger came to see Patrick. When Sister Sallabank returned to Patrick she was extremely surprised to see him walking about again with a decidedly pink colour. She requested a nurse to stay with Patrick.

At around 2 pm the second episode occurred. The nurse observing Patrick called Sister Sallabank back to Patrick. Sister Sallabank saw that he was in the same difficulties as he had been in at 12.40 pm and she became very worried. She went off to telephone Dr Horn again. Dr Horn informed Sister Sallabank over the telephone that she was on afternoon clinic and had asked Dr Rodger to come in her place. While the sister was talking to Dr Horn, the nurse reported to her that Patrick was now pink again; the sister then took the opportunity to explain to Dr Horn in detail the episodes which Patrick had experienced. Dr Rodger did not attend Patrick after the second episode. Her evidence was that her bleep was not working because of flat batteries so that she never got the message.

After the second episode, Sister Sallabank instructed Nurse Newbold to sit with Patrick: she was told that the doctors were coming to see him because he had been unwell earlier. Nurse Newbold tried to take Patrick's pulse and rate of

respiration but this proved very difficult as he appeared quite well and was jumping about and playing in his cot. She described Patrick as being very chatty and interested in reading the letters on a dish.

At about 2.30 pm the events leading to the final catastrophe began. There was a change in Patrick's condition. Although he retained his colour he became a little agitated and began to cry. Nurse Newbold left a colleague with Patrick and reported to Sister Sallabank who told her to bleep the doctors again. While she was on the telephone to the doctors, the emergency buzzer sounded having been set off by the nurse left with Patrick. Nurse Newbold immediately returned to Patrick. Sister Sallabank also heard the buzzer and sent out a call for the cardiac arrest team. Patrick had collapsed because his respiratory system was entirely blocked and he was unable to breathe. As a result he suffered a cardiac arrest. He was revived but there was a period of some nine to ten minutes before the restoration of respiratory and cardiac functions. In consequence, Patrick sustained severe brain damage. He has subsequently died and these proceedings have been continued by his mother as administratrix of his estate.

The case came on for trial before Hutchison J. There was a conflict of evidence between Sister Sallabank and Dr Horn as to what was said to Dr Horn in the course of the two telephone calls at about 12.40 pm and 2 pm. The judge accepted Sister Sallabank's version (which is the one I have summarised above). On that basis, the defendants accepted that Dr Horn was in breach of her duty of care after receiving such telephone calls not to have attended Patrick or arranged for a suitable deputy to do so.

Negligence having been established, the question of causation had to be decided: would the cardiac arrest have been avoided if Dr Horn or some other suitable deputy had attended as they should have done. By the end of the trial it was common ground, first, that intubation so as to provide an air way in any event would have ensured that the respiratory failure which occurred did not lead to cardiac arrest and, second, that such intubation would have had to be carried out, if at all, before the final catastrophic episode.

The judge identified the questions he had to answer as follows:

> '[Mr Owen, for the defendants] submitted, therefore, that (if once it was held that Dr Horn was negligent in failing to attend at either 12.40 or 2 o'clock) the sole issue was whether Patrick would on one or other of these occasions have been intubated. In submitting that on this aspect of the case the issue was what would Dr Horn or another competent doctor sent in her place have done had they attended, Mr Owen was, I think, accepting that the real question was what would Dr Horn or that other doctor have done, *or what should they have done*. As it seems to me, if Dr Horn would have intubated, then the plaintiff succeeds, whether or not that is a course which all reasonably competent practitioners would have followed. If, however, Dr Horn would not have intubated, then the plaintiff can only succeed if such failure was contrary to accepted medical practice (I am not purporting to consider the legal tests in detail, and merely using shorthand at this stage) ... Common to both sides is the recognition that I must decide whether Dr Horn would have intubated (or made preparations for intubation), and, *even if she would not, whether such a failure on her part would have been contrary to accepted practice in the profession.*' (My emphasis.)

As to the first of those issues, Dr Horn's evidence was that, had she come to see Patrick at 2 pm, she would not have arranged for him to be intubated. The judge

accepted this evidence. However, he found that she would have made preparation to ensure that speedy intubation could take place: in the event that proved to be an irrelevant finding since the judge found that such preparations would have made no difference to the outcome. Therefore, the judge answered the first of his two questions by holding that Dr Horn would not herself have intubated if, contrary to the facts, she had attended.

As to the second of the judge's questions (ie whether any competent doctor should have intubated if he had attended Patrick at any time after 2 pm), the judge had evidence from no less than eight medical experts, all of them distinguished. Five of them were called on behalf of Patrick and were all of the view that, at least after the second episode, any competent doctor would have intubated. Of these five, the judge was most impressed by Dr Heaf, a consultant paediatrician in respiratory medicine at the Royal Liverpool Children's Hospital, which is the largest children's hospital in the United Kingdom. On the other side, the defendants called three experts all of whom said that, on the symptoms presented by Patrick as recounted by Sister Sallabank and Nurse Newbold, intubation would not have been appropriate. Of the defendants' experts, the judge found Dr Dinwiddie, a consultant paediatrician in respiratory diseases at the Great Ormond Street Hospital, most impressive.

The views of the plaintiff's experts were largely based on the premise that over the last two hours before the catastrophe Patrick was in a state of respiratory distress progressing inexorably to hypoxia and respiratory failure. The defendants' experts, on the other hand, considered the facts as recounted by Sister Sallabank indicated that Patrick was quite well apart from the two quite sudden acute episodes at 12.40 pm and 2 pm. The judge held that the evidence of Sister Sallabank and Nurse Newbold as to Patrick's behaviour (which he accepted) was inconsistent with a child passing through the stages of progressive hypoxia.

Having made his findings of fact, the judge directed himself as to the law by reference to the speech of Lord Scarman in *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635 at 639, [1984] 1 WLR 634 at 639:

> '... I have to say that a judge's "preference" for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one *respectable* body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary.' (My emphasis.)

The judge held that the views of Dr Heaf and Dr Dinwiddie, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts. Therefore, he held, Dr Horn, if she had attended and not intubated, would have come up to a proper level of skill and competence, ie the standard represented by Dr Dinwiddie's views. Accordingly, he held that it had not been proved that the admitted breach of duty by the defendants had caused the catastrophe which occurred to Patrick.

An appeal to the Court of Appeal ((1992) 13 BMLR 111) was dismissed by Dillon and Farquharson LJJ, Simon Brown LJ dissenting. I will have to consider some of their reasons hereafter.

The Bolam test and causation

The locus classicus of the test for the standard of care required of a doctor or any other person professing some skill or competence is the direction to the jury given by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 122, [1957] 1 WLR 583 at 587:

> 'I myself would prefer to put it this way: a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'

It was this test which Lord Scarman was repeating, in different words, in *Maynard*'s case in the passage by reference to which the judge directed himself.

Before your Lordships, Mr Brennan QC, for the appellant, submitted, first, that the *Bolam* test has no application in deciding questions of causation and, secondly, that the judge misdirected himself by treating it as being so relevant. This argument, which was raised for the first time by amendment to the notice of appeal in the Court of Appeal, commended itself to Simon Brown LJ and was the basis on which he dissented. I have no doubt that, in the generality of cases, the proposition of law is correct but equally have no doubt that the judge in the circumstances of the present case was not guilty of any self-misdirection.

Where, as in the present case, a breach of a duty of care is proved or admitted, the burden still lies on the plaintiff to prove that such breach caused the injury suffered (see *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615, [1956] AC 613 and *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, [1988] AC 1074). In all cases, the primary question is one of fact: did the wrongful act cause the injury? But in cases where the breach of duty consists of an omission to do an act which ought to be done (eg the failure by a doctor to attend) that factual inquiry is, by definition, in the realms of hypothesis. The question is what would have happened if an event which by definition did not occur, had occurred. In a case of non-attendance by a doctor, there may be cases in which there is a doubt as to which doctor would have attended if the duty had been fulfilled. But in this case there was no doubt: if the duty had been carried out it would have either been Dr Horn or Dr Rodger, the only two doctors at St Bartholomew's who had responsibility for Patrick and were on duty. Therefore in the present case, the first relevant question is 'what would Dr Horn or Dr Rodger have done if they had attended?' As to Dr Horn, the judge accepted her evidence that she would not have intubated. By inference, although not expressly, the judge must have accepted that Dr Rodger also would not have intubated: as a senior house officer she would not have intubated without the approval of her senior registrar, Dr Horn.

Therefore the *Bolam* test had no part to play in determining the first question, viz what would have happened? Nor can I see any circumstances in which the *Bolam* test could be relevant to such a question.

However, in the present case, the answer to the question 'what would have happened?' is not determinative of the issue of causation. At the trial the defendants accepted that if the professional standard of care required any doctor who attended to intubate Patrick, Patrick's claim must succeed. Dr Horn could not escape liability by proving that she would have failed to take the course which any competent doctor would have adopted. A defendant cannot escape liability

by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter. I have no doubt that this concession was rightly made by the defendants. But there is some difficulty in analysing why it was correct. I adopt the analysis of Hobhouse LJ in *Joyce v Merton Sutton and Wandsworth Health Authority* (1996) 27 BMLR 124. In commenting on the decision of the Court of Appeal in the present case, he said (at 156):

> 'Thus, a plaintiff can discharge the burden of proof on causation by satisfying the court *either* that the relevant person would in fact have taken the requisite action (although she would not have been at fault if she had not) *or* that the proper discharge of the relevant person's duty towards the plaintiff required that she take that action. The former alternative calls for no explanation since it is simply the factual proof of the causative effect of the original fault. The latter is slightly more sophisticated: it involves the factual situation that the original fault did not itself cause the injury but that this was because there would have been some further fault on the part of the defendants; the plaintiff proves his case by proving that his injuries would have been avoided if proper care had continued to be taken. In *Bolitho* the plaintiff had to prove that the continuing exercise of proper care would have resulted in his being intubated.' (Hobhouse LJ's emphasis.)

There were, therefore, two questions for the judge to decide on causation: (1) What would Dr Horn have done, or authorised to be done, if she had attended Patrick? and (2) If she would not have intubated, would that have been negligent? The *Bolam* test has no relevance to the first of those questions but is central to the second.

There can be no doubt that, as the majority of the Court of Appeal held, the judge directed himself correctly in accordance with that approach. The passages from his judgment which I have quoted (and in particular those that I have emphasised) demonstrate this. The dissenting judgment of Simon Brown LJ in the Court of Appeal is based on a misreading of the judge's judgment. He treats the judge as having only asked himself one question, namely the second question. To the extent that Simon Brown LJ noticed the first question—would Dr Horn have intubated?—he said that the judge was wrong to accept Dr Horn's evidence that she would not have intubated. In my judgment, it was for the judge to assess the truth of her evidence on this issue.

Accordingly, the judge asked himself the right questions and answered them on the right basis.

The Bolam test—should the judge have accepted Dr Dinwiddie's evidence?

As I have said, the judge took a very favourable view of Dr Dinwiddie as an expert. He said:

> '... I have to say of Dr Dinwiddie also, that he displayed what seemed to me to be a profound knowledge of paediatric respiratory medicine, coupled with impartiality, and there is no doubt, in my view, of the genuineness of his opinion that intubation was not indicated.'

However, the judge also expressed these doubts:

> 'Mr Brennan also advanced a powerful argument—which I have to say, as a layman, appealed to me—to the effect that the views of the defendant's experts simply were not logical or sensible. Given the recent as well as the more remote history of Patrick's illness, culminating in these two episodes,

surely it was unreasonable and illogical not to anticipate the recurrence of a life-threatening event and take the step which it was acknowledged would probably have saved Patrick from harm? This was the safe option, whatever was suspected as the cause, or even if the cause was thought to be a mystery. The difficulty of this approach, as in the end I think Mr Brennan acknowledged, was that in effect it invited me to substitute my own views for those of the medical experts.'

Mr Brennan renewed that submission both before the Court of Appeal (who unanimously rejected it) and before your Lordships. He submitted that the judge had wrongly treated the *Bolam* test as requiring him to accept the views of one truthful body of expert professional advice, even though he was unpersuaded of its logical force. He submitted that the judge was wrong in law in adopting that approach and that ultimately it was for the court, not for medical opinion, to decide what was the standard of care required of a professional in the circumstances of each particular case.

My Lords, I agree with these submissions to the extent that, in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In *Bolam*'s case [1957] 2 All ER 118 at 122, [1957] 1 WLR 583 at 587 McNair J stated that the defendant had to have acted in accordance with the practice accepted as proper by a '*responsible* body of medical men' (my emphasis). Later he referred to 'a standard of practice recognised as proper by a competent *reasonable* body of opinion' (see [1957] 2 All ER 118 at 122, [1957] 1 WLR 583 at 588; my emphasis). Again, in the passage which I have cited from *Maynard*'s case, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives—responsible, reasonable and respectable—all show that the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

There are decisions which demonstrate that the judge is entitled to approach expert professional opinion on this basis. For example, in *Hucks v Cole* (1968) (1993) 4 Med LR 393, a doctor failed to treat with penicillin a patient who was suffering from septic places on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The Court of Appeal found the defendant to have been negligent. Sachs LJ said (at 397):

'When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risks, the court must anxiously examine that lacuna—particularly if the risks can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence.

a In such a case the practice will no doubt thereafter be altered to the benefit of patients. On such occasions the fact that other practitioners would have done the same thing as the defendant practitioner is a very weighty matter to be put on the scales on his behalf; but it is not, as Mr Webster readily conceded, conclusive. The court must be vigilant to see whether the reasons given for putting a patient at risk are valid in the light of any well-known b advance in medical knowledge, or whether they stem from a residual adherence to out-of-date ideas ...'

Again, in *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, the defendant's solicitors had conducted the completion of a mortgage transaction in 'Hong Kong style' rather than in the old-fashioned c English style. Completion in Hong Kong style provides for money to be paid over against an undertaking by the solicitors for the borrowers subsequently to hand over the executed documents. This practice opened the gateway through which a dishonest solicitor for the borrower absconded with the loan money without providing the security documents for such loan. The Privy Council held that even though completion in Hong Kong style was almost universally adopted d in Hong Kong and was therefore in accordance with a body of professional opinion there, the defendant's solicitors were liable for negligence because there was an obvious risk which could have been guarded against. Thus, the body of professional opinion, though almost universally held, was not reasonable or responsible.

e These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied on is reasonable or responsible. In the vast majority of cases the f fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, g in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

I emphasise that, in my view, it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical h judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be j logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed.

I turn to consider whether this is one of those rare cases. Like the Court of Appeal, in my judgment it plainly is not. Although the judge does not in turn say so, it was implicit in his judgment that he accepted that Dr Dinwiddie's view was a reasonable view for a doctor to hold. As I read his judgment, he was quoting counsel's submission when he described the view that intubation was not the

right course as being 'unreasonable and illogical'. The appeal of the argument was to the judge 'as a layman' not a conclusion he had reached on all the medical evidence. He refused to 'substitute his own views for those of the medical experts'. I read him as saying that, without expert evidence he would have thought that the risk involved would have called for intubation, but that he could not dismiss Dr Dinwiddie's views to the contrary as being illogical.

Even if this is to put too favourable a meaning on the judge's judgment, when the evidence is looked at it is plainly not a case in which Dr Dinwiddie's views can be dismissed as illogical. According to the accounts of Sister Sallabank and Nurse Newbold, although Patrick had had two severe respiratory crises, he had recovered quickly from both and for the rest presented as a child who was active and running about. Dr Dinwiddie's view was that these symptoms did not show a progressive respiratory collapse and that there was only a small risk of total respiratory failure. Intubation is not a routine, risk-free process. Dr Roberton described it as 'a major undertaking—an invasive procedure with mortality and morbidity attached—it was an assault'. It involves anaesthetising and ventilating the child. A young child does not tolerate a tube easily 'at any rate for a day or two' and the child unless sedated tends to remove it. In those circumstances, it cannot be suggested that it was illogical for Dr Dinwiddie a most distinguished expert to favour running what, in his view, was a small risk of total respiratory collapse rather than to submit Patrick to the invasive procedure of intubation.

Tragic though this case is for Patrick's mother and much as everyone must sympathise with her, I consider that the judge and the Court of Appeal reached the right conclusions on the evidence in this case. I would dismiss the appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. I agree with his analysis of the questions which have to be decided in cases of this kind and of the correct approach in law in deciding them. Despite my anxiety as to the result in this particular case, it is to me clear that Hutchison J asked the right questions and did not misdirect himself in answering them. He was entitled, on all the evidence, to accept that of Dr Dinwiddie. Accordingly, I agree that this appeal must be dismissed.

LORD NOLAN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.

Appeal dismissed.

Celia Fox Barrister.

Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) and others v Price Waterhouse (a firm) and others (Abu Dhabi and others, third parties) (Bank of England intervening)

CHANCERY DIVISION

LADDIE J

12, 13, 14, 23 MAY 1997

Bank – Deposit-taking business – Control by Bank of England – Bank's supervisory role over commercial banks in United Kingdom – Statutory prohibition on disclosure of information received relating to business or affairs of any person without consent of that person – Auditor having in possession information collected for onward transmission to Bank of England – Information concerning plaintiff bank – Bank seeking discovery of that information – Who required to give consent – How purpose of information determined – Whether information having a dual purpose disclosable – Whether court having power to order disclosure of prohibited information – Banking Act 1987, s 82.

In 1992 the liquidators of the BCCI group of companies, which prior to its liquidation had carried on a worldwide banking business, commenced an action for negligence against its former auditors, PW and EW, in respect of several annual audits of BCCI. Directions relating to the form and timetable of discovery were subsequently made and BCCI and PW began to exchange lists of documents. Among the documents in PW's possession were reports on BCCI prepared by them for the Bank of England under ss 39 and 41 of the Banking Act 1987, reports prepared by them for submission by BCCI to the College of Regulators, of which the Bank was a member, and correspondence and notes of meetings with the Bank; some of the information contained in that documentation was likely to include references to the affairs of customers of BCCI. PW's solicitors considered that there was a risk that disclosure of such documents could expose them and PW to criminal sanctions for breaching s 82(1)[a] of the 1987 Act, which made it a criminal offence for a person who under or for the purposes of the Act received information relating to the business or other affairs of any person to disclose that information without the consent of the person to whom it related. They accordingly removed those documents from PW's lists. BCCI and PW thereupon issued construction summonses to determine the ambit of s 82(1).

Held – (1) On its true construction, s 82(1) of the 1987 Act did not limit the category of persons who had the right to give or withhold consent to the disclosure of information to those who had been the subject of direct investigation or other limited classes of persons. The section was concerned to protect the interest of anyone whose business or affairs were disclosed to the Bank of England in the course of exercising its regulatory powers and not the person who had received the information about them. It followed that if any

a Section 82(1) is set out at p 786 *g h*, post

party to the litigation had received under or for the purposes of the 1987 Act information relating to the business or other affairs of any person, including a customer of BCCI, he committed a criminal offence if, without that person's consent, he disclosed it to a third party (see p 791 *f* to p 792 *c*, post); *Melton Medes Ltd v Securities and Investments Board* [1995] 3 All ER 880 considered.

(2) In determining whether information was received for the purposes of the 1987 Act, it was the recipient's intention or understanding which was relevant. However, where, at the time of receipt, the recipient anticipated that the information would be relevant to and used for purposes outside the 1987 Act and received it with that use in mind, it would not be a contravention of s 82(1) to disclose that information if, at the same time, he also anticipated that it was relevant to and to be used for the purposes of the 1987 Act. Accordingly, if PW believed that all requests received from the college were for the purposes of all its members, s 82(1) did not apply, since any information they received was for a dual purpose, including purposes outside the 1987 Act (see p 792 *f* to p 793 *c*, p 794 *d e* and p 795 *d e j*, post).

(3) Since the 1987 Act had made provision for clearly defined exemptions to the general prohibition on disclosure, the court had no power to order the disclosure by way of discovery of any documents containing information covered by s 82(1) of the 1987 Act (see p 797 *f* to *j* and p 799 *c d*, post); *Rowell v Pratt* [1937] 3 All ER 660 applied.

Notes

For restriction on disclosure of information, see 3(1) *Halsbury's Laws* (4th edn reissue) para 135.

For the Banking Act 1987, s 82, see 4 *Halsbury's Statutes* (4th edn) (1987 reissue) 613.

Cases referred to in judgment

A-G v Associated Newspapers Ltd [1994] 1 All ER 556, [1994] 2 AC 238, [1994] 2 WLR 277, HL.

Arbuthnott v Fagan [1996] LRLR 143, CA.

Franchi v Franchi [1967] RPC 149.

General Tire and Rubber Co Ltd v Firestone Tyre and Rubber Co Ltd [1972] RPC 457, CA; *rvsd* [1975] 2 All ER 173, [1975] 1 WLR 819, HL.

Humpherson v Syer (1887) 4 RPC 407, CA.

Melton Medes Ltd v Securities and Investments Board [1995] 3 All ER 880, [1995] Ch 137, [1995] 2 WLR 247.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R v Patents Appeal Tribunal, ex p Løvens Kemiske Fabriks Handelsaktieselskab [1968] 3 All ER 536, [1968] 1 WLR 1727, DC.

Rowell v Pratt [1937] 3 All ER 660, [1938] AC 101, HL.

Science Research Council v Nassé, BL Cars Ltd (formerly Leyland Cars) v Vyas [1979] 3 All ER 673, [1980] AC 1028, [1979] 3 WLR 762, HL.

Cases also cited or referred to in skeleton arguments

Adham v Bank of Credit and Commerce International SA (No 2), El Sawhary v Bank of Credit and Commerce International SA (No 2) [1995] 2 BCLC 581.

Arrows Ltd, Re (No 4), Hamilton v Naviede [1994] 3 All ER 814, [1995] 2 AC 75, HL.

Bank of Credit and Commerce International SA, Re (No 11) [1997] 1 BCLC 80.
Bankers Trust Co, Re (1995) 61 F 3d 465, US Ct of Apps (6th Cir).
Barclays Bank plc v Taylor, Trustee Savings Bank of Wales and Border Counties v Taylor [1989] 3 All ER 563, [1989] 1 WLR 1066, CA.
Dolling-Baker v Merrett [1991] 2 All ER 890, [1990] 1 WLR 1205, CA.
Esal Commodities Ltd, Re [1989] BCLC 59, CA.
Foster v Federal Comr of Taxation (1951) 82 CLR 606, Aust HC.
G E Capital Corporate Finance Group Ltd v Bankers Trust Co [1995] 2 All ER 993, [1995] 1 WLR 172, CA.
Government of Australia v Harrod [1975] 2 All ER 1, [1975] 1 WLR 745, HL.
Great Atlantic Insurance Co v Home Insurance Co [1981] 2 All ER 485, [1981] 1 WLR 529, CA.
Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm) [1987] 2 All ER 716, [1987] 1 WLR 1027, CA.
Kaufmann v Credit Lyonnais Bank (1995) Times, 1 February.
Litster v Forth Dry Dock and Engineering Co Ltd [1989] 1 All ER 1134, [1990] 1 AC 546, HL.
Marleasing SA v La Comercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135.
MacKinnon v Donaldson Lufkin & Jenrette Securities Corp [1986] 1 All ER 653, [1986] Ch 482.
Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, HL.
Paramount Airways Ltd, Re [1992] 3 All ER 1, [1993] Ch 223, CA.
Partenreederei M/S Heidberg v Grosvenor Grain and Feed Co Ltd, The Heidberg [1993] 2 Lloyd's Rep 324.
Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583.
R v Chief Constable of the West Midlands Police, ex p Wiley, R v Chief Constable of the Nottinghamshire Constabulary, ex p Sunderland [1994] 3 All ER 420, [1995] 1 AC 274, HL.
Tournier v National Provincial and Union Bank of England Ltd [1924] 1 KB 461, [1923] All ER Rep 550, CA.
Von Colson v Land Nordrhein-Westfalen Case 14/83 [1984] ECR 1891.
Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) [1997] BCC 29, CA.
Warner Lambert Co v Glaxo Laboratories [1975] RPC 354, CA.
Waugh v British Airways Board [1979] 2 All ER 1169, [1980] AC 521, HL.
Webster v James Chapman & Co (a firm) [1989] 3 All ER 939.
X Ltd v Morgan-Grampion (Publishers) Ltd [1990] 2 All ER 1, [1991] 1 AC 1, HL.

Interlocutory summonses

By summonses dated 27 September 1996 the plaintiffs, the Bank of Credit and Commerce International (Overseas) Ltd, BCCI Holdings (Luxembourg) SA and Bank of Credit and Commerce International SA (which were in liquidation), and the defendants, Price Waterhouse (PW) and Ernst & Whinney (EW) and others, applied to the court for the proper construction of s 82(1) of the Banking Act 1987 in order to determine whether certain documents in PW's possession were prohibited from discovery in the negligence action brought by BCCI against PW and EW in respect of annual audits of BCCI on the grounds that they had been obtained for onward transmission to the Bank of England in its role as regulator

under the 1987 Act of banking activities in the United Kingdom and by virtue of its membership of the College of Regulators. Abu Dhabi, the Emirate of Abu Dhabi, its government and ruler and others were joined as third parties to the action; the Bank of England appeared as intervener. The facts are set out in the judgment.

Ali Malek QC and *Adrian Beltrami* (instructed by *Lovell White Durrant*) for the plaintiffs.

Peter Goldsmith QC and *John Nicholls* (instructed by *Herbert Smith*) for the Price Waterhouse defendants.

Iain Milligan QC (instructed by *Linklaters & Paines*) for the Ernst & Whinney defendants (present only during the opening of the applications).

Peter Scott QC and *William Trower* (instructed by *Macfarlanes*) for the third parties.

Michael Brindle QC and *Bankim Thanki* (instructed by *Freshfields*) for the Bank of England.

Cur adv vult

23 May 1997. The following judgment was delivered.

LADDIE J.

INTRODUCTION

These are interlocutory applications in the litigation brought by the liquidators of various BCCI companies against their former auditors. Their purpose is to determine the scope and effect of certain provisions in Pt V of the Banking Act 1987. The plaintiffs are Bank of Credit and Commerce International (Overseas) Ltd (referred to in the pleadings as 'Overseas'), BCCI Holdings (Luxembourg) SA (Holdings), and Bank of Credit and Commerce International SA (SA). In this judgment, I will refer to the three plaintiffs together as 'BCCI'. The first 20 or so defendants and the 41st to 61st defendants consist of Price Waterhouse in various manifestations and various partners of the firm. I shall refer to them as 'PW'. The remaining defendants consist of Ernst & Whinney in various alleged manifestations and various of its partners. I shall refer to them as 'EW'. Third party proceedings have also been commenced against a number, but not all, of the shareholders of one or other BCCI company and certain other persons. When referring to BCCI, PW, EW and the third parties together, I shall refer to them simply as 'the parties'.

These proceedings commenced with the issue of a writ on 12 March 1992 against various of the PW and EW defendants. That related to the 1985 audits of BCCI. Various additional writs were subsequently issued in respect of other audit years. The actions were consolidated and a consolidated statement of claim was served on 1 September 1993. Consolidated defences and counterclaims and consolidated replies and defences to counterclaims have been served since then. Separate proceedings in relation to the 1988 and 1989 audits of BCCI have also been commenced. At the moment, they have not been consolidated with the earlier proceedings. Third party proceedings were commenced by three sets of the PW defendants in each of the consolidated 1988 and 1989 actions.

The sums claimed in the various actions, counterclaims and third party notices are very large indeed, running into billions of pounds. The pleadings are extensive, extending to many volumes. They currently raise wide ranging issues in relation to many areas of the operation of BCCI, the performance of various

duties, including auditing duties, by PW and EW and the part allegedly played by the third parties in, and following, the demise of BCCI. Discovery, which is far from complete, has been particularly onerous. Large numbers of solicitors and paralegal staff have been employed for a long time in preparing lists of documents. In the end the parties hoped and expected that all of them would have access to all or substantially all of the disclosed documents. For example, it was expected that there would be disclosure of documents not only between the defendants and BCCI but between the defendants themselves. On the last occasion on which the issue was before the court, it was estimated that the discovery exercise would take at least until the middle of 1998 to complete. In July 1996 I gave directions in the proceedings relating to the form and timetable for discovery. Pursuant to that order, BCCI served their first list of documents on PW on 22 July 1996. PW served their first list on 30 September 1996 and their second list on 8 January 1997. Although the details are not before me on these applications, I assume that a similar timetable has been followed so far in relation to discovery between BCCI and EW.

Recently progress in the discovery exercise was thrown into disarray when Messrs Herbert Smith, the solicitors for PW, came to the conclusion that there was a risk that disclosure of certain documents by their clients during the discovery exercise could expose them and their clients to criminal sanctions as a result of possible breaches of the provisions of s 82(1) of the 1987 Act. As a result 356 files were removed from PW's two lists of documents on the ground that they might contain information falling within that section of the Act. BCCI, PW, EW and the third parties are united in wanting there to be full and open discovery of all documents relevant to the numerous issues in these proceedings. They came to the conclusion that, properly construed, the Act did not restrict their obligation to give full discovery in these proceedings but that the matter was not clear. In the result, all the parties support BCCI's and PW's applications before me to construe the relevant provisions of the Act so that they all will know what is and what is not prohibited from disclosure. In particular, they put forward constructions of the relevant statutory provisions which will have the effect of confirming that no offences will be committed if they resume giving full discovery of the documents over which, at the moment, a cloud of uncertainty remains.

The 1987 Act is in large part concerned with the regulation of banking activities in the United Kingdom. The authorisation of institutions to carry on such activities is vested in the Bank of England under the Act and provision currently is made for the Bank to supervise such institutions and activities. The parties to these proceedings made their concerns known to the Bank of England. It did not agree with their construction and came to the view that some of the disclosures which were likely to be made in the course of the discovery exercise would be prohibited by the Act. Although it is not a party to the proceedings and has no desire to interfere with the process of discovery, it is directly concerned as to the scope and effect of the statutory provisions. It therefore appeared on these applications, represented by Mr Michael Brindle QC and Mr Bankim Thanki, to assist the court and to put forward its somewhat different views as to the meaning of s 82.

THE BANK OF ENGLAND'S POWERS

The Bank of England's power to supervise both authorised and unauthorised institutions is set out in the 1987 Act. These powers are wide and are there to

assist it comply with its duties, including a duty generally to supervise authorised institutions (see s 1(1)). To facilitate the exercise of these powers ss 36 to 44 make provision for the Bank of England to obtain information relating to the activities of such institutions including the power to call for the production of documents and to enter premises to obtain such documents, if necessary without prior notice. These powers do not extend solely to obtaining documents and information from an institution it is investigating. For example, if the institution is a body corporate, it can call for such information from or in relation to holding companies, subsidiary or widely defined related companies (see s 39(6)). Further the Bank of England can make such inquiries and investigations into any person who is to be a director, controller or manager of an authorised institution (s 39(9)) and into any person who is a significant shareholder of such an institution (see s 39(10)). The Bank of England may require an institution to provide it with a report by an accountant or other person with relevant professional skill on any matter of interest to it (see s 39(1)(b)). That accountant or other person must be nominated or approved by the Bank (see s 39(2)). Powers to investigate suspected contraventions of provisions of the Act are also given to the Bank by ss 42 and 43. Section 41 of the Act is also of particular significance to these proceedings. It provides that the Bank of England may—

> 'appoint one or more competent persons to investigate and report to the Bank on—(a) the nature, conduct or state of the institution's business or any particular aspect of it; or (b) the ownership or control of the institution; and the Bank shall give written notice of any such appointment to the institution concerned.'

Once again the appointed person has wide powers to ask for or go out and obtain information for the purpose of preparing his report for onward transmission to the Bank of England. The result of all of these provisions is that the Bank of England and any person appointed or nominated to investigate and to report to it is likely to come into possession of commercial information of a confidential nature.

It is against this background that the Act provides at s 82(1) as follows:

> 'Except as provided by the subsequent provisions of this Part of this Act—(a) no person who under or for the purposes of this Act receives information relating to the business or other affairs of any person; and (b) no person who obtains any such information directly or indirectly from a person who has received it as aforesaid, shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was received as aforesaid.'

Section 82(3) provides that any person 'who discloses information in contravention of this section' shall be guilty of an offence punishable by a fine, imprisonment or both. This prohibition on disclosure is subject to certain exceptions and exclusions which will be considered later in this judgment.

The potential application of s 82(1) to the discovery in this case

The BCCI group of companies carried on their banking business in an unusual way. Because it appears to have traded, in some respects, like a single entity in a number of countries, regulation of its activities needed the co-operation of the relevant authorities in those countries. This is referred to in an affidavit sworn in these proceedings by Mr Julian Wilson, a partner in Herbert Smith. I understand

that his explanation is not disputed, at least for the purpose of these applications. The overall picture is as follows. The BCCI group comprised Holdings and two main subsidiaries, Overseas and SA. Because it was not a bank, Holdings was not subject to any regulation in any country. Overseas and SA operated in a number of countries around the world. Until 1988, the Cayman Inspector of Banks was responsible for the regulation of Overseas as a whole and the Institute Monetaire Luxembourgeoise (the IML) was responsible for the regulation of SA as a whole, as well as its Luxembourg operations. In addition, the branches of Overseas and SA and a number of other subsidiaries of the BCCI group were regulated by various local banking regulators. PW learnt in 1986 that the IML regarded the BCCI group as an entity which the IML was not by itself well-positioned to supervise. This concern led, in early 1988, to the formation of a body known as the College of Regulators (the college), of which the Bank of England was a member and alternate chairman with the IML. The other members were the Swiss Federal Bank and the Bank of Spain and, from July 1989, it included, inter alia, representatives of the Hong Kong Banking Commissioner and the Cayman Inspector of Banks. It was an informal body in that it did not have any statutory basis or powers, although its members brought to their meetings their own respective national powers. The college assumed responsibility for the regulation of the BCCI group as a whole, though individual branches and subsidiaries were still subject to local regulation. I have been told that the formation and operation of the college has been, so far, a unique exercise in banking regulation designed to cater for the atypical way in which BCCI was operated.

The Bank of England's role in relation to the BCCI group can be divided into main areas. First, it had responsibilities in relation to the UK branch operations of SA (the UK region). In June 1980, having considered SA's application to be recognised as a bank under the Banking Act 1979, the Bank of England notified SA of its refusal and instead authorised it as a licensed deposit-taker. The Bank of England thereafter was responsible for supervising the UK branches of SA, both by receiving and analysing returns made by the UK region of SA and by holding periodic meeting with, amongst others, SA's management. When the 1987 Act came into force, SA automatically became an authorised institution under it. Following the appointment of the Luxembourg branch of PW (PW (Lux)) as auditors of SA, and the involvement of the UK branch of PW (PW (UK)) in reviewing the UK branches of SA, the Bank of England held meetings with management and PW (UK). Thereafter the Bank of England commissioned PW (UK) to produce a report under s 39 relating to the UK branches of SA. PW (UK) produced a number of reports in response to these instructions and had regular correspondence and meetings with the Bank of England concerning SA's UK region.

Secondly, the Bank of England was involved in the regulation of the BCCI group as a whole by virtue of its membership of the college. PW (UK) prepared reports twice a year for submission by the BCCI group to the college and attended meetings with the college as a whole and with individual members of the college. PW (UK) also communicated with the IML and the Bank of England in their roles as members of the college.

Finally, on 4 March 1991, the Bank of England commissioned PW (UK) to produce a report on SA under s 41 of the Act (the s 41 report). On 22 June 1991 PW (UK) sent the Bank of England a draft of their report. Prior to this an investigating committee had been set up in October 1990 to investigate problem

lending within the BCCI group. This was staffed, inter alia, by personnel from various PW firms. It was set up in Abu Dhabi and had nothing directly to do with the 1987 Act. The draft s 41 report was written using (a) information obtained by PW in the course of the audits, including the work done for the purpose of the investigating committee and (b) a report dated 3 October 1990 to identify problem loans which had previously been submitted to the college and had been prepared for the audit committee of Holdings.

There were other meetings between the Bank of England and various PW defendants.

The result of this history is that PW are likely to have obtained and assembled a considerable body of information for onward transmission to the Bank of England. There are a number of categories of documents in PW's hands which contain some of this information, including reports prepared by PW, the s 41 report and correspondence and notes of meetings with the Bank of England. Furthermore, it may be that there are other documents, such as returns prepared by SA for the Bank of England, which contain information which had been obtained by or on behalf of SA for onward transmission. The parties are agreed that some of this documentation may be of great importance to the issues between them in this litigation. The s 41 report is said to be central to the counterclaim which the third parties have brought against PW. Some of the information contained in this documentation will refer in greater or lesser detail to the affairs of, inter alia, major customers of BCCI. For example, some of the documents are likely to include references to the affairs and business of the Gokal family, one of whose members has recently been sentenced to a lengthy period of imprisonment following certain improper financial transactions conducted between him and BCCI. If such documents cannot be disclosed for the purpose of civil proceedings without the consent of the customers, then it is to be anticipated that some customers will refuse consent. Furthermore, since some of the documents will touch on the affairs of large numbers of customers, obtaining consent will be impossible. In either case, discovery will be prohibited.

'Information relating to the business or other affairs of any person'

Section 82(1) stipulates that the recipient of information 'relating to the business or other affairs of any person' shall not disclose it without the permission of 'the person to whom it relates'. At first blush it would appear that if the information relates, say, to the business or other affairs of a customer of BCCI, then that customer's consent must be obtained before it can be disclosed (unless it is in the public domain, or falls within one of the express statutory gateways to be considered below). This, says the Bank of England, is the correct construction of the statutory words. Section 82 binds the Bank of England itself. If it is supplied with information relating to the business or other affairs of a supervised institution's customers, it is understandable that it should be restrained from disclosing that material to third parties save to the extent that such disclosure is expressly sanctioned by the Act. No greater freedom to disclose should be had by a person, such as an auditor, who receives the information for onward transmission to the Bank of England.

However, the parties suggest that this is too broad a construction. They say that, for the purposes of s 82, the relevant information primarily relates to the business of BCCI, or its constituent parts, and that it is the consent of BCCI which is required and not the consent of such other third parties. On a true construction of s 82, consent is required not of every person whose affairs happen to be

mentioned but only that class of persons, primarily the authorised institutions, in respect of whose business or affairs the information is directly concerned for the purposes of the Act. In fact, the parties were prepared to accept that the class of protected persons is wider than that. Since, for example, the Bank has power under s 39(6) to extend its inquiries into the affairs of holding, subsidiary and associated companies of the authorised institution, under s 39(9) to make inquiries about directors, controllers, or managers of the institution and under s 39(10) to make inquiries about significant shareholders, it is their business and other affairs which may be significant features of any investigation. When s 82(1) refers to 'any person' it must be read in the context of the words 'relating to the business or other affairs'. As I understood it, this meant that that the consent required under s 82(1) was that of any person who was an investigatee, in this broader sense, of the Bank of England. Because of the Bank's wide investigating powers, that might well extend beyond the authorised institution but, save in exceptional cases, it would fall short of including customers.

In support of this construction, the parties ran a number of arguments. They said that the statutory provision had to be construed in the light of the 1987 Act, and its predecessor, the 1979 Act, as a whole. Section 82 is an adjunct to the Bank of England's investigative powers. Any investigation will inevitably touch on the affairs of the investigated institution's customers, but what the Bank of England is concerned with is the affairs and business of the institution. The customer's affairs are incidental.

Besides arguing that allowing a potentially enormous class, including customers, to veto disclosure would produce absurd results, particularly in a case like this where members of the class have been involved in fraud on a grand scale, three major points were advanced in favour of the narrow construction of the provision.

First, it was said that these provisions of the 1987 Act were designed to implement Council Directive (EEC) 77/780 on the co-ordination of laws regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (the 1977 banking directive) and, in a pre-emptive manner, Council Directive (EEC) 89/646 (the 1989 banking directive). The Act should be construed purposively to achieve the objectives in those directives. I accept that we must construe our statutes so as to be consistent with the European legislation they are intended to implement. But I can find nothing in the broad or the narrow constructions of s 82(1) which is inconsistent with either of these directives. This does not help resolve which is the proper construction to adopt.

Secondly, it was said that this is a case where the court should adopt a purposive construction and should have regard to the intention of the draftsman of the Act. To this end, it was said that it was permissible to look at relevant extracts from Hansard as a result of the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. On this basis I was shown a passage in Hansard in which Mr Denzil Davies, the responsible minister, touched on the purpose of cll 19 and 20 of the Banking Bill which led to the 1979 Act. These are the predecessors of s 82(1) in the 1987 Act. The minister said (958 Official Series (5th series) col 1504):

> 'Clauses 19 and 20 deal with the protection of the confidentiality of information relating to institutions authorised under the Bill. It is clearly necessary to protect such commercially sensitive information.'

I do not accept that it is legitimate to refer to this passage as an aid to construction. In *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 64, [1993] AC 593 at 634 Lord Browne-Wilkinson said:

> 'In my judgment ... reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.'

Even assuming that the first of these requirements is met in this case, I do not accept that the extract from Hansard clearly discloses that it was intended that the interests and wishes of customers and the like were to be ignored. On the contrary, I accept Mr Brindle's argument that there is nothing in this extract which shows that the point of construction now in issue was being addressed by the minister at all.

Thirdly, it was said that a favourable view on this issue was expressed by Lightman J in *Melton Medes Ltd v Securities and Investments Board* [1995] 3 All ER 880, [1995] Ch 137. That was a case concerning the application of s 179 of the Financial Services Act 1986, which, for present purposes, is to the same effect as s 82(1) of the 1987 Act. In the course of his judgment, Lightman J said ([1995] 3 All ER 880 at 892, [1995] Ch 137 at 149): 'The relationship for the purposes of s 179 must be direct, and not merely indirect or incidental.'

Based on this, it was said that the affairs of BCCI's customers and the like were merely indirect or incidental to the BCCI matters being investigated by the Bank of England and were not to be taken into account for the purpose of s 82(1) any more than they would have been taken into account for the purpose of s 179 of the 1986 Act.

To understand what Lightman J was saying in the *Melton Medes* case, it is necessary to have in mind the essential facts in issue. The first plaintiff, MA, was a company. The second plaintiff, MB, was a subsidiary which was trustee of MA's employees' pension fund. MB loaned money to MA which it subsequently repaid. Beneficiaries under the fund were suing MA and MB to make good losses allegedly suffered by the fund arising out of the loan and repayment. Imro and the Securities and Investments Board (the SIB) became involved in investigating the business and affairs, including the funds, of MB. The SIB disclosed to Kidsons, the auditors for the MB funds, some of the information it had gathered during the course of its investigations. This disclosure was permissible under the 1986 Act. Kidsons indicated that had it known of the information earlier it might not have given an unqualified audit report on the funds. Subsequently, during a telephone conversation between an SIB employee and a solicitor acting on behalf of the beneficiaries in their litigation, the former suggested that the beneficiaries might find out from the auditors that the latter were no longer happy that the audit report relating to the MB funds was unqualified. This and similar information to the same effect from the SIB eventually was said to have steeled the beneficiaries against settling their litigation. MA and MB then sued the SIB for having wrongfully disclosed information to the beneficiaries' solicitor. It was an application to strike out the statement of claim in the latter case which came before Lightman J.

The strike out was successful on a number of grounds. In the course of his judgment, Lightman J said that the statements made by the SIB to the

beneficiaries or their solicitor did not amount to disclosure at all. He then went on to make the statement referred to above. However, the full quotation is as follows ([1995] 3 All ER 880 at 892, [1995] Ch 137 at 149):

> 'The claim in respect of this alleged disclosure must accordingly be struck out. I should add that any claim by [MA] in respect of the disclosure is baseless. The restricted information on any basis, as it seems to me, relates only to the business and affairs of [MB], and not of [MA]. The relationship for the purpose of s 179 must be direct, and not merely indirect or incidental. The relationship (if any) of the restricted information in this case to [MA] is at the highest indirect and incidental.'

Beside the fact that the passage relied on by the parties is obiter, there is nothing in it which supports the submission which they seek to found on it. The only information which it was argued had been disclosed by the SIB was that the auditors of the *MB funds* might no longer be prepared to stand by their report *relating to those funds*. This might say something about MB. It said nothing at all about the business or affairs of MA. Therefore MA could not rely on the SIB's disclosures, if there were any, to give it a cause of action under s 179. MA's affairs and business were, at the most, indirectly concerned in the way in which the employee's pension fund was administered by MB. That, as it seems to me, is what Lightman J had in mind when he referred to an indirect or incidental relationship. Furthermore, I accept Mr Brindle's argument that if the *Melton Medes* case points in any direction it is against the narrow construction advanced by the parties here. If the only persons who have a veto on disclosure are those who are the subject of inquiries, then Lightman J would not have needed to consider the question whether the relationship was indirect or incidental. From the report it does not appear that any investigations were directed at MA. If the parties' construction is right, Lightman J would have been expected strike out the pleading on the simple ground that MA was not a target of the investigation. He would not have needed to consider issues of proximity.

In my view, the meaning of this part of s 82(1) is clear. No recourse needs to be made to external material. The words 'any person' mean what they say unless it is possible to discern a clear intention to limit them in some way. Any limitation must be capable of satisfactory definition and be justified by the terms of the 1987 Act. I can discern no such intention. Had the draftsman intended to limit the category of veto holders to those who had been the subject of direct investigation and other limited classes of persons, he would and should have said so. Furthermore, I am not persuaded that the natural broad meaning of those words is inconsistent with the presumed intention of the legislature. There is much to be said for a provision in the 1987 Act which protects the interest of anyone whose business or affairs are disclosed to the Bank of England in the course of exercising its regulatory powers. If, say, a misbehaving institution which is the subject of investigation has the power to veto onward disclosure by the Bank of England of commercial information relating to it which the Bank has received, subject to specific statutory exceptions, I can see no reason why an innocent customer whose affairs are revealed to the Bank during the course of such investigation should have less protection from disclosure. If he is to be protected against non-consensual disclosure by the Bank, he is just as entitled to be protected against non-consensual disclosure by someone like an auditor or accountant receiving information for onward transmission to the Bank. The need for such protection is no less real because there may be many other persons,

eg customers, in a similar position. The fact that the statutory exceptions may have been drafted more narrowly than some might like so that the restraint on disclosure causes difficulties to the receiver of the information is of little weight. Section 82(1) is concerned to protect the interests of the person whose affairs are at risk of being disclosed, not the person who has received information about them.

It follows that, absent some other way out of the problem, if any party to this litigation has received under or for the purposes of the 1987 Act information relating to the business or other affairs of any person, including a customer of BCCI, he commits a criminal offence if he discloses it to a third party, without that person's consent.

'Under or for the purposes of' the 1987 Act

There was no dispute and is no doubt that if persons in the position of PW gather information concerning the business or other affairs of their client and its customers for the purpose of carrying out, say, an audit, disclosure would not normally constitute a breach of s 82(1). Depending on the circumstances, such disclosure might support a breach of confidence action, but since the information would not have been received by PW under or for the purposes of the 1987 Act, it is outside the scope of s 82. However, the parties and the Bank of England did not have identical views as to what the position would be if the information was collected or received for dual purposes, one being under or for the purposes of the 1987 Act and the other not. This raises a number of issues of general application and one issue of particular significance to the facts of this litigation. The burden of arguing these points on behalf of the parties was shouldered mainly by Mr Goldsmith QC, counsel for PW.

If a first person gathers commercial information about a third party and passes it on to another believing it is for a non-Banking Act purpose, when in fact the recipient intends to and does in fact use it for such purposes, is the first person prevented by s 82(1) from disclosing it? Both the parties and the Bank of England agreed that he is not. I agree with them, but because of its impact on other issues, the reason for coming to that conclusion should be explained.

Section 82 creates an offence of strict liability. When it refers to a 'person who ... for the purposes of this Act receives information', I think it must be contemplating that it is the recipient's intention or understanding of the purposes of receipt which is relevant. Were it otherwise, an employee or agent of the recipient who performs the task of information gathering would be subject to criminal sanctions for subsequent disclosure even if he had been told, inaccurately, that the information was being gathered solely for a non-Banking Act purpose, such as auditing. Therefore when the Act looks to the information being received for defined purposes, it is the purpose of the recipient which is relevant, not the purpose of some other person perhaps many links down the chain of transmission. Similar considerations apply when the Act refers to a 'person who under ... this Act receives information'. There is nothing in the Act which unequivocally points to a broad construction of these words so as to encompass any information which happens to be used for Banking Act purposes. Before a recipient can be liable to criminal sanction he must be aware that his receipt of the information exposes him to it. This means that he must be aware that the information is received 'under or for the purposes of the Act'.

It is the recipient who will determine for what purpose he has received the information, even though others to whom he forwards it may require it or decide

to use it subsequently for other purposes. If this is so, then the purpose of receipt must be determined at the time of receipt. If the recipient subsequently learns that the information is to be or has been used for some other purpose, e g under the Banking Act, it does not alter the fact that it was received for a different purpose.

From this it follows that it will not be a contravention of s 82(1) for a person to disclose any information which at the time of receipt he anticipated was to be considered solely in connection with a non-Banking Act purpose. Thus, s 82(1) does not prevent PW from disclosing information which it received at a time when it anticipated that the information would be considered or used solely for the purpose of auditing. The same would apply to information which the recipient anticipated was to be considered solely in connection with the work of the investigating committee.

(a) Dual purpose (simultaneous)

The second situation which needs to be considered is where, at the time of receipt, the recipient understands that it is for dual purposes, one under the Banking Act and the other not. The parties and the Bank of England appeared to agree that s 82 did not bite. Mr Brindle drew a distinction between sequential receipts of the same information and a single receipt for what he called 'genuinely a dual purpose'. Because all counsel who appeared on these applications agreed that in these circumstances s 82(1) would not be breached, no one advanced any counter-arguments. Yet it seems to me that there is a significant counter-argument. Where A received commercial information about B for the purpose of the 1987 Act, s 82(1) protects B from having that information disclosed to third parties. The benefit to B secured by this is not only that the confidentiality in his commercial information is protected, but also he is protected to some extent from having third parties told that the information was thought to be relevant to a Banking Act investigation. As I have said already, s 82(1) is there to protect the owner of the commercial information. It can be said that in some cases this protection will be valueless if the recipient is released from restraint as long as he can think of some other reason for wanting the information. No doubt, as Mr Brindle said, the other reason must be genuine. But as a practical matter it is likely to be difficult to disprove an auditor who asserts that he had some second but genuine purpose in mind when he received the information. Particularly in a case like this where the Bank of England requests the auditor to carry out investigations on its behalf, it is likely that the auditor will believe that much of the information he has been asked to gather will prove of interest to his auditing duties. It is possible to envisage cases where the Bank of England's request to the auditor makes him search out commercial information he might not otherwise have thought of collecting had he simply been carrying out an audit. The reason for *seeking* the information would therefore arise solely out of the Bank of England's requests even though it would be gathered and *received* by the auditor in anticipation that it would be used both for Banking Act and auditing purposes. Yet if the parties and the Bank of England are correct on this point, s 82 does not prohibit disclosure.

As against this it can be said that since the recipient could not be subject to criminal sanctions if the information was received for non-Banking Act purposes, it would be particularly harsh if the position was different simply because there was a Banking Act purpose as well. Furthermore, the more restrictive construction of this part of s 82(1) could lead to strange results. Contemplate a

case where A gathers commercial information relating to B for a non-Banking Act purpose and forwards it to C, who receives and uses it solely for non-Banking Act purposes. At the same time A receives the information for Banking Act purposes and forwards it to the Bank of England for use by it. Section 82(1) could not be used to restrain C from disclosing this information, so why should A be in a worse position? As Mr Malek QC, who appeared on behalf of BCCI, put it, s 82 creates a category of information which is restricted from disclosure. This category is identified by reference, not to its subject matter, but to the circumstances in which the information was received or obtained. He said that it was implicit that the information was not also received or obtained in other circumstances. Information received or obtained in other circumstances is not restricted information under the section and there is no bar to its disclosure. In the premises, information received or obtained both under the Act and in other circumstances is not restricted information under the section.

This is not an easy point, but bearing in mind that s 82(1) imposes criminal sanctions and the considerations in the last preceding paragraph, I have come to the conclusion that the parties and the Bank of England are correct on this issue. I agree with Mr Malek's submission that there appears to be no policy or other reason why the section should be given a wider meaning. It follows that where, at the time of receipt, the recipient anticipates that the information would be relevant to and used for non-Banking Act purposes and he receives it with that use in mind, it will not contravene of s 82(1) to disclose that information even if, at the same time, the recipient also anticipates that it is relevant to and to be used for Banking Act purposes.

Before turning to the issue of sequential receipt of commercial information, it is convenient to deal with the question of the college.

(b) Receipt of information for onward transmission to the college

PW received information which was requested by and transmitted to the college. The parties argue that this does not fall within s 82(1). The Bank of England disagrees. It says that the college was set up, inter alia, to help the Bank of England carry out its duties under the 1987 Act and that all information requested by and obtained on behalf of the college was, and would have been realised by PW as being, for the purposes of that Act.

This factual issue must be determined in accordance with the construction of s 82(1) set out above. Even if the Bank of England is correct that one of the purposes of the college was to assist it to carry out its Banking Act duties, what is important is the frame of mind of PW at the time it received the information. I understood Mr Brindle to accept that if, say, the IML had asked PW directly for information for the purpose of helping it carry out its regulatory duties in Luxembourg, this could not fall within s 82(1). Even though the same information might be of interest to the Bank of England, it would be received by PW for purposes outside the Act. The same must follow in respect of requests made by one or more of the other regulators represented in the college. On the other hand, if the Bank of England issued a request to PW which was, and which PW understood was, *solely* for use by it in relation to the 1987 Act, then s 82(1) would apply. However, where PW believed that information was sought by the college for more than one purpose and where at least one of those purposes was thought to be outside the scope of the 1987 Act, eg for use by regulators in Switzerland, Luxembourg, Hong Kong or the Cayman Islands, then there would

be an understanding by PW of a genuine dual purpose and information received by it in those circumstances would not fall within the s 82(1) prohibition.

As Bingham LJ's report, *Inquiry into the Supervision of the Bank of Credit of Commerce International* (HC Paper (1992–93) No 198), says:

> '[Meetings of the College] were not intended to be a long-term substitute for consolidated supervision nor a long-term endorsement of the BCCI group's existing structure (which needed to be changed), nor were they intended to water down each supervisor's local responsibilities. Instead, they were intended to be an organised forum for the exchange of information between national supervisors and an opportunity to meet BCCI management and the auditors in order to gather information and make recommendations.'

It is likely that PW had reason to believe and did believe that all requests received from the college were for the purposes of all members of the college. If this was PW's understanding, then any information it received in relation to discussions with or inquiries from the college were for a dual purpose, including purposes outside the 1987 Act, and s 82(1) does not apply. By the same reasoning, information which at the time of receipt PW anticipated would be relevant to and considered in connection with the work of the investigating committee is not covered by s 82(1) even if PW also anticipated that it was for use under the 1987 Act.

(c) Dual purpose (sequential)

The parties also argued that it would not be a contravention of the section for PW to disclose any relevant information which was received by them under or for the purposes of the 1987 Act, provided that on another separate occasion (whether previously or subsequently) the same information was received by them otherwise than under or for the purposes of the Act. The heart of this issue turns on what PW's position is if they receive information for a Banking Act purpose and subsequently receives the same information for a non-Banking Act purpose. When the sequence is the other way round, no doubt PW will receive the information on the second occasion thinking it is relevant to both purposes, so that for reasons already given it will fall outside the section. Mr Brindle challenged the parties' argument. He said that receipt for purpose X cannot be reinterpreted in the light of later events as a receipt for purpose Y. He said that each receipt of information must be treated on its merits.

This is a short point. I find Mr Brindle's argument compelling. The section deals with the position of a person who 'under or for the purposes of the Act receives information'. It is not concerned with the use to which the information may subsequently be put. It is the purpose at the time of receipt which is relevant. If the same information is received again subsequently for a non-Banking Act purpose, then the recipient can disclose that information and, more importantly, the documents in which it is recorded, without fear of contravening the section. But the subsequent receipt does not alter the purpose for which it was originally received. As Mr Malek argued in relation to the simultaneous dual purpose point, what the Act is concerned with is not the subject matter of the information but to the circumstances in which it was received.

'Disclose'

The section prohibits certain types of disclosure. The summonses before me raise the question whether for this purpose the act of disclosure is constituted by the mere transmission of information from the recipient to a third party, or whether it is a necessary prerequisite that such information should not already be known to the third party. Mr Malek argued that the latter is the correct view. He emphasised the fact that the Act refers to 'disclose' rather than a less precise expression such as 'pass on' or 'transmit'. He said that to disclose information normally entails communicating information to someone who does not know it already. It means to bring to light or reveal something of which the third party was previously unaware. In support of this, he drew my attention to *A-G v Associated Newspapers Ltd* [1994] 1 All ER 556 at 561, [1994] 2 AC 238 at 255, a case concerning contempt of court, in which Lord Lowry said:

> 'The cardinal rule, as stated in the textbooks on interpretation, for example in *Maxwell on the Interpretation of Statutes* ... is that words in a statute prima facie bear their plain and ordinary meaning. If that rule is applied without modification, then the appellants disclosed the relevant particulars. There is no conflict or contrast between publication and disclosure. The latter activity has many manifestations and publication is one of them. To disclose is to expose to view, make known or reveal and in its ordinary meaning the word aptly describes *both* the revelation by jurors of their deliberations *and* further disclosure by publication in a newspaper of the same deliberations, provided always—and this will raise a question of fact—that the publication amounts to *disclosure* and is not a mere republication of already known facts.' (Lord Lowry's emphasis.)

Mr Brindle agreed with Mr Malek on this issue and so do I. However, it would appear to be of little practical value to the parties to this litigation. Even if PW were free to transmit otherwise embargoed information (and therefore documents containing that information) to others who already know it, it would be unlikely to be of much use here. The disclosure of documents containing such information in the discovery process in this litigation means that almost inevitably the material will be made available to parties, lawyers and others who were not aware of it before. It will also mean, eventually, disclosure to the judge and to those present in court at the trial. It is difficult to see how this problem could be circumvented. Permitting disclosure of discovery documents but on condition that they are only shown to people and parties who already knew the information contained within them would be unworkable. How does one find out if X already knew of the commercial information in a document without showing it to him? And how could this work if those excluded from seeing the documents include all the lawyers? In this case the problems are compounded by the fact that there are so many parties. There are about 60 individual defendants and some eight third parties. It is difficult to see how it would be possible to include contaminated documents in the discovery of some of the plaintiffs while preventing that documentation from being seen by other plaintiffs currently being represented by the same lawyers. Absent a reliable mechanism which would ensure that disclosure of documents went no further than the class of people who already knew the relevant information contained in them, the party who has the documents should not be compelled to give discovery of them.

Impact on discovery in civil proceedings

This leads into another argument advanced by the parties. They suggest that the compulsory disclosure of documents pursuant to an order of the court, for example as part of the discovery process, is outside the scope of s 82. In particular, they suggest (a) that the court retains a discretion whether or not to order production of documents, notwithstanding s 82 and (b) that disclosure pursuant to any such order cannot be prevented by the section. In my view, it is not sensible to split this issue into these two parts. If disclosure pursuant to an order for discovery in civil proceedings would constitute a crime, the court's inherent power to order discovery must give way to the intention of the legislature. The question is, therefore, whether the prohibition on disclosure in s 82(1) encompasses a prohibition on disclosure by way of discovery in civil proceedings.

Mr Malek argued that the Act contained no express fetter on the court's power to order discovery in civil proceedings and that, had that been intended, clear words would have been used by the draftsman. He drew my attention to s 10 of the Contempt of Court Act 1981 where such clear wording is used. He said that there was no need for any such fetter. The court was well able to balance the interests of the persons whose commercial information was at risk of disclosure and the needs of the parties to civil litigation. Furthermore, he suggested that the current climate is for more, not less, disclosure. He also drew an analogy with the common law where private obligations of confidence were overridden by the obligation to give discovery.

Absent relevant authority, I would be inclined against Mr Malek's argument. The analogy with the common law is a false one. The court will order discovery of confidential material because the private rights and interests of the parties cannot be allowed to frustrate the public interest perceived to exist in full exchange of documents relevant to court proceedings. But even that interest is subordinate to the public policy considerations which justify the embargo on disclosure of privileged communications. Where the legislature has determined that it is in the public interest that certain types of information should not be disclosed on pain of punishment save in defined and limited circumstances, the court should be wary of adding to the list of exceptions. Here, the primary purpose of the prohibition in s 82 is to protect persons whose commercial information comes into the hands of the Bank of England. This is subject to certain defined exceptions, contained in ss 83 to 85. Those include, for example, the right to disclose information for the purpose of any criminal proceedings, whether under the Act or otherwise (s 85(1)(a)), or proceedings under ss 7 or 8 of the Company Directors Disqualification Act 1986 (s 85(1)(e)). It is therefore clear that the question of the extent to which the embargoed material could be used in legal proceedings had been the subject of consideration by the draftsman. If discovery in civil proceedings was to be exempt from the effect of s 82(1), one would have expected the draftsman to have included an express provision to that effect.

In support of his argument Mr Malek relied on *Arbuthnott v Fagan* [1996] LRLR 143. That was a case brought by members of Lloyd's who had participated in the affairs of syndicates run by the first defendant. The other defendants were members' agents. Certain evidence had been given before a loss review committee and was recorded in transcripts. The plaintiffs sought discovery of the transcripts. The defendants resisted discovery, inter alia, on the ground that such disclosure of information was prohibited by the provisions of the Information

and Confidentiality Byelaw 1993 made under the Lloyd's Act 1982, a private Act of Parliament. The relevant byelaws were, so far as material, in essentially the same terms as s 82(1) of the 1987 Act. Staughton LJ said (at 152–153):

> 'It is not enough to exempt a document from discovery that it was confidential: see the speech of Lord Wilberforce in *Science Research Council v. Nasse* ([1979] 3 All ER 673 at 679–680, [1980] AC 1028 at 1065). Confidentiality is a relevant consideration when determining whether disclosure is necessary, under O. 24, r. 13. But for a document to be exempt one of the existing heads of privilege or immunity must apply, or there must be legislation having the same result. Mr. Barnes, for Feltrim, gave a number of examples of statutes which make such provision. One that is perhaps the most obvious is the Legal Aid Act, 1988, s. 38. I have some doubt as to whether par. 3 of the Information Byelaw 1993 is at all concerned with discovery in a civil action. It does not say that information or documents shall be exempt from disclosure or discovery. One would not normally expect to find such an exemption, which may affect people who are not members of Lloyd's, in a private Act of Parliament. Suppose that there were divorce proceedings between a member of Lloyd's and his wife. Would he be exempt from disclosing information which he had obtained pursuant to any exercise of the powers under the Lloyd's Acts? Indeed, the argument for the members' agents requires that he should not only be exempt but also prohibited from disclosing such information.'

This somewhat tentative conclusion appears to be based in large part on the fact that the 1993 byelaw was a private Act of Parliament. That consideration does not apply here. Furthermore, the attention of the Court of Appeal was not drawn to the decision of the House of Lords in *Rowell v Pratt* [1937] 3 All ER 660, [1938] AC 101 in which the question arose whether the obligation to give discovery in unrelated civil proceedings circumvented the following provision of the Agricultural Marketing Act 1931:

> '**17.** *Restrictions on disclosing information obtained under Act* ... (2) Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee ... shall be liable on conviction on indictment to imprisonment ... or a fine ... or to both ... or on summary conviction to imprisonment ... or to a fine ... or to both ... Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purposes of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder.'

The House of Lords decided that this provision prohibited disclosure in the course of discovery save to the extent expressly permitted by the section. This was explained by Lord Wright ([1937] 3 All ER 660 at 662, [1938] AC 101 at 105–106):

> '[The statutory] prohibition is quite unqualified. It is not necessary to determine whether the first paragraph, if it stood alone, would require a judge to refuse to order any person by whom information of the character

described has been obtained to disclose that information in court, because, in my opinion, the matter is put beyond doubt by the saving paragraph which follows. That paragraph falls into two parts, an exception, and then a limitation upon that exception. The exception relates to disclosures so far as required for the purposes of legal proceedings. If the paragraph stopped there, that exception would have covered the present case. But the super-imposed limitation is fatal to that view. The exception is limited by the super-imposed limitation to legal proceedings under or in virtue of the Act. It is only within these narrow limits that the information may be disclosed. The present case seems to me to fall outside the precisely expressed limits of the proviso, and the proviso removes any doubt that there might be as to whether the main prohibition applies to disclosure for the purposes of legal proceedings. A judge cannot compel a man to commit a criminal offence.'

This reasoning applies just as well to ss 82 to 85 of the 1987 Act. The court has no power to order the disclosure of documents containing information covered by s 82(1).

Information available to the public

BCCI's summonses seek a declaration as to whether or not the s 41 report is or has already been made available to the public, within the meaning of s 82(2) of the 1987 Act. The latter, in so far as material, provides:

'This section does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources ...'

The purpose behind this is easy to discern. Section 82(1) is designed to maintain the confidentiality of information relating to the business or other affairs of investigatees and third parties. Section 82(2) makes it clear that where that information is no longer secret, the prohibition in s 82(1) no longer serves a purpose and is lifted. A provision in essentially identical terms is also to be found in the 1986 Act and was considered by Lightman J in the *Melton Medes* case. In that case the issue was whether the information in a letter read out in open court was available to the public and therefore outside the relevant prohibition on disclosure. Lightman J noted that not only was the letter read out in public but that a transcript of the relevant part of the court proceedings was readily available to any member of the public. He said ([1995] 3 All ER 880 at 893, [1995] Ch 137 at 150):

'The words "other sources" clearly means "sources other than a primary or secondary recipient". Gateway (r) is directed at excluding from the ambit of s 179 what is or has been in the public domain, and for this purpose it seems to me sufficient that the information was disclosed in open court and that any member of the public present was free to make use of it. This accords with the apparent purpose of the provision, common sense and the decision, albeit in the distinct field of the law of patents, of the Divisional Court in *R v Patent Appeals Tribunal, ex p Løvens Kemiske Fabriks Handelsaktieselskab* [1968] 3 All ER 536 at 541–542, [1968] 1 WLR 1727 at 1734.'

Ex p Løvens is one in a long line of authority concerned with the issue of 'publication' in patent law. A patent is invalid in so far as it covers an invention which was previously published. There is a marked difference between the

patent law on the issue of publication and the law of confidence in relation to public domain. Under the former, information communicated to a single person free in law and equity to disclose it is treated as published. This is so no matter how unlikely it is that the public at large or any significant part of it will learn of the information. A description of a piece of equipment written in a little known foreign language and located on the shelves of an obscure library where, in practice, no one will look for or find it is treated as published for this purpose. There are well-established public policy reasons, based on the unyielding principle against allowing the re-patenting of old inventions, for this rigid approach. On a number of occasions the courts have noted that the law can be particularly harsh on a patentee who loses his patent on the basis of the application of this principle (see eg *Humpherson v Syer* (1887) 4 RPC 407). It has been described as somewhat artificial (see *General Tire and Rubber Co Ltd v Firestone Tyre and Rubber Co Ltd* [1972] RPC 457 at 482). There are cases which suggest that the concept of public domain in the law of confidence is somewhat less rigid and does not follow the patent law on publication. Information which is relatively secret may still be protected from unlicensed dissemination (see eg *Franchi v Franchi* [1967] RPC 149 per Cross J). Whether 'available to the public' in s 82(2) of the 1987 Act means the same thing as publication in patent law or the somewhat more practical concept of public domain in the law of confidence is not a matter which I have to decide in this case. There is nothing in the *Melton Medes* case to suggest that the distinction between these two alternatives was put before Lightman J. In any event, it is clear from the facts of that case that there had been sufficient dissemination to meet either test. I do not read Lightman J's judgment as laying down a general rule that publication in the patent sense will be sufficient to come within gateway (r) in the 1986 Act or s 82(2) in the 1987 Act. That is a question which is better reserved to a case in which its resolution is crucial.

In this case the parties have put before me evidence which deals with the dissemination of the information contained in the s 41 report. This evidence was contained in affidavits of Mr Sleigh, a partner in Messrs Lovell White Durrant instructed on behalf of BCCI, and Mr Wilson. Reference was also made to the contents of Lord Bingham's report. The material before me is to the following effect.

(1) In the United States of America, evidence was adduced at hearings before the US Senate Sub-committee on Terrorism, Narcotics and International Operations and the Committee on Foreign Relations chaired by Senator John Kerry. Mr Wilson says, on information and belief, that transcripts and oral testimony at these hearings and documents presented at such hearings were published in six bound volumes. They include a version of the s 41 report in which the customers' names have been redacted. He says that those who are familiar with BCCI, including the parties to this litigation, will be able to discern from the information left in the reduced report who are the customers referred to. Apparently, under relevant US law, the records of the evidence put before the Kerry committee and the report subsequently produced are in the public domain and freely available to be copied.

(2) The draft s 41 report was exhibited to an affidavit sworn in support of the Bank of England's application to wind up SA. Registrar Scott ordered that the affidavit might not be inspected on the court file without leave.

(3) Prior to the hearing of the Bank of England's latter application, the Bank provided the liquidators of BCCI with a copy of the draft report. A copy of the

draft report was also provided by the Bank to the majority shareholders of Holdings and by Messrs Allen & Overy to Mr Zafar Iqbal, the chief executive officer of BCCI.

(4) The English liquidators of SA brought proceedings against Bashir Ahmed Siddiqui, a former employee of SA, in the Queen's Bench Division of the High Court for recovery of a loan. In those proceedings, Mr Siddiqui swore an affidavit to which he exhibited the draft s 41 report. No information has been provided as to how he got hold of a copy of it. Although the affidavit and exhibit were put before Master Murray, Bell J and the Court of Appeal, there is no evidence that it was read from or referred to before any of them.

(5) The solicitors for Mr Siddiqui were Messrs Hallewell Bunyard. That firm represents many former employees of SA. Former employees have formed a campaign committee to co-ordinate the responses of employees to claims brought against them by the liquidators of SA. Mr Sleigh expresses the view, which is not challenged by the Bank of England, that it is highly likely that copies of the draft s 41 report have been distributed widely among former employees of SA.

(6) The English liquidators of SA also brought proceedings against Habib Rahman Malek and Shahid Jamshed Malek in the Chancery Division of the High Court for possession and money judgment under a legal charge dealing with the liabilities of Fitt Ltd, a retail customer of SA. Neither defendant was an employee. Mr Malek swore an affidavit to which was exhibited a copy of the draft s 41 report. No information has been provided as to how he got hold of that copy. Although the affidavit and exhibit were put before Deputy Master Wall, a High Court judge and the Court of Appeal, there is no evidence that it was read from or referred to before any of them.

(7) The solicitors for the Maleks were Hallewell Banyard.

(8) According to Lord Bingham's report, a copy of the draft s 41 report found its way into the hands of the New York district attorney. There is no evidence of how this happened.

In the light of this material, I have come to the following conclusions.

(1) The evidence suggests that the draft s 41 report has been widely disseminated to many people (see in particular paras (4), (5), (6), (7) and (8) above). As a result of that dissemination, the document and the information it contains is available to the public within the meaning of s 82(2) of the 1987 Act.

(2) The reduced version of the report put before the US Senate sub-committee is also available to the public (see para (1) above). However, the fact that the parties to this litigation may be able to identify the customers whose identity had been protected by redaction in the United States does not mean that their identity and, in particular, that identified pieces of commercial information relate to particular customers is knowledge which is available to the public. It may be that such information is in the public domain, for example by putting the draft report alongside the reduced version. But absent that, this finding only entitles the parties to give discovery of the reduced version or, more accurately, documents which give no more relevant information than the reduced version.

In coming to the above decision I have not taken account of the supply of a copy of the draft report by the Bank of England to the liquidators and the majority shareholders. One would assume that any such supply by the Bank was on express terms as to confidentiality. There is nothing in the evidence to suggest otherwise. In these circumstances the parties have failed to show that the draft

report was made available to the public within the meaning of s 82(2) by this route.

Gateways

Finally, the parties relied on certain express exceptions or gateways which are contained in s 85 of the 1987 Act. By the time of their closing speeches, they only relied on s 85(1)(d) and (f), which provides:

> 'Section 82 above does not preclude the disclosure of information ... (d) in connection with any other proceedings arising out of this Act ... (f) in connection with any proceedings in respect of any authorised institution or former authorised institution under the Bankruptcy (Scotland) Act 1985 or Parts I to VII or IX to XI of the Insolvency Act 1986 which the Bank has instituted or in which it has a right to be heard ...'

The parties submitted that s 85(1)(d) should be given a wide scope. It is not limited to proceedings arising 'under' the Act but extends to proceedings arising 'out of' the Act. These are such proceedings. In relation to s 85(1)(f), they submitted that SA was an authorised institution under the 1987 Act. It was wound up pursuant to the petition of the Bank of England. It is then said that the present litigation is 'connected with' the winding-up proceedings.

In my view, the s 85(1)(d) argument is without merit. The claims brought by BCCI against PW and EW are for negligence. They cannot be said to arise out of the Act. They arise out of the duty of care owed by PW and EW to their clients. The third party claim also does not arise out of the Act. As far as the third party counterclaim is concerned, this is based on a claim that PW wrongfully put itself into a conflict of interest position by agreeing to supply information for and co-operating in the production of the s 41 report. Once again, in no normal sense can this be said to be a claim arising out of the 1987 Act. It is a claim arising out of certain duties allegedly owed by PW to the third parties.

The s 85(2)(f) argument is based on a misreading of the subsection. It provides that s 82 does not apply to the disclosure of information 'in connection with ... proceedings ... under the Insolvency Act'. In those proceedings disclosure is permissible. However, the plaintiffs have construed the section as if it said 'in connection with proceedings which are connected with proceedings under the Insolvency Act'. That is not what s 85(1)(f) says or means.

As was agreed during the course of submissions, the detailed directions which may need to be given as to discovery and evidence in these proceedings will be determined after the parties have had an opportunity to consider this judgment.

Order accordingly.

Celia Fox Barrister.

R v Clark and another

COURT OF APPEAL, CRIMINAL DIVISION

LORD BINGHAM OF CORNHILL CJ, SACHS AND TOULSON JJ

5 DECEMBER 1996

Drugs – Drug trafficking – Confiscation order – Proceeds of drug trafficking – Assumptions to be made – Assumption that defendant has benefited from drug trafficking – Circumstances in which court can make assumptions – Imprisonment in default – Drug Trafficking Offences Act 1986, s 2(3).

The defendants pleaded guilty in the Crown Court to conspiracy to produce a class B controlled drug, contrary to s 1(1) of the Criminal Law Act 1977. Following an inquiry under the Drug Trafficking Offences Act 1986, the first defendant was sentenced to seven years' imprisonment and a confiscation order for £83,189·25 with two years' imprisonment in default was made. The second defendant was sentenced to 12 years' imprisonment and a confiscation order for £3,139,599 with ten years' imprisonment in default was made. The periods to be served in default of payment were the maximum in each case. The defendants applied for leave to appeal against sentence, contending, inter alia, that the judge had misdirected himself as to the appropriate test to be applied, or considerations to be taken into account, in determining whether to apply the statutory assumptions under s 2(3) of the 1986 Act that the defendants had benefited from drug trafficking, and that he had erred in imposing the maximum terms of imprisonment in default of payment.

Held – (1) When pursuing an inquiry under the 1986 Act to determine whether a defendant had benefited from drug trafficking, the court had to determine whether, in all the circumstances, it would be reasonable and not unjust to apply the statutory assumptions contained in s 2(3) of that Act. For the purposes of s 2, the words 'held by him since his conviction' applied to any property or funds held by the defendant on the date of his conviction, irrespective of the date on which he had acquired them. However, the court should not treat the identification of the property or expenditure to which the assumption could be applied, as itself a ground for exercising the discretion. In the instant cases, although the judge had erred so doing, it was clear that, if he had exercised his discretion in the correct manner, he would have been bound to reach the conclusion that the statutory assumptions should be made. Since there were no other grounds on which the judge's decision to apply the assumptions could be attacked, it followed that the court would not grant leave to appeal against the confiscation orders (see p 808 *b c j* to p 809 *d j* to p 810 *b*, post); *R v Dickens* [1990] 2 All ER 626 and *R v Chrastny (No 2)* [1992] 1 All ER 193 applied; dictum of Staughton LJ in *R v Redbourne* [1993] 2 All ER 753 at 758 considered.

(2) When imposing a period of imprisonment in default of payment of the sum payable under a confiscation order, the court should consider what period of imprisonment not exceeding the statutory maximum was necessary to coerce the defendant into realising and paying that sum. Further, in making that decision, the court was entitled to take account of the fact that the larger the sum to be paid, the greater the incentive for the defendant to serve an additional term of

imprisonment to avoid payment, and to rely on its assessment of the defendant gained in the course of proceedings. In the circumstances, the terms of imprisonment imposed in default were not longer that was necessary to ensure compliance with the confiscation orders. It followed that the court would not grant leave to appeal against the terms imposed (see p 812 *g* to p 813 *c*, post); *R v Osei* (1988) 10 Cr App R (S) 289 applied.

Notes

For confiscation orders under the Drug Trafficking Offences Act 1986, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1305–1308, and for cases on the subject, see 15(2) *Digest* (2nd reissue) 386–388, *21834–21838.2*.

For the Criminal Law Act 1977, s 1, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 669.

As from 3 February 1995 s 2(3) of the Drug Trafficking Offences Act 1986 was replaced by s 4(3) of the Drug Trafficking Act 1994. For s 4 of the 1994 Act, see ibid 1500.

Cases referred to in judgment

R v Chapman (1991) Times, 18 November, CA.
R v Chrastny (No 2) [1992] 1 All ER 193, [1991] 1 WLR 1385, CA.
R v Dickens [1990] 2 All ER 626, [1990] 2 QB 102, [1990] 2 WLR 1384, CA.
R v Khan (26 February 1996, unreported), CA.
R v Newton (1982) 77 Cr App R 13, CA.
R v Osei (1988) 10 Cr App R (S) 289, CA.
R v Popple (1992) 14 Cr App R (S) 60, CA.
R v Redbourne [1993] 2 All ER 753, [1992] 1 WLR 1182, CA.
R v Rose [1993] 2 All ER 761, [1993] 1 WLR 844, CA.
R v Shaw (1986) 8 Cr App R (S) 16, CA.
R v Szrajber (1994) 15 Cr App R (S) 821, CA.

Case also cited or referred to in skeleton arguments

R v Taylor [1996] 2 Cr App R 64, CA.

Applications for leave to appeal against sentence

Paul John Clark and John Preston Bentham applied for leave to appeal against the sentences imposed on them on 18 July 1995 by Judge Griffiths in the Crown Court at Maidstone following their pleas of guilty to charges of conspiracy to produce a class B controlled drug, contrary to s 1(1) of the Criminal Law Act. Clark was sentenced to seven years' imprisonment and a confiscation order made under the Drug Trafficking Offences Act 1986 in the sum of £83,189·25, with two years' consecutive imprisonment in default; Bentham was sentenced to 12 years' imprisonment, a confiscation order made under the 1986 Act in the sum of £3,139,599, with ten years' consecutive imprisonment in default. The facts are set out in the judgment of the court.

James Turner (instructed by *Berry & Berry*, Tonbridge) for Clark.
Alun Jones QC and *Rudi Fortson* (instructed by *Berry & Berry*, Tonbridge) for Bentham.
James Curtis QC (instructed by the *Crown Prosecution Service*) for the Crown.

LORD BINGHAM OF CORNHILL CJ. On 4 January 1995, in the Crown Court at Maidstone, the applicant John Preston Bentham pleaded guilty on re-arraignment to conspiracy to produce a controlled drug of class B, namely amphetamine, contrary to s 1(1) of the Criminal Law Act 1977. Sentence was adjourned pending a *Newton* hearing (see *R v Newton* (1982) 77 Cr App R 13) into the basis of the plea, an inquiry under the Drug Trafficking Offences Act 1986 and the trial of co-defendants. On 17 January 1995 the applicant Paul John Clark pleaded guilty on re-arraignment to the same count. In April and May there was a *Newton* hearing which extended over more than three weeks and an inquiry under the 1986 Act, at the end of which the case was adjourned with rulings having been given on various issues.

The trial judge, Judge Griffiths, delivered judgment on 18 July 1995 and passed sentence on the two applicants as follows. The sentence in the case of the applicant Bentham was one of 12 years' imprisonment for the substantive offence. In addition, a confiscation order for £3,139,599 was made under the 1986 Act and a consecutive sentence of ten years' imprisonment was imposed in default of payment. In the case of the applicant Clark, the sentence was one of seven years' imprisonment. Again a confiscation order was made under the 1986 Act, for £83,189·25 with a sentence of two years' consecutive imprisonment in default. Both applicants sought leave to appeal against sentence but were refused by the single judge following an oral hearing. Both now renew their application for leave to this court.

The thrust of the prosecution case briefly summarised was this. The Crown alleged that the applicant Bentham enlisted his nephew, the applicant Clark, and another friend Watkins (who was tried separately) to assist him in a conspiracy, which lasted for approximately ten months, to produce amphetamine. On the Crown case the conspirators had acquired enough chemicals to produce 190 to 285 kg which would produce 3·8 tonnes of amphetamine sulphate, which in turn was estimated to change hands on the street for something up to £35m. The applicant Clark had some previous experience as a laboratory technician.

There was evidence before the trial court as to how amphetamine was made. Attention was in particular concentrated on the drugs which are used as ingredients in its manufacture, the most important chemicals being Benzylmethylketone (BMK), which is made from phenylacetic acid, acetic anhydride and sodium acetate. A reaction is then achieved with ammonium formate by boiling which produces amphetamine. There was expert evidence called at the hearing before the judge in order to elucidate these technical matters.

There was evidence that the ingredients were acquired in very large quantities by the two applicants from a number of different sources between 10 September 1992 and 25 May 1993. They were both involved; false names were used; accommodation addresses were used; and the considerable quantities of chemicals so acquired were those which are necessary for the manufacture of amphetamine. Since the purchase of some of the chemicals is notifiable, the police learned of these bulk purchases at an early stage and that enabled them to monitor what happened thereafter.

There was evidence that on 16 November 1992, relatively early in the history of the conspiracy, the applicant Clark bought a house known as Primrose Cottage, Wrotham, Kent, very largely with money supplied to him by the applicant Bentham. There was evidence to show that, preceding the purchase, Clark had deposited large sums of money in a number of different banks and

building societies, enabling the inference to be drawn that he was anxious that the source of these moneys should not be easily traced. a

There was evidence of the purchase of a number of items necessary for this manufacturing process. The first of these purchases was dated back to 1980, a fact of some possible significance, when Bentham bought a blue metal cylindrical oven that could reach temperatures of over 1,000 degrees centigrade. There was evidence of further purchases in June 1993 of a filtration funnel, and in July 1993 b of the supply of a large boiling pot and of stainless steel tubing.

As a result of the notification given to them at an early stage the police mounted a surveillance operation and observed various activities during this period. For example, they saw Clark taking a drum of ammonium formate from a container at a removal repository and, as they inferred (although this was the c subject of dispute), driving it away by a route which suggested to them that he was trying to avoid being detected.

There was evidence of the third conspirator on various occasions going to a container and on one occasion being there while ten drums were being moved. There was also evidence that both the applicants were seen at Primrose Cottage on a number of occasions. On one occasion Clark was seen taking in overalls; on d another occasion he collected something from the boot of a car and took it inside; on another occasion while Clark was at the house the police saw smoke coming from the premises, and at that point Bentham arrived. Acting covertly, and without disclosing their presence, the police took samples of refuse and foliage from Primrose Cottage. These were tested and traces of amphetamine were e found, indicating to their expert that amphetamine had been produced from BMK and that the BMK had been produced from phenylacetic acid.

On 23 July 1993 both applicants were arrested at Primrose Cottage. Searches were carried out. A number of exhibits were seized and a video recording was made of the scene at that time. The applicant Bentham's home address at Yew Tree Cottage, Snodland, was also searched. It was judged to be an illicit f laboratory for the manufacture of amphetamine in substantial quantities. Barrels of phenylacetic acid were found which matched those ordered from one of the chemical suppliers. Also found were textbooks which explained the means of preparing BMK and explained the process used to convert BMK to amphetamine. There were also price lists and leaflets, some of them going back a number of g years. The repository from which chemicals were seen to be taken was searched. In one container there was a substantial number of barrels of ammonium formate crystals.

That in very brief summary was the way in which the Crown case was presented so far as it is necessary to go into it in the context of the two pleas of h guilty made by the two applicants.

The inquiry which preceded the making of the confiscation orders was conducted pursuant to the Drug Trafficking Offences Act 1986. The object of that Act, as is common ground, is to strip drug traffickers of their ill-gotten gains, whether or not those gains are the product of the offence giving rise to the inquiry. It is in our judgment plain from the terms of the Act that Parliament j recognised that it would in many cases be very hard, if not impossible, for the Crown to establish that funds held by a drug trafficker were indeed the product of drug trafficking, a matter which would ordinarily be outside the knowledge of the Crown and peculiarly within the knowledge of the drug trafficker. Accordingly the Act contains an unusual statutory assumption on which the

court may rely, if it thinks it appropriate to do so, within the limits laid down in the Act. That assumption is in any event provisional, in the sense that it has to be rebutted by a defendant and shown to be an incorrect assumption to draw.

The effect and meaning of the Act have been summarised by Lord Lane CJ with characteristic clarity and accuracy in *R v Dickens* [1990] 2 All ER 626, [1990] 2 QB 102, a judgment which is accepted by all parties as a correct statement of the law. The Act has also been considered in later authority, in particular *R v Redbourne* [1993] 2 All ER 753, [1992] 1 WLR 1182, *R v Rose* [1993] 2 All ER 761, [1993] 1 WLR 844 and *R v Khan* (26 February 1996, unreported). Those decisions relieve us of the need to recite the terms of the Act or to attempt any comprehensive description of how the Act operates. It is clear to us that there are a number of stages in the application of the Act which it might nonetheless be helpful to summarise, stressing that we are not suggesting that these stages should be accomplished in a mechanical, chronological sequence. A trial judge may well wish to hear argument and evidence relative to one point before he forms a view on another. None the less, the Act discloses, as we read it, a number of matters which the judge at first instance must at some stage of his inquiry consider.

The first question to be asked is: does the defendant appear before the Crown Court to be sentenced for one or more drug trafficking offences? That is the trigger of the procedures contained in the 1986 Act, as is evident from s 1(1). The definition of drug trafficking offences is found in s 38(1) of the Act. It is plain on the present facts (as all agree) that the answer is affirmative. That therefore is not a subject of contention in this case.

The second question which the judge must ask is: has the defendant benefited from drug trafficking? That is a question that appears in s 1(2) of the Act; it is to be considered in the light of the stipulative definition in s 1(3) and of the provisions of s 2(1) of the Act. The next matter which must at some stage be considered is: in answering the second question, should the court make the statutory assumptions in s 2(3) of the Act? It is plain, as already indicated, that the court is not bound to do so. Under the Act, as it was enacted in 1986, the court has a discretion. That raises the question: in what circumstances should the discretion be exercised? That was the question to which Staughton LJ, giving the judgment of the court, directed attention in *R v Redbourne* [1993] 2 All ER 753 at 758, [1992] 1 WLR 1182 at 1187, where he said:

> 'In our view a judge must have some reason to suspect that the defendant has benefited from drug trafficking before he makes the assumptions or any of them.'

That observation was the subject of some criticism in *R v Rose* [1993] 2 All ER 761 at 766, [1993] 1 WLR 844 at 849, but, as we read it the criticism was, to some extent at least, based on a misunderstanding of what Staughton LJ had said. The matter was the subject of helpful comment by Auld LJ in *R v Khan*, where he said:

> 'That takes us back to our own analysis of s 2(2) and (3) and Lord Lane CJ's judgment in *R v Dickens* and the contrary stance of this court in *R v Redbourne*, *R v Rose* and *R v Chapman*. It also leaves one still unanswered question. As Parliament gave the courts a discretion whether to make the assumptions in each case, what considerations did it have in mind should guide that discretion? We do not attempt to answer that question. It may be that Parliament has recognised the illogicality of giving such a discretion in

relation to the initial making of the assumptions by making them obligatory, subject to certain derogations, in the consolidating and amending 1994 Act. However, we are prepared to assume on the facts, without deciding, that the *Redbourne* test applies, namely that a court before making the statutory assumption, must have had some reason to suspect a connection with drug trafficking.' a

It may or may not be that the approach indicated by Staughton LJ is the correct one but the discretion must, as we conclude, in any event be one to be exercised when it is reasonable in all the circumstances to do so. It would follow that the court must not in all the circumstances consider it unjust to make these assumptions if it decides to do so. b

The next stage is in our judgment this. If the court provisionally decides or is minded to make the statutory assumptions in s 2(3)(a) or (b), then the court must go on to ask one or other of two questions. First: does the property appear to the court to have been held by the defendant at any time since conviction or to have been transferred to him at any time since 25 July 1987? That is the date relevant to this case. The second question is: was any expenditure of the defendant since 25 July 1987 met out of payments received by him? Those are factual questions to be answered on the basis of prima facie evidence. c d

One then moves on to the next stage which is this. If the court provisionally decides or is minded to make the statutory assumptions or either of them, it must then ask whether the assumption that property falling within s 2(3)(a) was received as payment or reward in connection with drug trafficking carried out by the defendant and whether the assumption that expenditure falling within s 2(3)(b) was met out of payments received by the defendant in connection with drug trafficking carried out by him were shown to be incorrect in the defendant's case and if so to what extent. That inquiry reflects the exception in s 2(2) of the Act when applied to the assumptions in s 2(3)(a) and (b). e

The next stage is to ask, applying the assumptions, or in the light of other evidence, or both, whether the court determines that the defendant has benefited from drug trafficking and if so what is the value of his proceeds of drug trafficking. That inquiry reflects s 2(2) of the Act and also s 2(3)(a), (b) and (c) of the Act. The question then arises: what is the amount to be recovered from the defendant? That is the question provided in ss 1(4), 4 and 5 of the Act. The court, having answered that question (assuming it reaches that stage), is then obliged to make an order in that sum by s 1(5)(a). It is, however, important to record that it is open to a defendant to return to the court for variation of the confiscation order if the realisable property is shown to be inadequate for the payment of the amount remaining to be recovered. So much is provided by s 14(1). f g h

With that by way of preface we turn to the specific complaints which are made on behalf of the applicant Bentham. In presenting his first complaint it is accepted that the judge recognised that the making of the statutory assumptions was a matter for his discretion. Furthermore it appears from his judgment that he recognised that the assumptions, if made, might assist the court to be satisfied so as to feel sure that the prosecution had made out its case. Counsel representing Bentham criticises the judge for having erroneously concluded that the court could make the assumption merely on prima facie evidence that the property had been held or transferred or expended within the scope of the Act. j

In support of that criticism he draws our attention to a number of passages in the judgment, singling out as an example the judge's treatment of various bank

accounts where the judge identifies a number of bank accounts and recites what is held in each. He says:

> 'These accounts have all been held by him since his conviction on 4 January 1995 and are still held by him. I therefore make the statutory assumptions in respect of those accounts under the provisions of the Act.'

There is, in our judgment, some force in this criticism of the learned judge's approach.

It is one thing to exercise a discretion to make an assumption; it is another to identify the property or expenditure to which, if the assumption is made, it may be applied. The judge did, in our judgment, fall into the error of treating the identification of the property or expenditure to which, if the assumption were made, it could be applied as itself a ground for exercising that discretion. This was, as we read it, a 'boot straps' argument, involving a logical error. It was not however, in our judgment, an error which vitiates the decision of the judge, because if he had approached the exercise of the discretion in what we would consider a correct manner, he could not, in our view, have reached any conclusion other than that the statutory assumptions should be made. So much is, in our judgment, quite plain from the passage in his judgment where the learned judge gives his reasons for holding that the assumptions had not been shown to be incorrect. It has to be recalled that the applicant Bentham was coming before the court as a multi-millionaire, namely as a man with assets running into millions. He also came before the court as a man with a very serious criminal record, having been released from an 11-year sentence for robbery in 1977. The judge, having had the opportunity of absorbing his evidence on more than one occasion, formed the conclusion that it was not only entirely unreliable but that at an earlier stage in the proceedings it had been perjured. In the course of his evidence seeking to justify his enormous assets, the applicant Bentham claimed to have a number of business interests which the judge referred to in his judgment. There was, however, nothing to substantiate those alleged business interests—no records, no accounts, no tax returns, no documents of any sort and no supporting evidence which weighed with the judge. He furthermore was entitled to conclude, in the light of the evidence before him, that the applicant Bentham was by no means a man without knowledge of the drugs field. He had first begun to acquire equipment necessary for this purpose in 1980; he was in possession of leaflets dating back to the 1980s; he had a price list also dating back to the 1980s; there was a transcript of a conversation suggesting some significant knowledge of the drugs market; and there was, as is clear from the judge's conclusion, no explanation which began to hold water as to where these very large sums of money had come from if they had not come from trafficking in drugs.

The learned judge had the benefit of hearing this evidence fully explored over a period of time. It is, in our view, clear beyond argument that if the judge had given what we consider to have been the correct self-direction in law, he would have had no hesitation in making the assumptions which the Act permitted him to make.

The second complaint argued on behalf of the applicant Bentham is that the judge erred in law in concluding that the words 'held by him since his conviction' in s 2(3)(a)(i) of the Act applied to any property or funds held by a defendant on the date when he was actually convicted, irrespective of the date at which he had

begun to hold them. That argument is in our judgment incompatible with the decision of this court in *R v Chrastny (No 2)* [1992] 1 All ER 193, [1991] 1 WLR 1385, as Mr Jones, on behalf of the applicant, was constrained to acknowledge. In our judgment the ruling of the court in that case, which is in any event binding, was plainly correct on the unambiguous language of the statute. The third complaint advanced on behalf of this applicant turns on two documents: 'App L', which contains a summary of Mr Bentham's cash expenditure, and 'App M', which summarises the applicant's assets in property, bank accounts, vehicles and cash. The complaint made is that the learned judge should not have lumped all the items in both these schedules together and dealt with them on an aggregate basis. Instead it is argued that he should have taken each of the items one by one and considered in respect of each whether the statutory assumption could safely be made in regard to that item, and whether the statutory assumption was displaced in regard to that item. It was (in counsel's submission) wrong of him to treat all the items together.

We would, for our part, accept that there may very well be cases in which the 1986 Act inquiry could not be fairly carried out without taking in turn each item alleged to be covered by the assumptions and considering both the evidence in relation to it and the evidence relied on to displace the assumption. Here, however, in our judgment, there was no need for that approach to be followed and it would indeed have been inappropriate to follow it. The applicant was unable to satisfy the judge that he had throughout the period since his release from prison had any significant source of income other than the proceeds of drug trafficking. Although it was apparently suggested that some of the money was the result of other crimes, in particular (as it was understood) other armed robberies, none the less no indications were given which would have entitled the judge to make any finding on that basis. It was in the circumstances open to the applicant to prove other sources and dispute specific items, but since he failed to satisfy the judge that he had any source of income other than the inferred income from trafficking in drugs it was, in our judgment, appropriate for the judge to approach the matter in the manner in which he did.

The fourth complaint has not in the circumstances been pursued. The complaints numbered 5, 6, 7, 8, 9, 10 and 13 all relate to specific items of property and are complaints that the learned judge did not treat these specific items as he should have done. In our judgment he was entitled to apply the assumptions in relation to them for reasons we have already given. All these items, some of them property, some of them cash, fell within s 2(3)(a) and (b) and in all the circumstances the judge was fully entitled to hold that those assumptions had not been shown to be incorrect. In the circumstances therefore those complaints cannot succeed.

So far as the eleventh complaint is concerned, it is said that the judge erred in equating a gift with expenditure. In our judgment expenditure means any form of disbursement. It would indeed be absurd if, by giving something away, a drug trafficker could remove it from the application of the Act. The inference that that is not permitted is very strongly reinforced by s 5(9) of the Act. We would reject this complaint.

The twelfth complaint, which although it appears in the notice has not been argued orally by Mr Jones QC, is that the judge was wrong to treat two Liberian companies which held property or funds as being agents or nominees of the applicant Bentham or as being a sham. In our judgment the judge was fully

entitled to treat those Liberian companies in precisely that way. There is nothing to suggest that these companies were anything other than the applicant's alter ego.

At this stage there remain two important grounds of application which have not yet been argued and we therefore say nothing about them. But so far as this applicant is concerned, on the grounds which have been argued and to which we have referred, we refuse leave to appeal.

We turn therefore to the application made on behalf of the applicant Clark. Insofar as he has adopted arguments already advanced by the applicant Bentham, we would reject them for the reasons already given. However, there are further grounds advanced by him which call for more specific treatment. It is argued on his behalf that the evidence before the court did not justify the judge's conclusion that at the time when Clark received money from Bentham to purchase Primrose Cottage he (Clark) had intended to use those premises for the manufacture of drugs. In our judgment the judge's ruling on that point was abundantly justified. It appears that Bentham gave Clark a very large sum of money for the purchase of his house (something in excess of £100,000), but there was evidence that he himself intended to retain a measure of control over it. There was evidence strongly suggesting that the funds used to purchase the house were distributed in a number of different accounts in order to conceal their origin and it is the case that the purchase of this house coincided with the delivery of a tonne of ammonium formate to the third conspirator. Furthermore, it appears that this house was used for the purpose of manufacturing drugs. That being so, it appears to us that the judge was fully justified in treating this house in the way in which he did. It is then said that the judge miscalculated the sums which had been received by Clark from Bentham towards the purchase of Primrose Cottage and failed to give any or any proper consideration to the origin of moneys that were in Clark's bank or building society accounts before the purchase. It is, as already mentioned, the case that the full purchase price did not come to Clark from Bentham. None the less the overwhelming bulk of the funds did come from Bentham and the figure which the learned judge treated as the recoverable figure was less than the sum assessed to be the overall receipt from drug trafficking of Clark. Accordingly it would make no difference, and therefore avail this applicant nothing, even if a nominal reduction were to be made.

It was argued that the learned judge should not have accepted the figure which was given for the value of this house. The value which he took was within the range given to him in evidence and his duty, under s 4(3) of the Act, was to treat as the amount to be recovered in the confiscation order the amount appearing to the court to be the amount that might be so realised. It is plain that the sum which the judge included was the sum which appeared to him to be the amount that might be so realised. That was, in our judgment, a sustainable conclusion.

The same applies to the car which was the subject of similar criticism. There was also an argument that the judge should not have treated this car as a benefit from drug trafficking. In our judgment the judge was fully entitled to make the statutory assumption in relation to it. The car was used to collect a drum of chemicals from the third conspirator. It was the car which adopted a route judged to be chosen for the purposes of avoiding surveillance and it was a car which, although registered in the name of Mrs Bentham, was the subject of a free gift by Bentham to his nephew. We have been reminded of the authority of *R v*

Osei (1988) 10 Cr App R (S) 289, and we conclude that this was a reward which could properly be treated as a benefit from drug trafficking. a

In relation to this applicant also there are two important grounds which have not been the subject of argument and on which as yet we make no decision. But on the grounds which have been argued so far in relation to Clark, we refuse leave to appeal.

[Counsel made submissions in relation to the sentences of imprisonment and b the terms of imprisonment imposed in default of compliance with the confiscation orders.]

LORD BINGHAM CJ. We have now heard argument on two matters which were not the subject of the judgment given earlier this afternoon. Both applicants c seek leave to challenge, first, the period of imprisonment ordered to be served in default of payment of the sum payable under the respective confiscation orders. In the case of the applicant Bentham the period ordered to be served in default was ten years' imprisonment consecutive. In the case of the applicant Clark, the period ordered to be served in default was two years' imprisonment consecutive. Those orders were made by virtue of s 6 of the Drug Trafficking Offences Act d 1986, which makes s 31(3)(a) of the Powers of Criminal Courts Act 1973 applicable in these circumstances. It was obligatory to impose such a term of imprisonment in default, as is made plain by s 31(2) of the 1973 Act and *R v Popple* (1992) 14 Cr App R(S) 60 at 64.

The point which is urged on behalf of each applicant is that the period to be e served in each case was the maximum under the band into which the respective confiscation orders fell. In the case of Clark, the maximum of two years applied for an order in a sum exceeding £50,000 but not exceeding £100,000, and in the case of Bentham, the period of ten years was the maximum for an order in a sum exceeding £1m.

On behalf of each applicant the argument essentially is, in reliance in particular f on *R v Szrajber* (1994) 15 Cr App R (S) 821 that it was wrong of the judge to impose the maximum and that he should have chosen a figure between the upper and lower ends of the bracket, reflecting the merits of the case as he saw it, but not necessarily the maximum figure.

It appears to this court that the question which a judge must ask himself when g imposing a period of imprisonment in default is this: What period of imprisonment not exceeding the statutory maximum is necessary to coerce this defendant into realising and paying the sum payable under the confiscation order? It is, as we see it, plain that the larger the sum of money to be paid, the greater the incentive to serve an additional term of imprisonment to avoid h payment. The court is accordingly entitled to take account of that factor when making its judgment as to what period should be served in default, and it is also entitled to rely on its assessment of the defendant gained in the course of the proceedings. Further, it is to be borne in mind that the term of imprisonment to be served in default is not served if payment is made and that there is a procedure, to which we have already referred, for varying the amount of the confiscation j order if it turns out that a defendant has been ordered to make a larger payment than his assets realise.

Taking account of those factors in the case of the applicant Bentham, it is apparent that the sum of money which he is ordered to pay exceeds by a substantial margin the maximum figure of £1m from which the highest bracket

starts. The learned trial judge had every opportunity to assess his character and the likelihood of payment. In all the circumstances we conclude that there is no basis for holding that the term of imprisonment which he ordered to be served in default was longer than that necessary for ensuring that the sum ordered to be paid was in truth paid.

A similar argument has been advanced on behalf of the applicant Clark. In his case the figure which he is ordered to pay under the confiscation order is not the maximum in his bracket, but it is a good deal closer to the top of the bracket than to the bottom. Again the judge had the opportunity of hearing Mr Clark and assessing the probability of payment, albeit in the smaller sum which he was obliged to pay. We have no reason for concluding that the period of two years' imprisonment, which he ordered to be served in default, was longer than was necessary for the purpose indicated. We do not therefore grant leave to appeal against the term of imprisonment ordered to be served in default.

The next matter raised on behalf of each applicant relates to the term of imprisonment imposed on each, in Bentham's case 12 years and in Clark's, seven. The argument on behalf of Bentham has been put under three heads: first, that insufficient credit was given for the applicant's plea of guilty; second, that the sentence imposed was manifestly excessive, having regard to the circumstances of the case and the role played by Bentham; and third, that insufficient allowance was made for the revised early release provisions under the Criminal Justice Act 1991.

The first argument is founded in particular on the fact that, when passing sentence, the learned judge did not say to Bentham that he was giving him credit for his plea of guilty. He did, however, observe that the potential yield of Primrose Cottage was enormous, and in his view would justify the maximum sentence. It is furthermore clear that he must have had in mind that both the applicants had pleaded guilty since he had been concerned intimately in the case over a period of months. In addition, it is apparent that he did impose a sentence which was below the maximum, despite his view that the offence would justify the maximum.

It is not in the circumstances to be held against either applicant that his plea of guilty was entered at a late stage. But it is true, particularly in the case of Bentham, that having entered his plea he had then at length given evidence which was inconsistent with his plea and had denied conspiring with those whom he had pleaded guilty to conspiring with, and thereby deprived himself of some of the benefit which would ordinarily have flowed from his plea of guilty. It is also true that the facts of this case were such that the possibility of successfully contesting the charge would have been very slight. In those circumstances we are not satisfied, despite his absence of an express reference to giving credit for the plea, that the judge failed to do so, or that he should have given more credit than he evidently did.

So far as the sentence being manifestly excessive is concerned, reliance is placed in particular on two cases: first, *R v Shaw* (1986) 8 Cr App R (S) 16 in which, on a plea of not guilty in a similar case, a sentence of ten years' imprisonment was described as "thoroughly merited", though it is not apparent what the court felt an appropriate sentence would have been; it simply declined to reduce a sentence of ten years. So far as the second case is concerned, *R v Popple* (1992) 14 Cr App R (S) 60, a sentence of 14 years' imprisonment was reduced to 12 in relation to an

offence of a somewhat similar character to this, simply because no credit whatever had been given in a case in which a plea of guilty had been entered.

More generally reliance is placed on the alleged lack of sophistication which is said to have characterised the operation in which the applicants were engaged.

The trial judge heard a good deal of evidence about this. It is right to say, as has been urged both by Mr Jones and by Mr Turner, that this was not a case in which laboratory facilities of the twenty-first century were found to exist. On the other hand, having heard the evidence, the judge said in his sentencing remarks:

> 'The evidence against them [the applicants] in relation to the potential yield is, in my view, overwhelming. I accept the conclusions of Mr Chirgwin when he says the chemicals in the possession of the defendants, and the apparatus, based upon the success that they had already achieved, were capable of producing the amounts which I referred to earlier.'

Those amounts were 3·8 tonnes of amphetamine sulphate with a street value of £35m. Although it appears that in some respects the equipment which the applicants were proposing to use was rudimentary, it also appears that they were in a position to produce large quantities of this prohibited controlled drug. Further, it must be borne in mind that, after the first batch had been duly made, there would no doubt be the capacity to make subsequent batches. It is also evident that they were succeeding, by one means or another and in one place or another, in producing amphetamine of a very high level of purity. However rudimentary their hardware, therefore, it certainly would appear that they had the skill, the expertise and the materiel necessary to produce a controlled drug of very high purity. In all those circumstances we do not conclude that the sentence imposed by the judge was manifestly excessive in Bentham's case.

Thirdly, it is submitted that insufficient allowance was made for the revised early release provisions under the Criminal Justice Act 1991. Reliance was placed on the Lord Chief Justice's practice direction ([1992] 4 All ER 307, [1992] 1 WLR 948) relating to that Act and its effect on length of sentences. In this particular case we do not conclude that any reduction from the level of sentences imposed is justified since this is not a class of case in which early release, even under the old provisions, would have been expected. In the case of the applicant Bentham therefore we do not grant leave to appeal against sentence.

We turn to the case of the applicant Clark. The grounds relied on are essentially the same. So far as credit for the plea of guilty is concerned, the same argument is not readily available. It is true that in his case also no reference was made to his plea of guilty, but it passes belief that the trial judge did not have that in mind. He was in the best possible position to judge the relative responsibilities both of these two applicants and of the third conspirator who is not before us. We do not therefore conclude that insufficient credit was given to the applicant Clark for his plea of guilty. We have considered whether in his case the sentence was manifestly excessive. Particular reliance was made in argument by Mr Turner on his behalf of the alleged lack of sophistication. We have already referred to that. The dominant facts here are that, however unsophisticated they may in some respects have been, the applicants had the capacity to produce large quantities of a controlled

drug and apparently had already done so in circumstances which enabled them to produce a high quality of product. Furthermore, as we have already indicated, the figures only relate to the first batch; there was nothing to prevent subsequent batches. Again we repeat: the judge was in much the best position to make sure that his sentences reflected the relative responsibility of the three conspirators and we can see no reason to interfere.

So far as the early release provisions are concerned, the point already made in our judgment applies here also. Accordingly, we do not in his case either grant leave to appeal against the term of imprisonment imposed.

Applications refused.

N P Metcalfe Esq Barrister.

Barclays Bank plc v Thomson

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, WAITE AND MORRITT LJJ
22 OCTOBER, 7 NOVEMBER 1996

Equity – Undue influence – Presumption of undue influence – Husband and wife – Constructive notice of undue influence – Duty of creditor to take reasonable steps to satisfy himself that wife properly advised – Charge over wife's property as security for overdraft facility on joint bank account – Bank appointing solicitor to advise wife in respect of her liabilities under charge – Bank obtaining possession of property – Wife alleging undue influence of husband and that solicitor's advice deficient – Whether bank fixed with constructive notice of deficient advice – Whether bank entitled to rely on solicitor's assurance that wife properly advised.

In July 1990, the plaintiff bank obtained a legal charge over the wife's family home in order to secure the borrowing on the joint bank account which she held with her husband. Prior to obtaining the charge, the bank had written to the solicitors dealing with the transfer of the property, who also acted for the husband's business, instructing them to register the charge in its favour, and requiring them to make the wife fully aware of its content. The solicitors had accordingly explained to the wife, in her husband's absence, that in signing the legal charge she would be allowing her house to act as security for borrowing on the joint bank account, and had written to the bank confirming that they had carried out its instructions. On 28 April 1992 the bank wrote to the wife and her husband demanding repayment of their liability in the sum of £100,480 and, when the demand remained unmet, obtained a possession order against the property. The wife subsequently applied to have the possession order set aside on the grounds that she had been subject to undue influence or misrepresentation by her husband, that the solicitors had been deficient in their advice to her, and that, because they were acting as the bank's agents, knowledge of that deficiency could be imputed to the bank so as to disentitle it from relying on the solicitors' assurance. The application was dismissed but allowed on the wife's appeal. The bank appealed.

Held – Where a bank instructed a solicitor to act on its behalf for the purposes of discharging its duty to ensure that a wife received independent advice in respect of her liabilities under a legal charge in its favour, the bank was entitled to rely on the solicitor's assurance that he had discharged his professional duty towards her and had given independent advice, even where the solicitor concerned was also acting for the husband and the bank itself. Knowledge of any deficiency in the advice given by the solicitor could not therefore be imputed to the bank. In the instant case, therefore, the bank was entitled to rely on the solicitors' assurance that they had properly advised the wife in accordance with its instructions. The wife's claim that the bank was fixed with constructive notice of their deficient advice would accordingly be rejected and the bank's appeal allowed (see p 825 *h* to p 826 *j* and p 828 *a* to *c*, post).

Massey v Midland Bank plc [1995] 1 All ER 929, *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, *Bank of Baroda v Rayarel* [1995] 2 FLR 376, *Midland Bank plc v Serter* [1995] 1 FLR 1034 and *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] 2 All ER 277 applied.

Notes

a For the avoidance of transactions procured by undue influence, see 18 *Halsbury's Laws* (4th edn) paras 330–331, 349, and for cases on the subject, see 25 *Digest* (2nd reissue) 150–155, 192, *751–786, 1096.*

Cases referred to in judgments

b *Allied Irish Bank plc v Byrne* [1995] 2 FLR 325.
Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle [1986] 2 Lloyd's Rep 221, CA.
Banco Exterior Internacional v Mann [1995] 1 All ER 936, CA.
Bank of Baroda v Rayarel [1995] 2 FLR 376, CA.
Bank of Credit and Commerce International SA v Aboody [1992] 4 All ER 955, [1990] 1
c QB 923, [1989] 2 WLR 759, CA.
Barclays Bank plc v O'Brien [1993] 4 All ER 417, [1994] 1 AC 180, [1993] 3 WLR 786, HL.
Blackburn Low & Co v Vigors (1887) 12 App Cas 531, HL.
Cooper v Scott-Farnell [1969] 1 All ER 178, [1969] 1 WLR 120, CA.
d *Forward v West Sussex CC* [1995] 4 All ER 207, [1995] 1 WLR 1469, CA.
Grimshaw v Dunbar [1953] 1 All ER 35, [1953] 1 QB 408, [1953] 2 WLR 332, CA.
Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky [1996] 2 All ER 277, [1996] Ch 207, [1996] 2 WLR 230, CA.
Lancashire Loans Ltd v Black [1934] 1 KB 380, [1933] All ER Rep 201, CA.
Massey v Midland Bank plc [1995] 1 All ER 929, CA.
e *Midland Bank plc v Serter* [1995] 1 FLR 1034, CA.
Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406, CA.
White v Weston [1968] 2 All ER 842, [1968] 2 QB 647, [1968] 2 WLR 1459, CA.

Cases also cited or referred to in skeleton arguments

f *Birkett v James* [1977] 2 All ER 801, [1978] AC 297, [1977] 3 WLR 38, HL.
Hayman v Rowlands [1957] 1 All ER 321, [1957] 1 WLR 317, CA.

Appeal

Barclays Bank plc appealed with leave of Hutchison LJ from the decision of Judge Foley made on 4 October 1995, whereby he reversed the decision of District
g Judge Ing sitting in the Gloucester County Court on 21 March 1995 dismissing an application by the respondent, Jennifer Thomson, to set aside an order made on 22 January 1993 giving the bank possession of her home, Valley View, Blakeney Hill, Blakeney, Gloucestershire, following the non-payment of a loan secured on the property. The facts are set out in the judgment of Simon Brown LJ.

h

Ali Malek QC (instructed by *Eversheds*, Cardiff) for the bank.
Miles Croally (instructed by *Clement Jones*, Bangor) for Mrs Thomson.

Cur adv vult

j 7 November 1996. The following judgments were delivered.

SIMON BROWN LJ. The respondent is the freehold owner of Valley View, Blakeney Hill, Blakeney in Gloucestershire (the property), which became her family home in the late 1980s upon its purchase by a trust of which she was sole beneficiary. She still lives there with her three teenage children, her husband having left in 1994.

In July 1990, in circumstances to which I shall come, the appellant bank obtained a legal charge over the property, dated 16 July 1990, to secure the borrowing on Mr and Mrs Thomson's joint account at the Chepstow branch of Barclays Bank plc.

On 28 April 1992 the bank wrote to the respondent and her husband demanding repayment of their liability in the sum of £100,480·00 and on 20 November 1992, that demand remaining unmet, issued proceedings against her in the Gloucester County Court claiming possession of the property.

On 22 January 1993 District Judge Ing made an order for possession in favour of the bank. Although the order records the respondent as having attended the hearing in person, it is common ground that she did not do so although her husband did.

Two years later, on 17 January 1995, the respondent applied to have the possession order of 22 January 1993 set aside, an application which was dismissed by District Judge Ing on 21 March 1995. That application raised for the first time a defence to the claim under the legal charge, what I may call the *Barclays Bank v O'Brien* defence (see *Barclays Bank plc v O'Brien* [1993] 4 All ER 417, [1994] 1 AC 180). It was rejected by the district judge on the merits.

The respondent's appeal against that order came before Judge Foley, who, on 4 October 1995, allowed the appeal and gave directions for the future conduct of the proceedings. The hearings before both District Judge Ing and Judge Foley were, it should be noted, conducted on affidavit evidence.

Before us today is the bank's appeal, brought by leave of Hutchison LJ, from Judge Foley's order. Principally, the appeal raises the undue influence issue. Under a respondent's notice, however, other issues are raised arising out of the respondent's non-attendance at the original hearing on 22 January 1993, and it will be necessary to turn briefly to these later in the judgment.

With regard to the undue influence issue, the respondent asserts and, for the purposes of the present proceedings the bank are content to assume, that this loan transaction was to her manifest disadvantage and that she was subject to undue influence on the part of her husband and/or that he misrepresented to her that the debt being secured by the charge was to be limited to £20,000. The case, therefore, falls into class 2(B) of the *Barclays Bank v O'Brien* classification and the critical question arising is whether or not the bank are fixed with constructive notice of this undue influence (and/or misrepresentation).

The central facts are these. Discussions took place on 14 and 21 June 1990 between Mr and Mrs Thomson and their local bank manager, Mr Brabon, with regard to increasing their overdraft facilities provided these were secured by legal charge. In her affidavit of 29 September 1995 the respondent deposes:

> 'Mr Brabon spoke to me at all times in the presence of Mr Thomson. He never spoke to me separately. He told me that the charge was in the nature of a mortgage which could result in my losing my home. I accept that I understood that losing my home was a possible consequence of the charge. Mr Brabon did not otherwise explain the terms of the charge. He advised me and Mr Thomson to go together to a firm of solicitors across the road from the bank. These solicitors were called Francis & Co. Mr Brabon did not advise me to obtain independent legal advice. Immediately after leaving the meeting with Mr Brabon, Mr Thomson and I went to Francis & Co. [Their advice was] to the effect that: "That is a standard form that is issued by the bank. You realise that you are putting your house up for security." This

solicitor did not explain to me that the charge was an all-monies charge which secured all present and future indebtedness of the company for an unlimited period. Indeed, this solicitor would not have known from the form of the charge that it was in the nature of a guarantee by me of my husband's business debts.'

I should make plain at once that the bank have never sought to rely upon this visit to Francis & Co as any part of their case that they took reasonable steps to guard against undue influence. On 20 June 1990 Mr Brabon wrote to another firm of solicitors, Gwyn James & Co as follows:

'Mrs Jennifer Thomson, Valley View, Blakeney Hill, Blakeney

We are assisting Mrs Thomson and her husband with facilities and we would require a legal charge on the above property. We are led to believe that the property is presently unencumbered and held in trust for Mrs Thomson. We are also informed that the trustees are presently conveying the title of Valley View into Mrs Thomsons name, therefore would you be in a position to register our proposed legal charge without any delay.'

Gwyn James & Co replied on 25 June 1990:

'We confirm the contents of the first paragraph of your letter and we are waiting for the solicitors acting for the trustees to transfer the property to Mrs Thomson. We expect that the transfer will require Mrs Thomson's signature and it would seem sensible that the proposed legal charge and the transfer be executed at the same time. As we have not seen the documents of title, we cannot tell you whether or not the title is registered, but we suspect that it is. If this is the case, will you wish us to register the legal charge—we shall be happy to get it executed by Mrs Thomson.'

The bank wrote again on 27 June 1990:

'We write further to your letter of 25 June relating to the above property and confirm that Mrs Thomson proposes to charge the property to us in order to secure borrowing in both her name and that of her husband. We, therefore, enclose for your completion and return to this office standard undertaking duly amended. We also enclose for signature by Mr and Mrs Thomson legal charge forms which we should be grateful if you would acknowledge receipt of and also register our interest on our behalf. We require that the full content of the legal charge is explained to Mrs Thomson so that she is fully aware of what she is signing and the fact that the property is being used to secure the borrowing at this office. We also require confirmation that Mr Thomson is the only other person with any equitable interest in the property and to this end we enclose a certificate of occupancy which we should be grateful if you would have signed in your presence and witnessed on our behalf, also confirm that to the best of your knowledge the details are correct. We also enclose a card which enables us to open a business account at this office in joint names. Perhaps you would be kind enough to obtain the Thomsons' signatures on this card so that we can proceed with the opening of the account on their behalf.'

The final letter in the series is one from Gwyn James & Co to the bank dated 5 July 1990, the day the respondent signed the charge:

'We return all the bank forms signed but we have retained the mortgage which has been signed but left undated until we are able to confirm that the property is finally vested in Mrs Thomson. We have explained the full content of the legal charge to Mrs Thomson and she is aware of what she has signed and that the property is being used to secure borrowing on the joint bank account. We can confirm that Mr Thomson is the only other person who may have an equitable interest in the property. We also enclose our own undertaking as requested.'

The respondent's account of the meeting with the solicitors at which she signed the legal charge is this:

'I went to see Gwyn James at the suggestion of and together with my husband. At a certain point, Mr James asked Mr Thomson to leave the room. Mr James then advised me ... to this effect: "You know that by signing this you are allowing your house to act as security for your husband's business". Again, like the solicitor at Francis & Co, he did not explain that the charge was unlimited in effect, with respect both to amount and period. Again, had he explained this to me, I would not have entered into the charge.'

She further deposes that Mr James—

'was the solicitor retained generally by my husband's business. My husband suggested that he should act for me in the transfer of my house from the trustees to my sole name. This was an example of how my husband normally looked after business affairs for me. Otherwise, I had nothing to do with Mr James who was essentially my husband's solicitor.'

The bank's internal information card shows that a £50,000 facility (that discussed at the meetings in June) was granted to Mr and Mrs Thomson on 10 July 1990, it being recorded that—

'undertakings have been received from solicitors and confirmation that charge forms have been signed. Gwyn James have also confirmed in their letter dated 5th July 1990 that they have fully explained the content of the legal charge to Mrs Thomson and she is aware of what she has signed and that the property is being used to secure borrowing on the joint bank account.'

As it happens, a later entry on the bank's information card made on 22 October 1990 records a further meeting between Mr Brabon and Mr and Mrs Thomson at which the bank were asked to increase the overdraft facility to £80,000. This meeting must have occurred a few days before the entry because on 19 October 1990 Mr Brabon wrote to Mr and Mrs Thomson confirming the increased facilities 'subject to the overriding condition that they are repayable upon demand at any time. I would also wish to confirm that we continue to rely upon our legal charge over Valley View, Blakeney Hill, as our security for this advance'. The respondent now says that she does not remember seeing this letter and 'does not believe that this [increased borrowing] was explained to her at the meeting'. For the purposes of this appeal I shall assume that it was not.

On the basis of these facts the respondent persuaded the judge below that she had a properly arguable case for saying that the bank had constructive notice of her husband's presumed or actual undue influence over her, an argument founded essentially upon the proposition that, in advising her as to the effect of

signing the legal charge, Gwyn James & Co were acting as the bank's solicitors and agents, not hers. In these circumstances, submits Mr Croally for the respondent, where (as for present purposes is to be assumed here) that advice was deficient, knowledge of that deficiency is to be imputed to the bank so as to disentitle them from relying on the solicitors' assurance.

It is the bank's central contention on this appeal that that analysis is wrong and that the respondent's argument is plainly unsustainable. True, Mr Malek QC acknowledges, the solicitors here can properly be regarded as having been retained by the bank to carry out the bank's instructions with regard to completing this loan transaction. The bank were, for example, requiring the solicitors to obtain a signed certificate of occupancy and business account card, and were to be responsible for the solicitors' fees in the first instance although these would then be added to the borrowers' total liability. True too, in none of the other recent undue influence cases were the lenders seeking to rely upon an assurance provided by their own solicitors. But, Mr Malek submits, there is no basis in logic or in law why that should make any difference to the result. In particular there is no basis for imputing to the bank any knowledge of the deficiency in the advice given, and no reason therefore why the bank should not be entitled, in the usual way, to rely on the solicitors' assurance—here the assurance contained in the letter of 5 July 1990 (equivalent, the respondent accepts, to the certificate or declaration generally provided in these cases) that:

> 'We have explained the full content of the legal charge to Mrs Thomson and she is aware of what she has signed and that the property is being used to secure borrowing on the joint bank account.'

The starting point for consideration of these rival arguments must be the trilogy of recent Court of Appeal decisions which clearly establish a bank's entitlement to rely upon a solicitor's certificate that proper advice has been given to the signatory of a relevant instrument even though that solicitor acts principally for the very person against whose undue influence the signatory must be guarded: *Massey v Midland Bank plc* [1995] 1 All ER 929, *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 and *Bank of Baroda v Rayarel* [1995] 2 FLR 376. I content myself with two citations only from these cases although there are several similarly helpful passages in the other judgments. First, this from the judgment of Bingham MR in *Mann*'s case [1995] 1 All ER 936 at 950:

> 'Was it reasonable to expect a solicitor, regardless of who was paying his fee, to regard himself as owing a professional duty to Mrs Mann alone in performing his task in relation to this declaration? In my view it was. If he felt himself torn between conflicting duties, he would feel obliged to make way for another solicitor not subject to that conflict. If he did not feel so torn, it would be because nothing impeded the performance of his task, which was to be performed for the benefit of Mrs Mann and no one else. Was it reasonable to expect a solicitor, in explaining the nature and effect of the document, to give appropriate advice? In my view it was. It is an ordinary incident of a solicitor's duty to explain the obvious potential pitfalls of legal transactions to those about to take part in them, and there is no clear dividing line between explanation and advice. If the certifying solicitor did his job with reasonable competence, as the bank was entitled to expect, Mrs Mann would appreciate quite clearly that if the worst happened she could lose her rights in the house and that it was for her to decide whether she was willing

to take that risk or not. It was no part of the solicitor's duty to advise her not to sign. It was enough if she would receive such advice as would leave her in no doubt of her right to decide whether she was willing in all the circumstances to take a risk which had been explained to her.' a

Second, this from Hoffmann LJ's judgment in *Rayarel's* case [1995] 2 FLR 376 at 386: b

'If a prospective surety deals with a bank through a solicitor, the bank is entitled to assume that the solicitor has given her appropriate advice. If there is a possibility of a conflict of interest between the surety and the other parties whom the solicitor is also advising, the bank is entitled to assume that the solicitor will have told her that she was entitled to take independent advice. The bank's legal department is not obliged to commit the professional discourtesy of communicating directly with the solicitor's client and tendering such advice itself. Nor is it obliged to inform the solicitor of his professional duties. This will be a fortiori the case when the documents submitted by the bank to the surety's solicitor contain a certificate that she has been advised of the effect of the document and her right to have independent legal advice. The bank was therefore not in the circumstances fixed with constructive notice of the undue influence which the judge found to have been exerted by the husband. I do not think that one needs to say that this is because the bank has taken reasonable steps to ensure that the wife was separately advised. It is true that the bank did take the step of including the certificate in its draft document, but I would not regard this as essential.' c d e

I pass next to two further Court of Appeal cases in which the solicitor advising the signatory was acting also for the lender, at any rate with regard to certain aspects of the transaction: *Midland Bank plc v Serter* [1995] 1 FLR 1034 and *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] 2 All ER 277, [1996] Ch 207. f

The facts in *Serter's* case were that the bank had provided the solicitor with the form of charge it wished to be executed, and the solicitor was instructed on behalf of the bank to register that charge. The solicitor (Mr Colley) who provided the certificate was principally the husband's solicitor and he had had little opportunity to discuss matters with the wife. Glidewell LJ (with whom Pill and Aldous LJJ agreed) dealt with the agency argument ([1995] 1 FLR 1034 at 1046–1047): g

'Mr Salter, for the bank, submits that the reasonable steps which the bank was required by the decision in *O'Brien* to take amounted in summary to the obtaining of Mr Colley's certificate that he had explained to both Mr and Mrs Serter the implications of the mortgage. The bank was not concerned as a matter of law to instruct Mr Colley how he should advise Mrs Serter, nor to ascertain from him what he needed to do in order to be able to sign the certificate honestly. Thus there was no need for the bank to appoint Mr Colley its agent for the purpose of advising Mrs Serter. It was sufficient for the bank to know that her solicitor, or her husband's solicitor who was willing for this purpose to advise her also, was taking on that obligation to her. When the bank received the certificate signed by Mr Colley, it was entitled to believe that he, as an honourable solicitor, had advised Mrs Serter in one or other of these capacities. Mr Salter reminds us of the general h j

principle of law that a solicitor, like any other agent, may be instructed specifically to act for a party for one particular purpose in relation to a transaction, but not to act for him generally for other purposes. Thus it is only knowledge which he acquires when carrying out that part of the transaction in which he is instructed to act as agent which is to be imputed to the party who for that purpose is his principal: see, for example, the decision of this court in *Saffron Walden Second Benefit Building Society v Rayner* ((1880) 14 Ch D 406) and *Blackburn, Low & Co v Vigors* ((1887) 12 App Cas 531). I am persuaded by Mr Salter's submissions. The evidence shows that Mr Colley was the agent of the bank to register the security, but there is no evidence that he was expressly appointed to take any antecedent step. In the ordinary way in advising Mrs Serter as he did he was either acting for her, or was acting for her husband and advising her in pursuance of what he properly perceived to be his general professional duty. The bank, as Mr Salter submits, was entitled to believe that he acted in one or other of these capacities. In neither capacity was what he knew to be imputed to the bank. I find nothing in the evidence to which Mr Leolin Price has referred us from which it can reasonably be argued that Mr Colley was the agent of the bank for the purpose of speaking to and advising Mrs Serter ...'

Earlier in Glidewell LJ's judgment (at 1045), however, appears this short passage upon which the respondent seeks to rely:

'In other words, in order for the bank not to be entitled to rely on the fact that Mr Colley, the solicitor for the husband who had acted previously for the wife also, was advising her, and on his certificate to that effect, it would have to be shown that when he spoke to Mrs Serter, Mr Colley was doing so on the instructions of, and as agent for, the bank. Only in this way would his knowledge of the circumstances be imputed to the bank itself.'

The facts in *Stepsky*'s case were that a husband and wife were remortgaging their house, that the husband misled the lenders as to the true purpose of the loan, that this was discovered by the solicitors acting for the husband and wife, and that a week later the solicitors were instructed to act also on behalf of the lenders. It was the wife's contention that the knowledge of the solicitors was to be imputed to the lenders. In rejecting that argument Morritt LJ (with whom Kennedy and Ward LJJ agreed) said ([1996] 2 All ER 277 at 284, [1996] Ch 207 at 216):

'In my view the section [s 199 of the Law of Property Act 1925] has to be applied in accordance with its terms to the facts of this case. There is no doubt that the information as to the true purpose of the remortgage loan imparted by the husband came to the knowledge of the solicitors on 12 June 1990 as the solicitors for the husband and wife alone, for they were not instructed to act for the lender until 19 June at the earliest. That knowledge once acquired remained with the solicitors and cannot be treated as coming to them again when they were instructed on behalf of the lender. As counsel for the wife accepted, their knowledge cannot be treated as divided or as disposed of and reacquired in that way. The conclusion seems to me to be inescapable: namely, that knowledge of the relevant matters, facts or things did not come to the solicitors as the solicitors for the lender. Accordingly, it did not come to them "as such". It was not disputed that the lender is a purchaser within the definition contained in s 205 of the 1925 Act.

Consequently s 199(1)(ii)(b) of that Act precludes the solicitors' knowledge of the relevant matters or facts being imputed to the lender.' a

The final decision to which reference must be made—it is, indeed, the decision most strongly relied upon by the respondent—is *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955, [1990] 1 QB 923, in which the very full judgment of the Court of Appeal was given by Slade LJ. The facts sufficiently appear from the following passage ([1992] 4 All ER 955 at 981–982, [1990] 1 QB 923 at 974–975) the only part of the judgment relevant for present purposes: b

'The 1980 charge stands in a different position to the other transactions, and depends on whether the knowledge of Mr Hallworth of what happened on 7 February 1980 can be imputed to the bank. The judge found as a fact, on clear evidence, that Mr Aboody pressurised Mrs Aboody into executing the 1980 charge; as he put it the evidence of Mr Hallworth about the incident was "redolent of undue influence". So on the assumption that the other factors necessary as a basis for undue influence—e g manifest disadvantage—could have been established, the question becomes whether Mr Hallworth was the agent of the bank for the purpose of ensuring that Mrs Aboody's execution of the 1980 charge was not flawed by undue influence. This in turn depends on the precise circumstances in which Mr Hallworth was instructed. The bank's solicitors were Messrs Grundy Kershaw. They advised the bank that if, as was the case, Mrs Aboody was not going to be advised by her own solicitor, it would be prudent to let them arrange for an independent solicitor to advise her on the legal charge and confirm in writing that she fully understood its [implications]. The bank therefore authorised Messrs Grundy Kershaw to arrange for Messrs Foysters (an old-established and respected firm of solicitors in Manchester of which Mr Hallworth was a partner) to supply one of their members to advise Mrs Aboody independently. Neither Mrs Aboody, Mr Aboody nor Eratex [the family company] ever gave any prior authority of any kind to arrange for Mrs Aboody to have independent legal advice; the fact that Eratex subsequently made no objection to Mr Hallworth's fees being debited to its account with the bank cannot affect this position. Furthermore, it was Grundy Kershaw, on behalf of the bank, who drafted the certificate in the following terms at the foot of the 1980 charge, which Mr Hallworth was expected to, and did, sign for the protection of the bank: "I hereby confirm that prior to the execution of this document I fully explained the contents and effect thereof to [name never inserted] who seemed to me, and informed me that she perfectly understood the same." In our judgment, the facts set out above gave rise to the following legal consequences. (1) Mr Hallworth had a contract with the bank: (a) to give independent advice to Mrs Aboody; (b) to provide a report to the bank. (2) It was the bank to whom Mr Hallworth was entitled to look for payment of his fees in the first place. The fact that the bank subsequently arranged for Eratex to pay those fees is neither here nor there. (3) Mrs Aboody became Mr Hallworth's client when he advised her. However, Mr Hallworth had also accepted the bank as his client for the purpose of his report. This undoubtedly put him in a position of some difficulty, because in the events which happened his duties to his two clients conflicted. (4) Nevertheless his duty to the bank required him to report to them and, knowing the purpose for which they required the certificate, to report also on any circumstances known to him which in his opinion made c d e f g h j

it unsafe for the bank to rely on the legal charge. This he failed to do. (5) In these circumstances Mr Hallworth's knowledge of the influence brought to bear on Mrs Aboody by Mr Aboody in the making of the 1980 charge is to be imputed to one of his clients, the bank. The fact that disclosing these facts to the bank might have rendered him in breach of duty to his other client, Mrs Aboody, does not alter that position: cf *Lancashire Loans Ltd v Black* [1934] 1 KB 380, [1933] All ER Rep 201.'

With those authorities in mind I can now indicate the rival arguments in rather more detail.

The respondent's case is essentially this.

(1) *Aboody*'s case although in other respects questionable following the House of Lords decision in *Barclays Bank plc v O'Brien*, remains good law on the point presently in issue. Here as there the bank instructed their own solicitors to give (or have others give) independent advice to the signatory, in each case at the Bank's initial expense. By the same token that there was imputed to the bank there the solicitors' knowledge of the undue influence brought to bear on the signatory in executing the charge, so here there must be imputed to the bank the solicitors' knowledge of their own deficient advice to the respondent. These deficiencies consisted, we must assume, of the solicitors' failure (a) to explain the unlimited effect of the charge, and (b) to ensure that the respondent was separately advised given that they were principally her husband's solicitors in relation to his business affairs. (This last point sits perhaps uneasily alongside the respondent's central contention that Gwyn James & Co were the bank's solicitors, but let that pass.) *Aboody*'s case was followed in *Allied Irish Bank plc v Byrne* [1995] 2 FLR 325, a first instance decision which similarly applied the agency principle.

(2) In none of the three cases, *Massey*'s case, *Mann*'s case, and *Rayarel*'s case were the solicitors, on whose assurance the lenders were relying, the lenders' own solicitors. No question of agency arose and *Aboody*'s case was not cited.

(3) It is implicit in the judgments in *Serter*'s case and *Stepsky*'s case—the two cases in which the solicitors were acting at some stage also for the lender—that had the solicitors advising the signatory been doing so on the lenders' instructions, that would have fixed the lenders with knowledge of the circumstances of their advice, including therefore any deficiencies in it. This appears clearly from the shorter passage cited from Glidewell LJ's judgment in *Serter*'s case and, indeed, from the reference in the longer passage to there being 'no evidence that [the solicitor] was expressly appointed to take any antecedent step'. It is said to be implicit, too, in Morritt LJ's reference in *Stepsky*'s case to the solicitors not being '...instructed to act for the lenders until 19th June at the earliest' (ie a week after the advice was given).

The appellant bank's contrary arguments are as follows.

(1) It is one thing as in *Aboody*'s case to impute to the bank the solicitors' actual knowledge of the undue influence affecting the signatory at the time of executing the charge; quite another to impute knowledge of the solicitors' own deficiencies. The solicitors in *Aboody*'s case were held to be under a duty to report to the bank the troubling circumstances surrounding the signing. An agent is not, however, under a duty to his principal to report his own defective advice: it would not be reasonable to imply into the agency contract any such obligation.

(2) Alternatively, if the two cases cannot properly be distinguished in this way, then the decision in *Aboody*'s case can no longer stand in the light of subsequent

authority. *Aboody*'s case was decided when the agency argument was at its height and before the House of Lords in *Barclays Bank plc v O'Brien* analysed the problem as one of notice and reasonable steps rather than of agency. Once thus analysed, and once it is recognised, as the trilogy of cases establish, that a bank is entitled to expect a solicitor to regard himself as owing a professional duty to the signatory alone when advising upon the execution of the charge (irrespective of who is paying his fee), it cannot matter whether the solicitor is introduced by the signatory, or by whoever is to benefit from the loan, or by the lender. If, as the cases establish, it is reasonable for the lender to trust the solicitor to decide for himself whether a conflict of interest disables him from advising properly and requires him to make way for another—and this is so even if the solicitor is acting principally for whoever is to benefit from the transaction and against whose undue influence, therefore, the person to be advised needs protection—then a fortiori it must be so when the solicitor is introduced and retained by the bank.

(3) On this approach there is really no room for the concept of agency, at any rate with regard to advising the signatory. When discharging that aspect of their retainer, the solicitors are acting exclusively for the signatory, not the lenders. They cannot at that stage have two clients: such a notion would defeat the very purpose of their retainer which is to give the signatory *independent* advice.

(4) One reaches the same result by applying s 199 of the Law of Property Act 1925, as Morritt LJ did in *Stepsky*'s case. Knowledge acquired by solicitors whilst tendering independent advice to a signatory does not come to them as agents for the lenders. At that time their professional duty is owed to the signatory alone.

It is time to state my conclusions. I can do so really quite shortly. I see no distinction in principle between *Aboody*'s case and the present case. In my judgment, however, the appellants' remaining arguments are to be preferred. They are, indeed, compelling. I can see no good reason whatever why a bank, perhaps conscientiously instructing solicitors to give independent advice to a signatory who might otherwise go unadvised, should thereby be disabled from relying on the solicitors' certificate that such advice has been properly given. The contrary argument founded on the agency principle is wholly artificial and to my mind now discredited. Mr Croally's suggestion that lenders may choose to instruct solicitors whom they know will advise the signatory incompetently I reject utterly.

Glidewell LJ's reference, in the shorter passage cited from *Serter*'s case, to the signatory's need to show that the solicitor, when advising her, 'was doing so on the instructions of and as agent for the bank', may indeed suggest an assumption on his part that a solicitor who is instructed by a bank to give independent advice remains the bank's agent whilst giving it. If so, however, then I have to say that in my respectful view it was a mistaken assumption. As for Morritt LJ's factual observation in *Stepsky*'s case that the solicitors there were not instructed to act for the lenders until a week after the signatory had been advised, I cannot find in that any necessary inference that he would otherwise have decided the case differently.

In short, I find nothing in the present case to distinguish it from all five of the recent Court of Appeal cases to which I have referred. The bank was equally entitled to rely on Gwyn James & Co's assurance here as were the lenders in all those cases to rely on the various certificates and declarations there.

I pass then to the two points taken in the respondent's notice arising out of the respondent's non-attendance at court on 22 January 1993 when the possession order was originally made. I can deal with these comparatively briefly.

The first argument is that this was an irregular judgment which the court was bound to set aside ex debito justitiae. It is said to be irregular on the ground of failure of service of the originating process, the respondent having deposed in her affidavit of 16 January 1995 that she was 'not aware of' the possession summons. It does not follow, however, that she was not validly served within the County Court Rules. Order 7, r 10(1) and (2) provides for service to be effected 'by an officer of the court sending it by first-class post to the defendant at the address stated ...' and r 10(3) provides that 'the date of service shall, unless the contrary is shown, be deemed to be the seventh day after the date on which the summons was sent to the defendant'.

There is every reason to suppose that the summons was not only sent to the respondent but that it duly arrived at her address: how else would her husband have been in a position to attend the hearing? Whether the fact, assuming it to be a fact, that the respondent herself never learned of the hearing is sufficient to establish irregularity of service depends on whether *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647 and *Cooper v Scott-Farnell* [1969] 1 All ER 178, [1969] 1 WLR 120 (Court of Appeal decisions on the substantially similar 1936 rules, which appear to decide the contrary) are to be regarded as implicitly overruled by *Forward v West Sussex CC* [1995] 4 All ER 207, [1995] 1 WLR 1469 (a recent Court of Appeal decision on the effect of the Rules of the Supreme Court as to service). That is not an altogether easy question. In my judgment, however, it is not a question which needs to be decided here. Even assuming that service here was deficient so as to make the original judgment irregular, I think it clear that Ord 37, r 5(2) would operate to defeat the respondent's entitlement to have it set aside. This rule provides:

> 'No application to set aside any proceedings for irregularity shall be granted unless made within a reasonable time, nor if the party applying has taken any step in the proceedings after knowledge of the irregularity.'

Once one appreciates (a) that no application to set aside the possession order was made here for two years (nine months after the respondent says she first became aware of it), and (b) that the application was in any event litigated before the District Judge on the merits—the ex debito justitiae argument based upon the contended for irregularity not being advanced until the hearing before Judge Foley in October 1995—it seems to me plain almost beyond argument, first that the application to set aside the proceedings for irregularity was not made 'within a reasonable time', and second that the respondent had by then taken a 'step in the proceedings after knowledge of the irregularity', namely the step of seeking to set aside the judgment on the merits. Either conclusion would be fatal to the respondent's present argument.

The second point raised by the respondent's notice is that, even accepting that the application to set aside was made under Ord 37, r 2 and not on the ground of irregularity of service under Ord 37, r 3, the test to be applied was that established by *Grimshaw v Dunbar* [1953] 1 All ER 35, [1953] 1 QB 408 rather than the *Saudi Eagle* test (cf *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1986] 2 Lloyd's Rep 221). In other words, the question for the courts below was whether the respondent's defence was manifestly unsupportable rather than whether there was a reasonable prospect of her succeeding on the merits. In my judgment, however, even applying this less stringent test the respondent's argument fails. Even if one accepts every fact to which she has deposed on affidavit (and that, I may say, involves accepting a good deal more that on a wider

view of the evidence looks likely), I, for my part, for the reasons given earlier in this judgment, would nevertheless regard the defence proposed here as manifestly unsustainable in law. a

I would accordingly allow this appeal, dismiss the respondent's notice, and restore the order of District Judge Ing made on 21 March 1995.

WAITE LJ. Although it may well be arguable that (as Morritt LJ points out) this is a case to which s 199(1)(ii)(b) of the Law of Property Act 1925 could be shown to apply, I would prefer to rest my own agreement that the appeal be allowed exclusively upon the wider reasoning adopted by Simon Brown LJ. I also agree that the respondent's notice should be dismissed for the reasons given. b

MORRITT LJ. I have read and, subject to one point, agree with the judgment of Simon Brown LJ. I add a few words of my own on the central feature of the argument for Mrs Thomson to the effect that the knowledge of the solicitors, Gwynn James & Co, as to their defective advice to her, which is to be assumed, is to be imputed to the bank. c

In my view it is necessary to return to the decision of the House of Lords in *Barclays Bank plc v O'Brien* [1993] 4 All ER 417, [1994] 1 AC 180 in order to see why the bank should be concerned with whether Mrs Thomson obtained advice at all. The reason appears clearly from the speech of Lord Browne-Wilkinson (see [1993] 4 All ER 417 at 429, [1994] 1 AC 180 at 196). It arises from the principle that the right to set aside a transaction for undue influence or misrepresentation is exerciseable against a third party who has notice of such invalidating tendency. The third party may have constructive notice of such invalidating tendency if he is put on inquiry as to the circumstances in which the person seeking to set aside the transaction gave his or her consent. To avoid constructive notice of the rights of the person seeking to set aside the transaction the person who would otherwise be put on inquiry must take reasonable steps to satisfy himself that that person's agreement to the transaction has been properly obtained. The reasonable steps required for that purpose include advising even urging that person to take independent legal advice. d e f

Accordingly in this, as in all comparable cases, the claim of the wife to set aside the mortgage cannot be maintained against the bank unless in accordance with general equitable principles the bank can be shown to have notice actual or constructive of the wife's rights against her husband. Those principles include the statutory restrictions on notice now contained in s 199 of the Law of Property Act 1925. The relevant restriction is that contained in sub-s (1)(ii)(b) which provides that a purchaser, which includes a mortgagee, shall not be prejudicially affected by notice of any fact or thing unless— g h

> 'in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.' j

Thus where, as here, the solicitor on whose certificate the bank relies was in some respects the solicitor for the bank the question of whether or not knowledge or notice is to be imputed to the bank by virtue of the knowledge of that solicitor depends on whether the section applies in the circumstances of the

case. In deciding whether or not it does the principles of the law of agency will be relevant on the questions whether vis-à-vis the bank the solicitor was 'his' and if so whether the bank's solicitor was acting 'as such' when acquiring the knowledge sought to be imputed to the bank. I do not think that the extent to which, if at all, and for what purposes the law of agency imputes to the principal knowledge of the (non-fraudulent) breach of duty of his agent arises in cases in which s 199(1)(ii)(b) of the 1925 Act applies. I would prefer not to express any view on whether in circumstances where s 199 does not apply such knowledge may or may not be imputed to the principal.

I have no doubt that Gwynn James & Co were not acting as the bank's solicitor when advising Mrs Thomson, notwithstanding that they did so at the request of the bank. The object of the exercise was that Mrs Thomson should obtain advice independent of the bank as well as independent of her husband. The professional obligations of Gwynn James & Co in relation to the advice they gave were owed to her and not to the bank. Provided that the bank was not put on notice by other matters within their knowledge that Gwynn James & Co had not performed their professional duty to give independent advice to Mrs Thomson they were in my judgment as entitled as the banks in *Massey*'s case, *Mann*'s case and *Rayarel*'s case to rely on the solicitors' representation that they had. The extra ingredient relied on by counsel for Mrs Thomson is of no avail to her for although the solicitors may have been the solicitors for the bank in certain respects they were not acting in those respects when the knowledge relied on (and for present purposes required to be assumed) was acquired by them. I do not think that the decision of this court in *Aboody*'s case is relevant to this question for the knowledge sought to be imputed to the bank related to the conduct of the husband and not the advice tendered to the wife. No doubt it was for that reason that no reference was made to s 199(1)(ii)(b).

Subject only to the one reservation I have indicated I agree entirely with the order proposed by Simon Brown LJ and his reasons for that proposal.

Appeal allowed.

3 June 1997. The Appeal Committee of the House of Lords (Lord Mustill, Lord Nolan and Lord Steyn) refused leave to appeal.

L I Zysman Esq Barrister.

Practice Note

COURT OF APPEAL, CIVIL DIVISION
LORD WOOLF MR, SCHIEMANN AND BROOKE LJJ
5 NOVEMBER 1997

Court of Appeal – Practice – Civil Division – Presentation of appeals – Skeleton argument – Timetable for lodging skeleton arguments – Appeals with fixed dates – Short warned list cases – Extension of time for lodging skeleton arguments.

Court of Appeal – Practice – Civil Division – Case management – Supervising Lords Justices – Directions concerning progress and conduct of appeals.

LORD WOOLF MR gave the following direction at the sitting of the court.

Introduction

This practice direction deals with two separate matters, the continuing problem of late skeleton arguments and the establishment of a new case management system in the Court of Appeal (Civil Division).

The court has been concerned for some time about the number of cases where skeleton arguments are lodged late. A recent analysis revealed that, in spite of clear directions from the court that the time limits are intended to be adhered to, we are still in the unsatisfactory position that just over 30% of skeleton arguments are lodged after the due date without any extension of time having been sought. Quite often the skeleton arguments are not lodged until the Civil Appeals Office staff have chased for them. Presiding Lords Justices, with the assistance of their clerks, will be taking steps to ensure that skeleton arguments are lodged timeously, and (with the exception of cases assigned to the short warned list), in future, requests for extensions of time for lodging skeleton arguments will normally be dealt with by a Presiding Lord Justice personally.

After consultation with the members of the court, the Master of the Rolls has invited a small team of Lords Justices (to be known as Supervising Lords Justices) to maintain oversight of groups of appeals. This will involve them in specific case management as well as keeping abreast of developments in their areas of litigation. They will welcome general information from the professional bodies and specialist associations about difficulties or initiatives of which the Court of Appeal should be aware. The membership of the team will change from time to time. The names of the current Supervising Lords Justices and their areas of responsibility are set out below.

Directions

Skeleton arguments

With effect from 10 November 1997 paras 49 and 50 of the practice direction on Court of Appeal procedure ([1995] 3 All ER 850, [1995] 1 WLR 1191) cease to have effect and the provisions in paras 2 and 3 below are substituted in their place.

2.(1) With the exception of cases assigned to the short warned list, applications for extensions of time for lodging skeleton arguments will normally be dealt with by the Presiding Lord Justice of the court in which the case is due to be heard.

(2) Applications for extensions of time should be made *well before* the date on which the skeleton argument is due to be lodged, save in cases where exceptional circumstances have made that impossible.

(3) Applications for extensions of time must be made by the advocate personally (not by his or her clerk, or instructing solicitor). Such applications should be made by letter or fax setting out the reasons why the prescribed timetable could not be complied with and what further time is required. As advocates will not usually know, when making the application, to which court the case has been assigned, the letter or fax should simply be addressed to 'The Presiding Lord Justice'. Such letters should be lodged with, or posted to, the Civil Appeals Progress Office (Room E307, Royal Courts of Justice, Strand, London WC2A 2LL); the fax number is 0171-936 6810. The Progress Office will then pass the letter or fax to the relevant Presiding Lord Justice.

(4) Only in exceptional circumstances will applications by telephone be entertained. If such a case arises the advocate concerned should initially telephone the Progress Office manager (0171-936 6096) explaining why it is not possible to make the application by letter or fax and the matter will then be referred to the Presiding Lord Justice.

(5) The court expects the time limits to be strictly adhered to and extensions of time will only be granted if the Presiding Lord Justice is satisfied that there are good reasons for doing so.

3. In the case of appeals and applications assigned to the short warned list, applications for extensions of time for lodging skeleton arguments will normally be dealt with by the Registrar of Civil Appeals and the letter or fax should therefore be addressed to him. Requests for cases to be removed from the short warned list and given a fixture will not automatically dispense advocates from the obligation to lodge skeleton arguments within the time limit specified in the short warned list letter. In some instances, before deciding whether the case should be taken out of the short warned list, the registrar will need to see the skeleton arguments in order to assist him to determine whether the case is one which satisfies the test for being given a fixture or second fixture. Where skeleton arguments are required for that purpose, the Civil Appeals Listing Office will inform the advocates concerned.

Case management

4. Supervising Lords Justices will give directions concerning the progress and future conduct of appeals of their own motion wherever they think fit, and most requests from parties for expedition or for other directions to be given will be referred to the relevant Supervising Lord Justice.

5. So far as possible, directions will be given on paper, in the interests of saving costs. In those cases where a hearing is necessary, it will be conducted before the Supervising Lord Justice in chambers (unless otherwise directed) and therefore both solicitors and counsel will have a right of audience. It will rarely be necessary for more than one counsel, or, where counsel has not been briefed, for more than one solicitor, to attend on behalf of any particular party.

6. Directions hearings will not be allowed to develop into satellite litigation. They are intended to be a speedy and informal means of arriving at practical solutions to unresolved problems relating to the preparation for and future conduct of the appeal. Attempts at 'point scoring' will not be tolerated. The Supervising Lord Justice will have read in advance the judgment under appeal, the notice of appeal and any respondent's notice, together with any correspondence or other documents which raise or define the issues to be decided at the directions hearing. Advocates should therefore proceed straightaway to make their points about those issues briefly and without any

opening or preamble. The costs of such directions hearings will be in the discretion of the court in the usual way. Although a shorthand note of the hearing will be taken, a detailed or lengthy judgment will not normally be given.

7. To ensure that all requests for directions are centrally monitored and correctly allocated, all requests for directions or rulings (whether relating to listing or any other matters) should be made to the Civil Appeals Listing Office. Those seeking directions or rulings must not approach the Supervising Lord Justice either directly, or via his or her clerk.

8. Where leave to appeal has been granted by a single Lord Justice, he or she may well give directions at that stage concerning the future progress and conduct of the appeal.

9. If directions are requested or needed close to the hearing date, the matter will normally be referred to the Presiding Lord Justice of the court in which the appeal is due to be heard. He or she will then make the necessary directions as a single Lord Justice or refer the matter to the Full Court.

10. The management of the list will continue to be dealt with by the listing officer under the oversight of the registrar. Subject to any direction given in any individual case by the Full Court or by a Lord Justice, the registrar and deputy registrar will continue to exercise their powers to give directions (RSC Ord 59, rr 9(3) and (4) and 14(1A)).

11. The current Supervising Lords Justices are:

Lady Justice Butler-Sloss and Lord Justice Thorpe	Family appeals
Lord Justice Millett and Lord Justice Morritt	Appeals from the Chancery Division
Lord Justice Pill	Appeals from the Lands Tribunal and cases involving issues relating to planning, highways, footpaths or the Countryside Act
Lord Justice Aldous	Patent appeals
Lord Justice Schiemann	Public law appeals (including appeals from the Immigration Appeal Tribunal) and cases involving points of European Community Law
Lord Justice Brooke	Appeals from the county courts (other than family cases)
Lord Justice Judge	Appeals from the Queen's Bench Division
Lord Justice Waller	Appeals from the Commercial Court
Lord Justice Mummery	Appeals from tribunals (other than the Immigration Appeal Tribunal and the Lands Tribunal)

12. As this system is new and experimental, any suggestions for improvement will always be welcome. Any suggestions or comments should be made in writing addressed to the Master of the Rolls.

Kate O'Hanlon Barrister.

R v Chief Constable of the Royal Ulster Constabulary, ex parte Begley
R v McWilliams

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD LLOYD OF BERWICK, LORD STEYN, LORD HOFFMANN AND LORD HOPE OF CRAIGHEAD

23, 24, 30 JULY, 16 OCTOBER 1997

Solicitor – Access to – Right of person in custody – Presence of solicitor during interview – Suspect arrested under prevention of terrorism provisions – No statutory right to have solicitor present – Whether common law right – Whether House of Lords permitted to infer such right – Prevention of Terrorism (Temporary Provisions) Act 1989, s 14(1).

On 5 March 1996 B was arrested in Northern Ireland under s 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989 in connection with the murder of a suspected terrorist. The police allowed him to consult privately with a solicitor, but refused permission for the solicitor to attend during police interviews. The Divisional Court dismissed B's application for judicial review of the decisions denying him the right to have his solicitor present during interviews on the ground that a person arrested under s 14(1) of the 1989 Act had no such legal right. M had also been arrested under s 14(1) in connection with a murder inquiry and was similarly refused permission to have a solicitor present during interviews. The Court of Appeal in Northern Ireland dismissed M's appeal against conviction for murder, ruling that he had no legal right to have a solicitor present during interviews. B and M appealed, contending that the common law already recognised a right in every person (including a person arrested under s 14(1) of the 1989 Act) to have the advice and assistance of a solicitor during police interviews and, if no such right existed, B and M invited the House to recognise that right.

Held – A person arrested under s 14(1) of the 1989 Act had no common law right to have a solicitor present during police interviews. Moreover, it would be impermissible for the House to develop the common law so as to recognise such a right, since it was the clearly expressed will of Parliament that persons arrested in Northern Ireland under s 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (as distinct from persons arrested there under other provisions or persons arrested in England and Wales under, inter alia, the same provisions) should not have the right to have a solicitor present during interview. It followed that both appeals would be dismissed (see p 837 *j* to p 838 *c* and p 839 *c* to *g*, post).

Notes

For detained persons' rights in general, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 726–730.

For the Prevention of Terrorism (Temporary Provisions) Act 1989, s 14, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1147.

Case referred to in opinions

Murray v UK (1996) 22 EHRR 29, ECt HR.

Appeals

R v Chief Constable of the Royal Ulster Constabulary, ex p Begley

Charles Begley appealed from a decision of the Queen's Bench Divisional Court (MacDermott LJ and Kerr J) on 6 March 1996 dismissing his application for an order of certiorari to quash two decisions of the Royal Ulster Constabulary on 5 March 1996 refusing to allow a solicitor to be present during police interviews. On 18 April 1996 the Divisional Court refused leave to appeal but certified that the following point of law of general public importance was involved in its decision: whether a person arrested under s 14 of the Prevention of Terrorism Act 1989 has (i) a right at common law to be accompanied and advised by his solicitor during interviews with the police or (ii) if such right did not exist at common law, can it now be said to exist in the light of the provisions of the Criminal Evidence (Northern Ireland) Order 1988 and in particular art 3 thereof. The facts are set out in the opinion of Lord Browne-Wilkinson.

R v McWilliams

Thomas Stewart Patrick McWilliams appealed against a decision of the Court of Appeal (Hutton LCJ, Carswell and Nicholson LJJ) dated 20 September 1996 dismissing his appeal against his conviction for murder by McCollum J sitting in the Crown Court at Belfast on 31 March 1995. On 16 October 1996 the Court of Appeal refused leave to appeal but certified that the following points of law of general public importance were involved in its decision. (1) When a judge is trying a case without a jury under the Northern Ireland (Emergency Provisions) Act 1991 in which it is proved that the accused has made confessions to terrorist crimes in the course of interviews where the solicitor of the accused was not present and during a period when access to consult privately with that solicitor was lawfully delayed pursuant to s 45(8) of the 1991 Act, and where the judge is satisfied beyond reasonable doubt that there was no improper conduct by the police to induce the accused to make the confessions, should the judge exclude the confessions from evidence pursuant to his discretion under s 11(3) of the 1991 Act on the ground that the absence of the solicitor from the interviews and the delaying of access to consult privately with the solicitor constitute or may constitute a breach of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms? (2) When a judge is trying a case without a jury under the 1991 Act and he is satisfied beyond reasonable doubt that confessions made by the accused to terrorist crimes and admitted in evidence are true, should the judge acquit the accused on the ground that convictions would be unsafe because there was or might be a breach of art 6 of the convention by reason of the fact that the confessions were made in the course of interviews when the solicitor of the accused was not present and during a period when access to consult privately with that solicitor was lawfully delayed pursuant to s 45(8) of the 1991 Act? The facts are set out in the opinion of Lord Browne-Wilkinson.

A D Harvey QC and *J F Larkin* (both of the Northern Ireland Bar) (instructed by *B M Birnberg & Co*, agents for *John J Rice & Co*, Newtownards) for Begley.

R E Weatherup QC and *Bernard McCloskey* (both of the Northern Ireland Bar) (instructed by the *Treasury Solicitor*) for the Crown.

Kevin Finnegan QC and *Seamus Treacy* (both of the Northern Ireland Bar) (instructed by *Madden & Finucane*, Belfast) for McWilliams.

J A Creaney QC and *P T Lynch* (both of the Northern Ireland Bar) (instructed by the *Director of Public Prosecutions*, Belfast) for the Crown.

Their Lordships took time for consideration.

On 30 July 1997 by orders of the House of Lords both appeals were dismissed for reasons to be given later.

16 October 1997. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, by orders of the House made on 30 July 1997 the appeals in the case of Begley against a decision of the Queen's Bench Divisional Court in Northern Ireland and in the case of McWilliams against a decision of the Court of Appeal in Northern Ireland were dismissed. I will now explain the reasons for those orders.

In the two appeals a single question of law arose regarding the rights of a person arrested under s 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989, viz a person arrested on the ground that he is or has been concerned in the commission, preparation or instigation of acts of terrorism. In the case of Begley, the Divisional Court certified a question of law in the following terms:

> 'Whether a person arrested under s 14 of the Prevention of Terrorism Act 1989 has (i) a right at common law to be accompanied and advised by his solicitor during interviews with the police or (ii) if such right did not exist at common law, can it now be said to exist in the light of the provisions of the Criminal Evidence (Northern Ireland) Order 1988, SI 1988/1987 and in particular art 3 thereof.'

The first part of the question is self-explanatory. The second part of the question is a reference to the change brought about by legislation in 1988 in Northern Ireland, which enables the court in certain circumstances to draw inferences from an accused's failure to mention particular facts when he is questioned, charged etc, if the accused 'could reasonably have been expected to mention [the facts].' Despite the language of the second part of the certified question, the question is not whether the legislation of 1988 created a right to have a solicitor present during interview: it plainly did not. The question is simply whether the radical change brought about in 1988 in Northern Ireland justifies a common law development to create such a right. The certified question in the case of McWilliams is wider in scope, but it was common ground at the hearing that it need not be considered separately.

Given the narrow question of law to be considered, the circumstances of the two appeals can be described quite briefly. The first case is that of Begley. On 5 March 1996 Begley was arrested under s 14(1) of the 1989 Act in connection with the murder of Gino Gallagher, who was reputedly a leading member of the proscribed Irish National Liberation Army (INLA). Begley was taken to the Castlereagh Police Office. The police allowed him to consult privately with a solicitor. On Begley's instructions the solicitor requested permission to attend the police interviews with Begley. The general practice of the Chief Constable of the Royal Ulster Constabulary is to refuse permission for solicitors to attend

interviews of persons arrested under s 14(1) of the 1989 Act, but occasionally it is permitted as a matter of concession. The police refused the request for the solicitor to attend Begley's interviews. The police first interviewed Begley in the evening of 5 March. On the next day the police allowed Begley, on two occasions, to consult privately with his solicitor and conducted further interviews with him in the absence of his solicitor. On 6 March Begley obtained leave to apply for judicial review of the decisions denying him the right to have his solicitor present during interviews. A few hours later the matter came on for hearing before a Divisional Court presided over by MacDermott LJ. The Divisional Court held that a person arrested under s 14(1) of the 1989 Act has no legal right to have a solicitor present during interviews and dismissed the application. As a result of things said by him in interviews Begley was charged with murder on 9 March 1996. Subsequently, he was committed for trial on a charge of murder. He still awaits trial.

The second case is that of McWilliams. On 11 March 1993 the police arrested McWilliams under s 14(1) of the 1989 Act in connection with a murder committed a few hours earlier by two masked gunmen. They took him to Castlereagh Police Office. Despite McWilliams' request for the attendance of a solicitor, the police denied him access to a solicitor for 56 hours. In delaying McWilliams' access to his solicitor, the police purported to act under s 45 of the Northern Ireland (Emergency Provisions) Act 1991. The lawfulness of the decisions to delay McWilliams' access to a solicitor is not an issue on his appeal. The pertinent matter on his appeal is that McWilliams was not allowed to have a solicitor present during a succession of interviews. In the first five interviews he remained silent. In the sixth interview, and before he had received any legal advice, McWilliams started making admissions which he later amplified. He was charged with murder. At his trial the only evidence against him was the admissions made in interview. Counsel for McWilliams asked the judge to exclude the evidence of the admissions on the ground inter alia that he had not been allowed to have a solicitor present during the interviews. The judge refused to do so. McWilliams was convicted of murder and of certain other charges by the judge sitting without a jury. He appealed to the Court of Appeal against his conviction on grounds which included the ground that he had not been allowed to exercise the alleged right to have a solicitor present during interviews. In giving the judgment of the court Carswell LJ (now the Lord Chief Justice of Northern Ireland) ruled that McWilliams had no legal right to have a solicitor present during interviews. In the result McWilliams' appeal was dismissed on all grounds.

Counsel for the two appellants adopted an identical stance. They submitted that as the law stood at the time of the making and coming into operation of the Criminal Evidence (Northern Ireland) Order 1988, SI 1988/1987, the common law already recognised a right in every person (including a person arrested under s 14(1) of the 1989 Act) to have the advice and assistance of a solicitor during police interviews. If that submission is rejected, counsel invited the House now to recognise such a right, notably because, as counsel put it, the legislation of 1988 'transformed the landscape of a criminal trial'. Counsel do not contend for an absolute right to have a solicitor present during interviews. At the request of the House counsel formulated the qualified right they contended for as follows: A person arrested under s 14(1) of the 1989 Act has the right to be accompanied by, and receive advice and assistance from, his solicitor during police interviews, unless the exercise of that right would lead to active disruption of the interview

or investigation, or (arising from concerns about any individual solicitor) would give rise to a risk of improper communication, or a fear for the safety of any person, or would otherwise be improper. This is the particular legal right which, if counsel's submissions are correct, was recognised by the common law or, if it was not, should now be recognised by the House.

The first step in the inquiry is to see how far the authorities have gone. Certainly, the common law recognised a general right in an accused person to communicate and consult privately with his solicitor outside the interview room. This development is reflected in the Judges' Rules and Administrative Directions to the Police which were published as Home Office Circular 89/1978 (see *Archbold's Criminal Pleading, Evidence and Practice* (42nd edn, 1985) para 15-46). The text expressly provided that the rules do not affect certain established principles, which included the principle:

> '(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so ...'

This principle was subsequently enshrined in legislation in England and Wales as well as in Northern Ireland, and the right was extended to persons suspected of having committed offences under the terrorism provisions. To that legislation I will turn later in this judgment. But this case is concerned with the separate and independent question whether every accused person has an established common law right to have a solicitor present during police interviews, regardless of the nature of the offence in respect of which he was arrested. Needless to say there is no decision or dictum in support of such a right. Indeed no such argument has ever been placed before a court. There is no academic support for the existence of such a right. Counsel invokes the principle already recited from the Judges' Rules as wide enough to embrace such a right. The passage in question, read in the context of the rules as a whole, is not capable of bearing the meaning that counsel seeks to put on it. If the Judges' Rules had been formulated on the supposition that a suspect already had a legal right to have his solicitor present during interview, it is inconceivable that such a right and the necessary qualifications to it would not have been spelt out in the elaborate statement of the rights of a suspect in the Judges' Rules.

The printed cases of the two appellants appeared to contend that art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969), as interpreted by the European Court of Human Rights in *Murray v UK* (1996) 22 EHRR 29, might give support to the appellants' contentions. But in *Murray*'s case the European Court of Human Rights specifically declined to make a ruling as to whether a refusal to allow a solicitor to be present during police interviews violates art 6. In these circumstances counsel for the appellants conceded that no assistance can be gained from art 6 or the jurisprudence of the European Court of Human Rights. One has therefore arrived at the position that there is no positive law to support the proposition that the common law recognised a right in a suspect to have his solicitor present during a police interview.

Counsel then approached the point from a rather different angle. They argued that even if the right to have a solicitor present during interview had not been established by specific judicial decision it was, nevertheless, part of the corpus of

the common law. They argued that the rationale of the general principle, which gave a suspect a right to consult a solicitor outside the interview room, is fairness. They argued that fairness similarly demanded the recognition, subject to qualifications such as they have put forward, of a general principle that any suspect should be entitled to have his solicitor present during interviews. What a court of law would have decided if such a common law issue had been presented to it is a hypothetical point. I am far from saying that a court could not have developed by analogy with the right to consult a solicitor privately a further right for the solicitor to be present during police interviews in aid of the fairness of the pre-trial procedure. But I am quite satisfied that such a common law principle has not been established to date.

That brings me to the alternative argument that the House should now, by analogy with the right to consult a solicitor outside the interview room and on the grounds of fairness, recognise a suspect's right to be accompanied by his solicitor in a police interview. This argument is reinforced by the fact that by the statutory provisions of 1988 the right of an accused person to remain silent in interview has been attenuated by the court's power to draw adverse inference from silence where it would be reasonable for the accused to be forthcoming in his responses to questions. This argument has considerable force. But it cannot be considered in isolation and divorced from the legislative framework made applicable to Northern Ireland. It is true that the House has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament. And that is in truth what the House is being asked to do.

Under s 58 of the Police and Criminal Evidence Act 1984 (PACE) any suspect (including a suspect arrested under s 14(1) of the 1989 Act) has a legal right to consult privately with a solicitor as well as a right to have a solicitor present during interview (see also the Code of Practice, Code C, para 6 and Annex B). That represents the law in England and Wales. A different regime applies in Northern Ireland. It is true that under the PACE legislation applicable in Northern Ireland a suspect has both the rights already described (see art 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, Code of Practice, Code C, para 6.1). But this does not apply to a person arrested or detained under the terrorism provisions (see art 59(12) and the Code of Practice foreword). A suspect detained under the terrorism provisions is merely entitled to consult privately with a solicitor (see s 15 of the Northern Ireland (Emergency Provisions) Act 1987, s 45 of the Northern Ireland (Emergency Provisions) Act 1991 and s 47 of the Northern Ireland (Emergency Provisions) Act 1996). The Code of Practice issued under s 61 of the 1991 Act is to the same effect (see para 6 and Annex B). Nowhere is there any reference to any right in a person arrested under terrorism provisions to have a solicitor present during interview. The differential treatment of persons suspected of having committed offences under the terrorism provisions in Northern Ireland is plainly part of a deliberate legislative policy. If this view needs further support it is to be found in the response of Parliament to the Review of the Northern Ireland (Emergency Provisions) Act 1991 (1995) (Cm 2706), prepared by Mr J J Rowe QC. Regarding the problem under consideration, he observed (para 130):

> 'I do not propose that solicitors should be present at interviews. I say that with reluctance. I heard great concern expressed by the legal profession

about the fact that they cannot be present. (There is no express rule against it: but the EPA Code does not provide for their presence.) The RUC oppose it. But quite apart from that it seems to me that the regime of a holding centre, as permitted, must be looked at as a whole. Section 11, and the courts' interpretation of it, permit lengthy and persistent questioning, probably more so than PACE (NI): to allow solicitors to be present at interviews would be contradictory. Putting it another way, the regime of the holding centres contemplates that kind of questioning; but solicitors, quite legitimately, by advising their clients not to answer, would impair that regime.'

It is of the first importance that, despite this clear statement of the prevailing view and practice in Northern Ireland, Parliament re-enacted the relevant provisions in the same form as in the 1991 Act on which Mr Rowe commented. The conclusion is inescapable that it is the clearly expressed will of Parliament that persons arrested under s 14(1) of the 1989 Act should not have the right to have a solicitor present during interview. In these circumstances I would reject the invitation to develop such a right as beyond the power of the House of Lords.

For these reasons I took the view that both appeals ought to be dismissed.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I too would dismiss both appeals.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he has given I would also dismiss both appeals.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I too would dismiss both appeals.

LORD HOPE OF CRAIGHEAD. My Lords, for the reasons given by my noble and learned friend Lord Browne-Wilkinson I also took the view that both appeals should be dismissed.

Appeals dismissed.

Celia Fox Barrister.

Practice Note
Smith v Cosworth Casting Processes Ltd

COURT OF APPEAL, CIVIL DIVISION
LORD WOOLF MR, PETER GIBSON AND SWINTON THOMAS LJJ
26 FEBRUARY 1997

Court of Appeal – Leave to appeal – Application for leave to appeal or to set aside leave to appeal – Guidance to court considering application.

Application

The defendant, Cosworth Casting Processes Ltd, applied to set aside the order of Otton LJ made on 17 September 1996 granting the plaintiff, Paul Anthony Smith, leave to appeal from the refusal of Judge Morris in the Worcester County Court on 22 August 1995, to grant him leave to appeal from the declaration by District Judge Vincent made on 15 February 1995 that his action had been struck out under CCR Ord 17, r 11 on 28 January 1995 and dismissing his appeal from the order of District Judge Freeman on 27 April 1995 refusing his application to reinstate the action. The defendant applied to the court for an order, inter alia, that the plaintiff's application for leave to appeal be dismissed.

Paul Downes (instructed by *Everatt & Co*, Evesham) for the defendant.
Simon Monty (instructed by *Connell Smith*, Worcester) for the plaintiff.

SWINTON THOMAS LJ (giving the first judgment at the invitation of Lord Woolf MR) delivered a judgment dismissing the application in which he said: The grant of leave by the single Lord Justice is in all ordinary circumstances conclusive and [the defendant] can only succeed in setting aside if he shows that in due time the appeal could not succeed.

PETER GIBSON LJ agreed.

LORD WOOLF MR. I agree entirely with the judgment which has been given by Swinton Thomas LJ. I only add to what has been said in order to give some general guidance as to applications for leave to appeal and applications to set aside such leave. The guidance which I propose to set out is largely a matter of common sense. It was because it was appreciated that this application might make it appropriate to give general guidance, that it has been heard by a three-judge court, whereas normally an application of this nature would be heard by two Lords Justices only.

The guidance is as follows.

(1) The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

(2) The court can *grant* the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal

has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.

(3) When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention of the parties and the court hearing the appeal. It is a misconception to assume that because only one aspect of the proposed appeal was mentioned in any reasons which were given, that leave was granted under a misapprehension that there were not other issues to be determined on any appeal unless the reasons make this clear.

(4) When leave is granted, the applicant does not need to know more than that he has the leave which he needs and therefore that he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application which is usually made ex parte.

(5) The heavy onus on a respondent who seeks to set aside leave is dealt with in the judgment of Swinton Thomas LJ which has just been given. I would only add that, before making such an application, the respondent must bear in mind that the fact that the appeal has no realistic prospect of success does not necessarily mean that leave should not have been given. The applicant will be required to establish that there was no good reason for giving leave, which may not be the same thing.

(6) In addition, it should be borne in mind prior to making such an application that this court is likely to be very unsympathetic to it being made if it will in effect involve the parties in exactly the same expense as determining the appeal itself, and will not necessarily save the time of the court but risk the court having to have two hearings when only one would be necessary if there was no application to set aside. It is appreciated that any litigant will feel aggrieved by being faced with delay in waiting to have an appeal heard which has no prospect of success. However, the only consequence of applications such as this having to be heard is to delay the hearings of appeals the determination of which serves some purpose. There are circumstances where an application to set aside leave is fully justified, but the present application does not fall within that category.

With regard to the last item of guidance, I would emphasise that I do accept what Mr Downes said to this court, that he gave very conscious and careful consideration as to the desirability of making the application. I fully accept that was done.

PETER GIBSON LJ. I agree with the guidance given by Lord Woolf MR.

SWINTON THOMAS LJ. I also agree.

Application dismissed.

L I Zysman Esq Barrister.

Curtis v London Rent Assessment Committee and others

COURT OF APPEAL, CIVIL DIVISION
BUTLER-SLOSS, HIRST AND AULD LJJ
1, 2, JULY, 9 OCTOBER 1997

Court of Appeal – Jurisdiction – Appeal by appellant against order in his favour – Appeal on ground that judge's reasoning wrong – Whether successful party can challenge reasoning of judge's order – Whether judge's order giving appellant all that he wanted or to which he was entitled – Whether Court of Appeal able to alter order below or grant effective relief.

Rent restriction – Rent – Determination of fair rent – Objection – Objection to rent determined by rent officer – Reference to rent assessment committee – Whether rent assessment committee entitled to have regard to registered fair rent comparables in determining a fair rent where close market rent comparables available – Whether rent assessment committee's reasons adequate – Rent Act 1977, s 70(1)(2)(3).

C owned two flats in a purpose-built terrace, one on the ground floor and one on the first floor, which were let on regulated unfurnished tenancies. In July 1993 fair rents were determined of £3,100 p a for the ground floor flat and £3,400 p a for the first floor flat under s 70[a] of the Rent Act 1977. In July 1995 the rent officer registered rents of £3,640 and £3,900 respectively for the flats. C referred the assessments to the rent assessment committee, seeking rents of £5,720 and £6,240, and relying on seven nearby market rent comparables. The committee accepted four of those comparables, although they identified differences between them and the subject flats, but having regard to the 1993 fair rent determinations, which they held had not been demonstrated to be unsound, and to their general knowledge of comparable registered rents, they concluded, after making appropriate deductions for those differences and for scarcity, neither of which they quantified in any way, that there was no reason to disturb the rent officer's registrations. C appealed to the court, which allowed his appeal on the ground that the committee had taken into account written assertions of the tenants made after the hearing. In quashing the committee's decision and remitting the matter to a differently constituted committee for determination in accordance with his judgment, however the judge held that the committee had been entitled to rely on their own knowledge of comparable registered rents and that their conclusion was one to which they could reasonably have come, but that the reasons they had given were inadequate, although not such as to lead to the inference that their decision making process was irrational or unlawful. Notwithstanding that he had obtained an order in his favour, C appealed to the Court of Appeal, contending that the judge's reasoning was wrong.

Held – (1) In general, an appeal to the Court of Appeal lay only against an order of the lower court and not the reasons for it. However, that principle applied only where the Court of Appeal could not alter the order made below or could not otherwise grant effective relief. In the instant case neither of those

a Section 70, so far as material, is set out at p 847 *e* to *j*, post

circumstances applied, since the relief sought included the remission of the matter for determination by a differently constituted committee in accordance with the judgment of the Court of Appeal, and if granted, that relief would affect the committee's determination. Moreover, if the judge's reasoning was wrong or such as possibly to mislead a new committee into repeating the errors of the present committee, his order had not given C all that he wanted and to which he was entitled, and it would be unjust to require him to submit to a redetermination in accordance with that reasoning. It followed that C could appeal against the judge's order (see p 856 *c* to p 858 *a* and p 870 *c* to *e*, post); *Lake v Lake* [1955] 2 All ER 538 distinguished.

(2) Following the Housing Act 1988, the best evidence of fair rent was close market rent comparables, and where such comparables were available enabling the identification of a market rent as a starting point, there was normally no need to refer to registered fair rent comparables at all. Moreover, where there was a significant difference between registered fair rent comparables and close market rent comparables, a rent assessment committee should not normally have regard to the former at all, and could not, in any event, properly prefer them to the latter without an explanation which would necessarily require some analysis. The judge had, therefore, erred in his reasoning and in holding that the inadequacy of the committee's reasons was not such as to lead to the inference that their decision making process was irrational or unlawful. Accordingly, the appeal would be allowed and the matter remitted to a differently constituted committee in accordance with the judgments of the Court of Appeal (see p 863 *f* to p 864 *f*, p 865 *d* to *f*, p 866 *f*, p 868 *f* to p 869 *a* and p 870 *c* to *e*, post); *Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee* (1996) 28 HLR 107 applied.

Notes

For the jurisdiction of the Court of Appeal, see 10 *Halsbury's Laws* (4th edn) para 900.

For determination of fair rent, see 27(1) *Halsbury's Laws* (4th edn reissue) para 776.

For the Rent Act 1977, s 70, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 893.

For the Housing Act 1988, see ibid 1053.

Cases referred to in judgments

Albyn Properties Ltd v Knox 1977 SLT 41, Ct of Sess.

Bolton Metropolitan DC v Secretary of State for the Environment [1995] 3 PLR 37, HL.

BTE Ltd v Merseyside and Cheshire Rent Assessment Committee (1991) 24 HLR 514.

Crake v Supplementary Benefits Commission [1982] 1 All ER 498.

Crofton Investment Trust Ltd v Greater London Rent Assessment Committee [1967] 2 All ER 1103, [1967] 2 QB 955, [1967] 3 WLR 256, DC.

Curtis v Chairman of the London Rent Assessment Committee, Susands v Chairman of the London Rent Assessment Committee (1996) 28 HLR 841.

District Estates Ltd v Chairman of the Merseyside and Cheshire Rent Assessment Committee [1997] NPC 39.

GREA Real Property Investments Ltd v Williams [1979] 1 EGLR 121.

Guppys (Bridport) Ltd v Sandoe (1975) 30 P & CR 69.

Guppys Properties Ltd v Knott (No 1) [1978] EGD 255.

Lake v Lake [1955] 2 All ER 538, [1955] P 336, [1955] 3 WLR 145, CA.

London Rent Assessment Committee v St George's Court (1984) 48 P & CR 230, CA.

Mason v Skilling [1974] 3 All ER 977, [1974] 1 WLR 1437, HL.
Metropolitan Properties Co (FGC) Ltd v Lannon [1968] 3 All ER 304, [1969] 1 QB 577, [1968] 3 WLR 694, CA.
Metropolitan Property Holdings Ltd v Finegold [1975] 1 All ER 389, [1975] 1 WLR 349, DC.
Metropolitan Property Holdings Ltd v Laufer (1974) 29 P & CR 172, DC.
Mountview Court Properties Ltd v Devlin (1970) 21 P & CR 689, DC.
North Western Estates Development Ltd v Merseyside and Cheshire Rent Assessment Committee (27 November 1996, unreported), QBD.
Northumberland and Durham Property Trust Ltd v London Rent Assessment Committee (29 February 1996, unreported), QBD.
Onslow v IRC (1890) 25 QBD 465.
Poyser and Mills' Arbitration, Re [1963] 1 All ER 612, [1964] 2 QB 467, [1963] 2 WLR 1309.
R v Criminal Injuries Compensation Board, ex p Cook [1996] 2 All ER 144, [1996] 1 WLR 1037, CA.
Save Britain's Heritage v Number 1 Poultry Ltd [1991] 2 All ER 10, [1991] 1 WLR 153, HL.
Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee (1996) 28 HLR 107, CA; *affg* (1994) 27 HLR 243.
Tormes Property Co Ltd v Landau [1970] 3 All ER 653, [1971] 1 QB 261, [1970] 3 WLR 762, DC.
Waddington v Surrey and Sussex Rent Assessment Committee [1982] 2 EGLR 107.
Western Heritable Investment Co Ltd v Husband [1983] 3 All ER 65, [1983] 2 AC 849, [1983] 3 WLR 429, HL.
Young v Secretary of State for the Environment [1990] 2 PLR 82, CA.

Cases also cited or referred to in skeleton arguments

Castle Court Investment Co (Southampton) Ltd v Southern Rent Assessment Panel (1994) Times, 9 July.
Hope v Secretary of State for the Environment (1975) 31 P & CR 120.
Learmonth Property Investment Co v Aitken 1970 SC 223, Ct of Sess.
Northumberland and Durham Property Trust Ltd v London Rent Assessment Committee (1997) Times, 26 June.
Palmer v Peabody Trust [1974] 3 All ER 355, [1975] QB 604.
R v City of Westminster Assessment Committee, ex p Grosvenor House (Park Lane) Ltd [1941] 1 KB 53, CA.
R v Poole BC, ex p Cooper (1994) Times, 21 October.
R v Secretary of State for the Enviroment, ex p Hackney London BC [1984] 1 All ER 956, [1984] 1 WLR 592.
R v Westminster City Council, ex p Ermakov [1996] 2 All ER 302, CA.
Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 4 All ER 840, [1997] 1 WLR 1538, CA.
Westminster City Council v Great Portland Estates Ltd [1984] 3 All ER 744, [1985] AC 661.

Appeal

Robert G Curtis (the landlord) appealed with the leave of the Court of Appeal from the order in his favour of McCullough J on 27 November 1996 whereby he (i) quashed the decision of the London Rent Assessment Committee made on 21 December 1995 for which written reasons were given on 16 March 1996

determining fair rents for the ground floor flat 50 Worcester Road and the first floor flat 46 Worcester Road, Walthamstow, London E17 5QR, and (ii) remitted the determination of such fair rents to the London Rent Assessment Committee for determination by a differently constituted committee in accordance with his judgment. The tenants of the flats, the second and third respondents, took no part in the appeal. The facts are set out in the judgment of Auld LJ.

James Bonney QC and *Jonathan Gavaghan* (instructed by *Drewitt Willan*, Manchester) for the appellant.

Kim Lewison QC and *John Hobson* (instructed by the *Treasury Solicitor*) for the first respondent.

9 October 1997. The following judgments were delivered.

Cur adv vult

AULD LJ (giving the first judgment at the invitation of Butler-Sloss LJ). This is an appeal, following the grant of leave by this court, by Robert G Curtis (the landlord), from an order in his favour of McCullough J of 27 November 1996 quashing determinations of the London Rent Assessment Committee of 'fair' rents of two unfurnished regulated tenancies for registration under Pt IV of the Rent Act 1977 and remitting the references to a differently constituted committee for determination in accordance with his judgment. The appeal raises three main questions. The first is whether and in what circumstances a successful party can challenge in the Court of Appeal the reasoning of the judge below. If such a challenge can be made, the second and third questions concern the lawfulness and rationality of the committee's mode of assessment and the adequacy of its written reasons.

The Rent Act 1965 introduced a scheme for regulating unfurnished tenancies and for rent control of them by the registration of fair rents. The Rent Act 1974 extended the scheme to furnished tenancies. Parts III and IV of the Rent Act 1977 now contain the statutory scheme. It enables limitation of the recoverable rents of regulated tenancies by entry of them in registers maintained by rent officers for local authority registration areas. Either party may apply to a rent officer to register a rent, which means, albeit indirectly introduced in s 67(2) of the Act, 'a fair rent'. The rent officer's determination of such a rent is subject to appeal by reference to a rent assessment committee, consisting usually of a legally qualified chairman, a surveyor and a lay member.

The 1977 Act does not define 'a fair rent', but s 70 of it describes how it is to be determined. Its effect is to take as its starting point the market rent for the premises in their current state, assuming a hypothetical absence of scarcity of similar properties available for letting in the locality and disregarding the personal circumstances of the landlord and tenant and certain other matters, including disrepair or defects for which the tenant is responsible or improvements made by him.

The Housing Act 1988 created new forms of tenancy from 15 January 1989, assured periodic tenancies and assured shorthold tenancies at open market rents. Such rents were to be determined by the parties in the first instance and, on the proposal by a landlord of a new rent, by a rent assessment committee if required by the tenant. Section 14 provides that a market rent is that which, subject to certain considerations, the property 'might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy'. The Act also

provided for a phasing out of the regime of regulated tenancies and registered 'fair' rents provided by the 1977 Act. The phasing out will take a long time since it is to be achieved by freeing only post-1988 Act tenancies, subject to certain exceptions, from the control of the earlier legislation. There are thus two systems of statutory control of tenancies and rents, a substantial but dwindling body of pre-1989 regulated tenancies for which fair rents may be registered and a growing number of assured tenancies at market rents. In most cases registered fair rents are significantly lower than market rents for comparable properties. McCullough J neatly summarised the effect of the two systems in his judgment as follows:

> '... unless the tenant requires the intervention of the rent assessment committee, the rent is fixed in a real market. Thus, given two dwellings in a comparable location, with comparable accommodation, in a comparable state of repair and decoration ... and let on the same terms, if one was let before 15 January 1989 and the other on or after that date, the tenant of the former will pay a lower rent than that paid by the latter unless there is no scarcity component in the rent of the latter.'

Before 1989 rent officers and rent assessment committees, when determining fair rents for registration under the 1977 Act, most commonly looked to other registered rents as comparables. There were then relatively few market rent comparables. Since that time market rents of assured tenancies of similar dwellings have become increasingly available as comparables and starting points for determination of 1977 Act fair rents.

The main substantive issues raised by this appeal are whether rent officers and rent assessment committees: (1) should normally determine fair rents by reference to market rent comparables rather than fair rent comparables when both are available; (2) should, if they prefer fair rent comparables or some other method to available market rent comparables, have good reasons for doing so; and (3) should explain their reasons adequately, setting out their workings arithmetically if necessary.

The Court of Appeal considered these issues, obiter, in *Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee* (1996) 28 HLR 107. Morritt LJ, with whom Glidewell LJ and Sir John May agreed, held, as part of the ratio, that a 'fair rent' under the 1977 Act is the same as a 'market rent' under the 1988 Act save for the assumption of no scarcity and allowing for the statutory 'disregards', and that, in assessing a fair rent, regard should be had to market rent comparables if any. He said (at 122–123):

> '... the fair rent to be determined is a market rent less the disregards and discounted for scarcity. Thus ... if there is no scarcity and no disregards then the rents should be the same whether the tenancy is a regulated tenancy or an assured tenancy.'

As to the issues here, the sense of Morritt LJ's obiter observations were: (1) that where there are good market comparables, such as assured tenancies of flats in the same block virtually identical to that for which a fair rent is to be determined, those comparables should normally be adopted as the means of assessing the fair rent; and (2) that in such circumstance if a committee departs from such approach they should explain why; and (3) the extent to which they should explain their

reasoning must vary with the nature of the decision and of the case generally and that their 'workings' or figures may well be required.

Uncertainty about the interpretation of those observations and about their effect in law have caused difficulties for at least some rent assessment committees. Those difficulties are reflected in some inconsistency in approach by judges at first instance on appeal from assessments. It is said that landlords rely on the observations as authority for the propositions that rent officers and rent assessment committees should no longer rely on previous determinations and registered fair rent comparables, but should instead refer to market rent comparables and should explain their determinations, setting out their arithmetical workings. Some rent assessment committees have taken a contrary view—dismissing Morritt LJ's observations as obiter—stating that it is sufficient to rely without more on general or particular registered fair rent comparables to meet a challenge based on market rent comparables, and that, in any event, there is no need to give detailed reasons, still less arithmetical workings, whichever method of assessment they use.

Before considering the *Spath Holme* case and its effect in greater detail, I should set out s 70 of the 1977 Act. It provides for the determination of 'a fair rent' for registration under the Act. In sub-ss (1) and (2) it sets out respectively the criteria for and the assumption of no scarcity to be made in determining such a rent and, in sub-s (3), the matters to be disregarded when making the determination.

> '(1) In determining, for the purposes of this Part of this Act, what rent is or would be a fair rent under a regulated tenancy of a dwelling-house, regard shall be had to all the circumstances (other than personal circumstances) and in particular to—(a) the age, character, locality and state of repair of the dwelling-house, (b) if any furniture is provided for use under the tenancy, the quantity, quality and condition of the furniture, and (c) any premium, or sum in the nature of a premium, which has been or may be lawfully required or received on the grant, renewal, continuance or assignment of the tenancy.
>
> (2) For the purposes of the determination it shall be assumed that the number of persons seeking to become tenants of similar dwelling-houses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the number of such dwelling-houses in the locality which are available for letting on such terms.
>
> (3) There shall be disregarded—(a) any disrepair or other defect attributable to a failure by the tenant under the regulated tenancy or any predecessor in title of his to comply with any terms thereof; (b) any improvement carried out, otherwise than in pursuance of the terms of the tenancy, by the tenant under the regulated tenancy or any predecessor in title of his; (e) if any furniture is provided for use under the regulated tenancy, any improvement to the furniture by the tenant under the regulated tenancy or any predecessor in title of his or, as the case may be, any deterioration in the condition of the furniture due to any ill-treatment by the tenant, any person residing or lodging with him, or any sub-tenant of his...'

SPATH HOLME

In the *Spath Holme* case the rent assessment committee had rejected market rent comparables as an indicator of market rent for the subject premises, because, inter alia, they were not satisfied of the actual absence of scarcity, and thus found that the landlord had not demonstrated the unsoundness of registered fair rent

comparables. Harrison J ((1994) 27 HLR 243), whose first instance judgment to quash the determination of the rent assessment committee was upheld by the Court of Appeal, set out (at 257) the following six principles:

> '(1) A "fair rent" under section 70 of the Rent Act 1977 is the market rent adjusted for the scarcity element under section 70(2) and disregarding the personal circumstances mentioned in section 70(1)and the matters specified in section 70(3). (2) There are various methods of assessing the fair rent, including the use of registered fair rent comparables and the use of assured tenancy comparables. (3) The method or methods adopted by a rent assessment committee may vary according to the particular circumstances of each case. (4) The rent assessment committee must consider, and have regard to, the method or methods suggested to them by the parties. (5) In deciding which method to adopt the rent assessment committee must take into account relevant considerations and give adequate reasons for their choice of method. (6) Subject to compliance with those requirements, the rent assessment committee is free to adopt the method which appears to them, on the evidence, to be the most appropriate method provided it is not a method which is either unlawful or unreasonable. It follows from a consideration of those principles that a rent assessment committee is not bound to use assured tenancy comparables in determining a fair rent under section 70, although that method may be expected to be used increasingly in the future in the same way as registered fair rent comparables were used increasingly following the advent of the Rent Acts.'

Harrison J (at 258) added that it was open to a committee to adopt either the market rent or registered rent approach, or both, depending on the material before them, and that the absence of scarcity was no reason for rejecting market rent comparables. He said, however, that a committee would have to show weighty reasons for departing substantially from market rents recently agreed on similar flats within the same block, as in that case.

On appeal to the Court of Appeal the rent assessment committee maintained that adjusted market rents could not be used as comparables to determine fair rents. Not unnaturally in the light of that contention, it also expressed concern about Harrison J's observation on the need to show weighty reasons for departing from assured rent comparables, since market rents and fair rents are not the same. As I have said, the Court of Appeal upheld Harrison J's approach and implicitly approved his six principles. It held that, subject to scarcity and disregards, a fair rent is a market rent—ie an adjusted market rent—and that market rent comparables where they exist are matters to which a rent officer or committee may have regard when assessing a fair rent.

However, in response to submissions made on behalf of the chairman of the committee, based on his concern as to how a committee should approach and explain their decision when there are both fair and market rent comparables, Morritt LJ went on to give some general guidance on those matters. In observations that may be obiter but, in my view, flow from the main ratio of his judgment that a fair rent is an adjusted market rent and that market rent comparables are relevant to the assessment of a fair rent, he said ((1996) 28 HLR 107 at 123–124):

> 'In this case there are a number of flats in the same block let on assured tenancies at, by definition, open market rents which are virtually identical to

those for which a fair rent is to be determined. In my judgment if, in those circumstances, a rent assessment committee wishes to exercise its discretion to adopt some other comparable or method of assessment it will be failing in its duty to give reasons if it does not explain why. In this case the third reason given by the rent assessment committee as recorded by the judge was that the registered rent comparables had not been demonstrated to be unsound. That is not, of course, a reason for rejecting the assured tenancy comparables. It is not for the court to say in advance what would be a good reason for doing so but if such a reason involves "working through" such comparables so be it: that consequence is no ground for rejecting the validity of its cause. But it should also be noted that the registered rent comparables are not in their nature any more or less sound than the open market rent with or without discount. Any registered rent has built into at least two variables namely the open market rent and the discount for scarcity. Each should have been considered at the time of the original determination. The assessment of the soundness of that registered rent for use as a comparable would require each of those variables to be reconsidered at the time of their possible use as a comparable. In this connection it was also objected that if the rent assessment committee were required to give detailed reasons that might necessitate giving detailed arithmetical workings or quantifying the degree of scarcity involved contrary to statements in *Guppy's Property v Knott* ([1978] EGD 255) and *Metropolitan Properties v Laufer* ((1974) 29 P & CR 172). But those statements were made in relation to the facts of those cases. It does not follow that there will not be cases in which the duty to give reasons will require such workings or quantification to be afforded.'

Before I turn to the facts of this case, I should mention that Morritt LJ's observation in the above passage that the soundness of registered rent comparables should be reassessed at the time of their possible use as comparables has occasioned some confusion. McCullough J read it as a reassessment of the original determination. I read it, as McCullough J thought it should read, as a reassessment in the light of the circumstances at the time of its possible use as a comparable. However, as the most usual yardstick for such reassessment is likely to be the market rent derived from market rent comparables, it is difficult to see the point of such an exercise (there is a possibility of using return on capital as a means of determining market, and hence fair rent—see *Western Heritable Investment Co Ltd v Husband* [1983] 3 All ER 65 at 69, [1983] 2 AC 849 at 857 per Lord Keith—but recourse to such a method appears to be unusual). If there are market rent comparables from which the fair rent can be derived, why bother with fair rent comparables at all?

Perhaps more importantly, Morritt LJ, in making that observation, seems to me simply to have been making the point that registered rent comparables if relied on, just as market rent comparables if relied on, must be brought up to date by some process of working through or quantification. He was not suggesting, as has been assumed by Mr Bonney QC in his submissions, that where there are both market and fair rent comparables the former or some other yardstick should be used to test the current validity of the latter. As I understand his general reasoning, his view was that where there are close market rent comparables, there is normally no need to consider fair rent comparables.

THE FACTS

I turn now to the facts of this case, the determination of the rent assessment committee and the judgment of McCullough J.

The landlord owned two similar flats in a two-storey purpose-built terrace of flats, one on the ground floor and one on the first floor. Both were regulated unfurnished tenancies. On 8 July 1993 a rent assessment committee had determined fair rents of £3,100 pa for the ground floor flat and £3,400 pa for the first floor flat. Two years later, on 14 July 1995, on the landlord's application for the determination of £5,200 pa and £5,720 pa as fair rents for the flats respectively, the rent officer registered rents of £3,640 and £3,900. The landlord referred these assessments to the respondent rent assessment committee, seeking before it somewhat higher rents than he had put to the rent assessment officer, namely £5,720 pa and £6,240 pa respectively. There was thus a very substantial difference between the rent officer's registrations and the market rents based on the landlord's market rent comparables, over £2,000 pa in each case.

At a hearing on 21 December 1995 the committee received written and oral submissions from the landlord and written submissions from the tenants, who did not attend. The landlord relied on as comparables seven assured short-hold tenancies of identical or very similar flats in the same block and in a similar block in an adjoining road, the market rents of which broadly matched those which he sought. He also maintained, producing written confirmation from two local estate agents, that there was no scarcity of such properties in the area, the relevance being that the market rent that such comparables might suggest for the subject properties would not require adjustment downwards to take account of the no scarcity assumption required by s 70(2).

The landlord invited the committee to adopt the approach indicated by Morritt LJ in the *Spath Holme* case. He urged them to deal with each of his assured tenancy comparables, indicating their workings and quantifying any substantial scarcity that they found and, if it departed from them, stating their reasons for doing so.

The committee also had before it the registered rents for the two flats as determined by the rent officer in 1993 and a report and a schedule prepared by her of registered rents of other properties in the area indicating a range of comparables well below the market rent comparables on which the landlord relied. The rent officer's report also referred to recent market research information and a market evidence database held by her office indicating a local scarcity of similar property. The tenants, in their written submissions, referred respectively to the extent of the increases in rent over the preceding ten years in contrast to increases in pension and to the installation of tenant's fittings. On the day of the hearing the committee inspected both of the subject flats externally and one internally. They also inspected externally the main comparables upon which the landlord relied.

After the hearing, but before the committee provided their decision, Latham J allowed an appeal by the same landlord against the same committee in respect of their determination of a fair rent for one of the comparables relied upon by the rent officer in this case, a ground floor flat almost identical to the subject ground floor flat: see *Curtis v Chairman of the London Rent Assessment Committee, Susands v Chairman of the London Rent Assessment Committee* (1996) 28 HLR 841. There, the landlord had contended for a fair rent of £5,200 pa and the committee had determined a fair rent of £3,380 pa. Latham J, in quashing the assessment and remitting it for redetermination by a differently constituted committee, criticised

the committee for only paying lip service to the *Spath Holme* principles, for apparently applying an uplift from the previous registered rent rather than having regard to an obvious market rent comparable and for failing adequately to explain why they had taken that course. They had purported to explain it by stating that they had 'gained more help' from the committee's previous determinations of the subject premises and by concluding in para 7 of their statement of reasons:

> 'Having regard to the evidence, to our inspection, to our own knowledge and experience, and to the provisions of section 70 of the Rent Act 1977 we determined the fair rent exclusive of rates to be ... [£3,380 pa].'

Latham J's comment (at 849–850) on an almost identical paragraph in the committee's reasons in one of two unsuccessful appeals by Susands heard together with that of Curtis was:

> 'Now that the Court of Appeal has underlined both the objective as identified by Harrison J., and the need to give reasons, Rent Assessment Committees can expect the court to look with some care at the sort of bare assertions that are set out in paragraph 9 of these reasons.'

Returning to this case, the landlord, by letter to the clerk of the committee of 6 February 1996, sought to make further submissions, which he set out in the letter. He referred to Latham J's criticisms in *Curtis and Susands'* cases, in particular, as to the committee's failure to explain their decision so as to demonstrate that they had had proper regard to the market rent comparables and how they had dealt with them. By letter of 9 February 1996, the clerk to the committee wrote enclosing their decision and returning his letter, stating that the chairwoman had determined that the committee would not consider it because neither the sealed court order nor the approved transcript of Latham J's judgment was available. The letter did, however, indicate that the committee had removed the property from their consideration as one of the fair rent comparables relied upon by the rent officer.

THE RENT ASSESSMENT COMMITTEE'S DETERMINATION

By their decision the committee confirmed the rent officer's determinations of £3,640 pa for the ground floor flat and £3,900 for the first floor flat, a modest increase in each case on the 1993 determinations for the premises.

The written reasons of the committee indicate how they say they approached their task. I summarise it as follows. They considered the seven market rent comparables upon which the landlord relied, and accepted four of them as 'provid[ing] current market rental evidence for the subject flats forming the basis of their assessment of their fair rent assessment'. They gave reasons for rejecting the other three. They identified in some detail differences between the four market rent comparables and the subject flats, but did not quantify the effect of those differences in monetary or percentage terms. They concluded, having heard conflicting evidence from the landlord and the rent officer, that there was scarcity, which they did not quantify in percentage or other terms. They referred to the 1993 determinations of fair rents for the subject premises, which they stated had 'not been demonstrated to be unsound'. They presumed that those determinations reflected the scarcity element at the time they were made and accepted evidence from the rent officer, seemingly derived from her own market research survey and/or database, that market rent levels in the area had been static for two years. They had regard to the previous determinations and to their

general knowledge of comparable registered rents. They made 'appropriate deductions' for the differences between the four market rent comparables and the subject premises and allowed for scarcity, neither of which they quantified in any way. 'Having done so, they saw no reason to disturb the rent officer's registrations.'

I set out below some of the more critical passages of the written reasons. First, the chairwoman rehearsed the scheme of the landlord's submission:

> '7. On the subject of a fair rent the landlord cited passages from the *Spath Holme* case ([1995] 2 EGLR 80) and summarised the findings of the SLA [Small Landlords' Association]. He requested the committee, following the *Spath Holme* case, to work through the assured tenancy comparables giving their workings or quantification of any substantial scarcity. He concluded ... by stating that the starting point for assessing a fair rent is the market rent adjusted for any scarcity element ...'

She mentioned the other material and submissions to which I have referred and the committee's inspections, and set out the legal basis of their approach to the factual issues before them:

> '13. The Committee's objective was to determine a fair rent which was a market rent adjusted for scarcity in accordance with the first principle laid down by Harrison J. in the *Spath Holme* High Court case and approved by the Court of Appeal. They accepted that in this instance [four of seven of] the landlord's assured shorthold tenancy comparables ... provided current market rental evidence for the subject flats forming the basis of their fair rent assessment. Whilst they observed that the properties were similar, the lettings were not identical to the regulated tenancies because they were assured shorthold tenancies, as opposed to assured tenancies, as in the *Spath Holme* case. As the Committee are bound to have regard to all the circumstances (other than personal circumstances) under section 70(1) of the Rent Act 1977 they found that there were the following differences between the market rent comparables and the subject flats ...'

The chairwoman then referred to differences of size, standard of kitchen fittings, repairing liabilities and 'a perceived enhanced value arising in short term lettings'.

On the issue of scarcity, the chairwoman referred to the test of Lord Widgery CJ, with which Mais and Croom-Johnson JJ had agreed, in *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389 at 394, [1975] 1 WLR 349 at 353–354, that it must be taken over a broad area, not just the immediate locality. She and her fellow members of the committee rejected the views of the two local estate agents on whom the landlord relied because, in their view, they related to the immediate locality only and because they were simply assertions of opinion unsupported by 'hard evidence'. She expressed the committee's view, in reliance on the rent officer's report based on her general knowledge of scarcity of property of the sort in the area and on the short time it had taken the landlord to let some of the properties on which he had relied as comparables—

> 'that there was a substantial shortage of basic unimproved property to let at lower levels of rent for which there is an unfulfilled demand and which is reflected in the market rents the landlord [was] able to achieve ... They

concluded that a discount from market rents must be applied to account for the scarcity factor.'

Having gone thus far along the market rent comparables route, the chairwoman then purported to test them and their conclusion as to scarcity by reference to registered rents comparables, before expressing the committee's conclusion:

'16. The committee had regard to the report from the Rent Officer which was in evidence and which referred to her own extensive market evidence research and survey recently conducted from information obtained from many agents and landlords from which the Rent Officer had concluded that there was a dearth of flats available to rent in Waltham Forest without floor covering, white goods and central heating.

17. The rents previously determined for the subject flats by a Committee ... with effect from 21 June 1993 have not been demonstrated to be unsound and are presumed to have reflected the scarcity element at that time. Evidence obtained by the Rent Office suggests that market rent levels have been static, Forest Bureau [one of the agents upon whom the landlord relied] apparently stating that it has been static for over two years. This would tend to show that there has been no marked diminution in scarcity since the last fair rent determination ...

19. The Committee had regard to their knowledge of comparable registered rents and also to the last Committee decision in respect of the subject flats ...

21. In reaching their decision based on likely market rents for the subject flats the Committee have made appropriate deductions from the landlord's market rent comparables for the difference commented on between those and the subject flats as well as a discount for the scarcity element. Having done so they [saw] no reason to disturb the Rent Officer's registrations. Nor did they consider that in the circumstances of this case it was appropriate to offer artificial calculations, detailed workings or hypothetical percentages; they were entitled as a tribunal expert in valuation to rely upon a broad but well-founded assessment approach.

22. Having regard to all the evidence put before them, to their inspection, to their own knowledge and experience, and to the provisions of section 70 of the Rent Act 1977 the Committee confirmed those fair rents to be registered ...'

That last paragraph, it should be noted, was in the same terms as the paragraph in *Curtis and Susands'* cases which Latham J had regarded as unsatisfactory. However, here the committee have reasoned their decision more fully before expressing their conclusion in that way than they did in that case.

McCULLOUGH J'S JUDGMENT

The landlord appealed to McCullough J on 18 grounds. He succeeded on one only, namely that the committee had taken into account written assertions of the tenants as to their responsibility for internal repairs made after the hearing and of which they (the committee) only informed him after their decision. On that procedural ground McCullough J quashed the committee's decision and remitted the matter to a differently constituted committee for determination in accordance with his judgment.

The landlord is concerned about the grounds on which he failed before the judge, notwithstanding his success in having the committee's decision quashed and remitted for redetermination. That is because he maintains that the judge wrongly rejected those grounds and that the new committee, having regard to the judge's rulings, are likely to make the same mistakes again. He maintains that the committee, whilst acknowledging the *Spath Holme* principle that a fair rent is a market rent adjusted for scarcity and the 'disregards', failed to apply it on the evidence before them and failed adequately to explain their decision. He says that, despite what they said, they wrongly rejected the assured tenancy comparables as the best evidence of fair rents for the subject properties and wrongly relied on the registered rent comparables and their own knowledge of the registered rents of other unspecified properties. He argues that the committee failed to identify any workings or calculations quantifying the differences to which they had referred between his market rent comparables and the subject premises or as to the scarcity element and that, overall, they had shown no good reasons for departing from the comparable market rents as indicators of fair rents. He relies also, in this connection, on the chairwoman's refusal to take account of Latham J's judgment in *Curtis and Susands'* cases.

McCullough J found, in reliance on the committee's assertions, that they had 'accepted' four of the landlord's seven assured tenancy comparables as 'forming the basis of their fair rent assessment'; that they had made 'appropriate', though unspecified, deductions for the differences, which they had identified, and for scarcity. He regarded that as sufficient 'working through'—as sufficient and implicit reasoning that the deductions taken together were of sufficient weight to adjust the market rent comparables to the rent officer's registrations. He held that it was well established that the committee was entitled to rely on their own knowledge of comparable registered rents without having to specify the properties for which they had been registered (citing *Crofton Investment Trust Ltd v Greater London Rent Assessment Committee* [1967] 2 All ER 1103 at 1108, [1967] 2 QB 955 at 967 per Lord Parker CJ, *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304 at 308–309, 312, [1969] 1 QB 577 at 597, 603 per Lord Denning MR and Edmund Davies LJ and *Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172 at 176 per Lord Widgery CJ). He equated the exercise with the reliance of a judge in a criminal court on his general knowledge of sentencing levels when fixing on an appropriate penalty.

As to the committee's reliance on the previous (1993) registered rents for the flats, McCullough J accepted, in reliance on pre-1988 Act authorities, that, in the absence of material to suggest to the contrary, a rent officer or rent assessment committee was entitled to assume that the fair rent last determined for the premise had been properly determined (see *Tormes Property Co Ltd v Landau* [1970] 3 All ER 653 at 655, [1971] 1 QB 261 at 266 per Lord Parker CJ, *Mason v Skilling* [1974] 3 All ER 977 at 979, [1974] 1 WLR 1437 at 1439 per Lord Reid and *London Rent Assessment Committee v St George's Court* (1984) 48 P & CR 230 at 235 per Griffiths LJ). However, he was of the view that where, as in *Spath Holme*, there was evidence that fair rents had fallen far behind market rents, allowing for the element of scarcity in the latter, such difference would, as Morritt LJ said, require reconsideration of the 'soundness' of the registered rent as a comparable. This is how he expressed the point:

> '... in general ... experience since 1989 has increasingly shown that fair rents have fallen too far behind market rents (allowing for the element of

> scarcity in the latter). As the years progress this disparity may be expected to diminish and, ideally, should be eliminated ... If that is right, then the assumption ... will more often, and perhaps generally be displaced. Nowadays it will more often, and perhaps generally, be shown that the market rents of matching premises (ie those to all intents and purposes exactly comparable) let on matching assured tenancies suggest a fair rent significantly greater than that suggested by the last rent registered for the subject premises. Where it is, the very fact of this difference will prompt the need for the reconsideration of which Morritt LJ spoke.'

McCullough J, having gone that far, and whilst expressing concern about the committee's failure to quantify its deductions for the differences between the assured tenancy comparables and the subject flats and for the element of scarcity, nevertheless appears to have felt trapped by the committee's implicit reasoning in their statement of reasons that their 'appropriate deductions' for those factors reduced the market rents to the levels of those registered by the rent officer. This is how he dealt with the matter:

> 'It does not ... necessarily follow that with "appropriate deductions" the market rents of his comparables will have reduced to the level of the previously registered rents of the subject premises, suitably adjusted for inflation. The committee would appear to have thought that they did, and it is difficult to say that this was a conclusion that they could not reasonably reach. [Had they disclosed figures for their "appropriate deductions" one could have seen whether this was so, but they did not.]'

As to the landlord's complaint and his counsel's submission about the absence of figures, McCullough J said:

> 'I think there is force in this submission. The *Spath Holme* case does not go so far as to require figures in every case, but I would echo what Latham J said in *Curtis v London Rent Assessment Committee* by saying that the court is more likely than hitherto to expect them. If adequate reasons are not given for the decision of a rent assessment committee the fact that its members have knowledge and experience of their subject provides, in my judgment, no excuse. Rather should it facilitate the explanation of the reasoning used. If figures are used there is no difficulty in telling the parties what they are. In this case "appropriate deductions" were made; so figures were used. The committee considered whether "to offer artificial calculations, detailed workings or hypothetical percentages" and decided it would not be "appropriate". Those dissatisfied with decisions of rent assessment committees do not ask for anything artificial or hypothetical; they want to know how the committee reached its conclusion. I would be surprised if any complicated mathematics was ever needed: some simple subtraction and perhaps the odd percentage should surely do.'

McCullough J then set out an example of what he had in mind from a decision of the Southern Rent Assessment Panel in December 1994 and continued:

> 'The question for the court, however, is not whether figures could easily have been provided let alone whether the court would have preferred to see them included—as it would; it is whether the decision of the committee can be castigated as unlawful because they were not provided. I would like to

hold that it should, but, at the end of the day, though I have hesitated about it, I do not think that I can. This is chiefly because the committee dealt so fully, albeit without providing figures, with the differences between ... [the landlord's] comparables and the [subject] tenancies ... Of a committee's reasons the opaque paragraph to which Latham J referred, and which the London Rent Assessment Committee appears to adopt as a matter of routine, says nothing. Had it stood alone my decision would have been to the contrary ... I would express the hope that, when ... [the landlord's] application is reconsidered, the committee's reasons, whatever their decisions will inform the parties of such simple arithmetic as was used in reaching them.'

APPEAL BY A SUCCESSFUL PARTY

The first matter for consideration is whether the landlord can appeal from the order of McCullough J, notwithstanding that it was the order he sought, because he is dissatisfied with some of the judge's reasoning with which, in accordance with the order, a differently constituted committee is to redetermine the matter. The judge's order had two parts, a quashing of the decision of the committee and a remission of the matter, pursuant to RSC Ord 55, r 7(5), to a differently constituted committee for determination in accordance with his judgment.

Lake v Lake [1955] 2 All ER 538, [1955] P 336, a divorce case, is the authority most commonly cited for the proposition that an appeal lies only against an order not the reasons for it. There, a wife respondent who had been found guilty of adultery, but who had succeeded in defending her husband's divorce petition on the ground of condonation, sought to appeal the finding of adultery. Evershed MR, with whom Hodson and Parker LJJ agreed, held that the wife's right of challenge went only to the form of order not to the reasons for it.

Evershed MR's reasoning turned on two points: first, the form of the order, namely that the husband 'had not sufficiently proved the contents of the petition'; and second, the wording of the then Ord 58, r 1 (the predecessor of today's Ord 59, r 3(2)), permitting appeal from 'the whole or any part of any judgment or order'. As to the form of the order, he said ([1955] 2 All ER 538 at 540–541, [1955] P 336 at 342–343):

'The ... question that we must decide is whether ... there is, properly speaking, any subject-matter on which we could properly entertain an appeal. I have come to the conclusion that there is not. It is quite clear from the form of order or judgment ... that it does record accurately the conclusions which, in the end, the commissioner reached ... I start by assuming and accepting that this is an appropriate and correct form of order. From that it seems to me to follow inevitably that we could not now entertain an appeal on this matter of fact: Aye or no, was the wife guilty of adultery? For, even if we came to the conclusion that the commissioner formed a wrong view on the facts, we could not make any alteration at all in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. As I indicated to counsel for the wife, let it be supposed that he were free to raise this matter in the court and that the court came to the conclusion ... that the manner of the trial of this issue was not satisfactory, the right course for the court to take, presumably, would be then to order a new trial. A new trial of what? That again, as I think, shows the impossibility of our acceding to

> counsel for the wife's request, for I cannot see how we could possibly order the issue of adultery as such to be re-tried, seeing that it could not possibly lead, in the circumstances, to any effective result whatever.'

As to the words 'judgment or order' in Ord 58, r 1, Evershed MR said ([1955] 2 All ER 538 at 541, [1955] P 336 at 343):

> 'Nothing from the cases brought to our attention by counsel for the wife persuades me that by the words "judgment or order" in the rule or in the sub-section is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute.'

Hodson LJ, in his concurring judgment ([1955] 2 All ER 538 at 543, [1955] P 336 at 346) referred with approval on this point to Lord Esher MR's distinction between a 'judgment' and an 'order' in *Onslow v IRC* (1890) 25 QBD 465 at 466, namely: 'A "judgment", therefore, is a decision obtained in an action, and every other decision is an order.'

Mr James Bonney, on behalf of the landlord, submitted that the principle in *Lake v Lake* applies only where the Court of Appeal cannot alter the order made below or cannot otherwise grant effective relief. Neither of those circumstances, he maintained, apply here; the relief sought includes the remission of the matter for determination by a differently constituted committee in accordance with the judgment of this court, which relief, if granted, should affect that committee's determination. He added that it would be unjust to require the landlord to submit to a redetermination in accordance with McCullough J's reasoning, which he maintained was wrong, possibly requiring him to seek further recourse to the courts to resolve matters that can be dealt with now. He added that there is some urgency for this court to deal with them now because McCullough J's judgment differs from that of Turner J delivered on the same day in *North Western Estates Development Ltd v Merseyside and Cheshire Rent Assessment Committee* (27 November 1996, unreported), and that the outcome in many pending cases will turn upon the guidance the court can give.

Mr Kim Lewison QC, on behalf of the committee, made no submissions on the point, indicating that their attitude was neutral on it. He suggested, however, that McCullough J's judgment did not preclude the landlord from urging a new committee to adopt and demonstrate in its written reasons an arithmetical approach, the judge having said that such would be desirable though not, as a matter of law, necessary.

In my judgment, there is force in Mr Bonney's submissions. If he is right in saying that McCullough J's rulings on the substantive issue are wrong or are such as possibly to mislead a new committee into repeating the errors of the present committee, the judge's order has not given the landlord all that he wants and to which he is entitled and the Court of Appeal can do something about it. The court cannot do anything about the first part of the order, the quashing of the determination, and the landlord naturally does not seek that. However, it can give a different and proper effect to the second, the remission of the reference for determination in accordance with the order of the court. It can exercise, under Ord 59, r 10(3), the power of the court below to remit the matter for rehearing and determination under Ord 55, r 7(5) in accordance with the correct opinion of the court (see also on the precise form of the order and whether it gives the successful party all that he wants *Young v Secretary of State for the Environment*

[1990] 2 PLR 82 at 87, 89 and 90 per Dillon, Woolf and McCowan LJJ). Accordingly, I would hold that the landlord may appeal against the order of McCullough J.

POST-SPATH HOLME CASES

Since the Court of Appeal's judgment in the *Spath Holme* case there have been a number of first instance judgments which suggest some uncertainty as to the application of its principles, in particular, as to manner and detail in which a rent assessment committee should demonstrate its process of reasoning in fixing on a fair rent. That uncertainty necessarily turns in part on the earlier question to which I have referred, whether when good market rent comparables are available a committee should use them as the starting point for their assessment and should only depart substantially from them where there are good reasons for doing so. Here, the committee purportedly took market rent comparables as their starting point. McCullough J appears to have accepted that that was an appropriate approach because he regarded such comparables as the best indicators of market rent. As I have indicated, he was uneasy about the committee's failure to furnish their reasons with figures, but he did not regard that deficiency as sufficient to render their determinations unlawful. As I have also indicated, he took the same view as Latham J in *Curtis and Susands'* cases on the inadequacy of the London Rent Assessment Committee's routine concluding paragraph, if it had stood on its own. The main difference between the two cases is that here, the committee, having purportedly relied on market rent comparables, set out some reasons for adjusting them to the previously registered rents for the subject premises subject to a modest uplift.

There is much in common in the approach of McCullough J in this case and that of Turner J in the *North Western Estates Development* case (27 November 1996, unreported). They are both of the view that committees must explain their process of reasoning in fixing on their assessments, McCullough J expressly stating that some use of figures would be desirable and Turner J implicitly calling for figures as part of the reasoning process. The main difference between them is that McCullough J was prepared to accept as adequate reasoning for differing from market rent comparables (in addition to the differences between them and the subject premises identified by the committee) the committee's statement of reliance both on their previous determinations for the subject premises and on their general knowledge of comparable registered rents without identification of the properties or reassessment of their current applicability; whereas Turner J held, on his understanding of Morritt LJ's observation in the *Spath Holme* case, that if a committee has in mind relying on such comparables to depart substantially from market rent comparables, they must first reassess their soundness and must demonstrate by their reasoning that they have done so.

In the *North Western Estates Development* case, the committee had to consider as comparables both assured shorthold tenancy market rents and registered fair rents. The landlord's case was that there was no scarcity requiring a discount from the market rent. However, the committee made a significant deduction for scarcity without explaining why, save for a general reference to registered fair rent comparables, by clinging to a particular fair rent determination comparable because they 'had no reason to believe that it was suspect', and otherwise in the most general terms in their reasons:

> '... by quantifying scarcity to the best of our ability using our knowledge and experience of supply and demand; by taking into account rents in this neighbourhood as indicated by the landlord's comparable[s] as well as comparable[s] relating to the registered rent of other regulated tenancies in the immediate vicinity; by taking account of the statutory provisions ... by noting the general level of rents as an indication of the character of the locality and lastly the evidence of our inspection and thus we determined that the fair rent herein should be £33·50 per week.'

On appeal by the landlord, Turner J allowed all but one of the grounds of appeal. On the issue of the adequacy of the committee's reasons, he summarised the law as he understood it in the light of Morritt LJ's judgment in the *Spath Holme* case (1996) 28 HLR 107 and of a number of earlier authorities, including pre-1988 decisions of the Divisional Court on the giving of reasons:

> 'What Morritt LJ was clearly seeking to avoid was that an assessment committee would perpetuate a level of rent which was not fair merely by referring to, and being guided to the point of exclusion, by other registered rents. Before a registered rent was used as a comparable it required to be re-examined and justified, or, in his language, "worked through". It is manifest from the above, that unless there is clear evidence of the validity of a comparable ... it will usually be the case that "working through" of open market rents, discounted and subject to disregards, as appropriate, and of registered fair rents will be required.'

He described the committee's reasons as a 'hotchpotch' containing no clear findings of fact:

> 'Although paragraph 7 of the reasons says that the committee did quantify scarcity by "using our knowledge and experience of supply and demand", it did not refer to the evidence adduced in regard to the general supply of properties available for renting as assured tenancies. On this ground, the decision may be criticised for a lack of sufficiency. Again, there being evidence which was fit for the committee's consideration, the fact that it did not expressly bring it into account suggest[s] that the muddled approach, above described as "hotch potch", readily gives rise to the inference that the committee wrongly directed itself in law. Significantly, within that information there was nothing to indicate the extent to which the two critical variables, identified by Morritt LJ in *Spath Holme*, which were scarcity and disregards [sic] could have influenced the determining committees to fix a fair rent at a figure which must be assumed to have been below the open market rent.'

He added the following general observations on adequacy of reasons:

> '... much has changed since the early decisions of the Divisional Court concerned with the reasons that RACs were required to give ... These early cases [sic] may in some instances have been reached on the basis that RACs were not composed of legally qualified individuals and that it would be wrong to expect too much of them by way of reasons which would stand up to rigorous judicial scrutiny. Nevertheless, it would be wrong to ignore the factors of: (a) a jurisprudential need for such a tribunal to provide adequate and sufficient reasons for its decisions: *Re Poyser and Mills' Arbitration* [1963]

1 All ER 612, [1964] 2 QB 467 and subsequent cases; (b) the increased training which is now afforded to all members of the tribunals under the auspices of the Judicial Studies Board; and (c) the qualifications of those who are now selected to become members of RACs. All those factors strongly point to the requirement that reasons should not merely pay lip service to the statutory umbrella under which the particular tribunal is operating, rather that they should condescend to articulate the actual process that has led to the decision which is, in this court, sought to be impugned. This is a natural and logical development of the decision in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498.'

Owen J adopted a similar approach in *District Estates Ltd v Chairman of the Merseyside and Cheshire Rent Assessment Committee* [1997] NPC 39. There, he allowed the landlord's appeal following a concession by the committee that they had given insufficient reasons, but went on in his judgment to express, obiter, a number of general propositions, including the following: that in most cases in which registered rent comparables are put forward it might well be necessary to reconsider the variables inherent in them and that in calculating a fair rent from market rent comparables by reference to differences between properties and the statutory disregards and by discounting for scarcity, some calculations are likely to be required and that 'if proper reasons are to be given those calculations will need to be disclosed'.

A recent judicial observation, which—possibly influenced by the particular circumstances of the case—is not of a piece with the above approaches as to the need for reasons is that of Macpherson of Cluny J in *Northumberland and Durham Property Trust Ltd v London Rent Assessment Committee* (29 February 1996, unreported). There, the committee had regard to a single market rent comparable, to seven recently determined fair rents of similar flats in the same terrace (one of them in the same house) as the subject premises and to all the material differences between the various premises. In considering the scarcity element, the committee took the view, without putting a percentage to it, that the recently determined fair rents must have reflected 'a high degree of scarcity from which a substantial discount from the market rent must be applied'. The main argument on behalf of the landlord, which Macpherson J rejected, was that the committee should not have considered the fair rent comparables. However, the landlord, who had contended for a fair rent based on its market rent comparable discounted for scarcity, also challenged the committee's approach to that issue. In the course of rejecting that challenge too, Macpherson J said:

'They were experienced in applying the discount for scarcity to figures which were put before them because that is part of the experience of committees operating in this field. I see no error in law in their approach in connection with scarcity. How much they discounted in connection with scarcity is not identified. But, as the cases show, there is no need for a rent committee to show the mathematical working which they employ. Cases have been cited to me which, in my judgment, establish that beyond peradventure. I do not need to name them because it seems to me that the basis of that argument on behalf of the respondents is unassailable. What the committee must do is to show that they have approached the case in the proper way. They must heed all the arguments that are put before them. They must follow the advice and instruction given to them in any case which

is put before them. But, at the end of the day, provided they follow the principles set out and consider both the market rent discounted and the other comparables which they must unavoidably consider, they do not have to give fuller reasons than this committee gave for its own conclusions. At the end of the day what they are entitled to say is that they determined the fair rents as they conclude them to be in the final paragraph of their decision.'

THE GROUNDS OF APPEAL AND THE SUBMISSIONS

There are 33 grounds of appeal. With one or two exceptions, Mr Bonney's submissions on them may be summarised in the following five propositions.

(1) A fair rent is an adjusted market rent. Thus, the identification of a market rent is the first step in assessing a fair rent. Comparable market rents, if they are present, are the best evidence of the market rent (a fortiori in this case where four of the comparables were similar flats in the same and/or an adjacent purpose-built block).

(2) Where there are market rent comparables from which a rent assessment committee can derive a fair rent, they should rely on them without reference to any registered fair rent of the subject premises or of fair rent comparables unless they have reassessed and found them to be reliable indicators of the current market rent suitably discounted for scarcity and disregards if any. The committee did not do that. On the contrary, their approach was to require the landlord to demonstrate that the previously registered rents for the subject premises were unsound by reason of scarcity or otherwise and to act on their previous determinations in respect of the subject premises and on their knowledge of fair rent comparables generally without reassessing their current applicability.

(3) If there are market rent comparables, a rent assessment committee must have and must identify good reasons for departing substantially from them, if they do, in their assessment of a fair rent.

(4) A committee's assessment of a fair rent from the starting point of a market rent requires it to identify a number of figures: first, the market rent, which will include, depending on the closeness of the market rent comparables, figures or percentages to allow for differences between them and the subject premises, a figure or percentage for scarcity, if any, and a figure or figures to reflect the appropriate disregards, if any.

(5) The committee's statement in para 21 of their reasons that they had made 'appropriate deductions', without identifying figures, from the market rent comparables is inadequate reasoning. It deprives the landlord of information which, if it existed, should have been readily available to demonstrate and justify their decision to depart so substantially from those comparables and invites the inference that the committee had not in fact made appropriate calculations or deductions and had, therefore, determined the matter unlawfully or irrationally.

Mr Lewison, in reply, relied on the following propositions.

(1) Fair rent is not an adjusted market rent (contrary to the committee's purported approach to its determinations). Morritt LJ was wrong when he said in the *Spath Holme* case (1996) 28 HLR 107 at 122 that a fair rent is 'the market rent less the disregards and discounted for scarcity'. The 1977 Act has not prescribed market rent as the starting point—s 70 of the 1977 Act does not even mention it , and it is not for the courts to tell rent assessment committees, who are in the position of valuers, how to assess fair rents. The 1977 Act requires only the assessment of a fair rent, and identifying and starting with a market rent is only

one of several methods of achieving that end. Depending on the available material, two other possibilities are the use of fair rent comparables and/or the assessment of return on capital value. On the material before it, the committee were entitled to use market and/or fair rent comparables as they saw fit (see eg *Tormes Property Co Ltd v Landau* [1970] 3 All ER 653 at 655, [1971] 1 QB 261 at 266 per Lord Parker CJ and *Mason v Skilling* [1974] 3 All ER 977 at 980, [1974] 1 WLR 1437 at 1441 per Lord Morris).

(2) The 1988 Act has not changed the law governing fair rents or introduced any new culture. Market rent comparables, where available, have always been potentially relevant in the assessment of fair rents (*Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172 and *Mason v Skilling*); there are just more of them now. There is, therefore no reason to discard pre-1989 jurisprudence to the effect that a committee should, subject to allowing for inflation, rely on close registered fair rent comparables and may do so without reassessing them.

(3) Market rent as a starting point may be relevant, but it is not determinative. Even if it is a better approach in any individual case than that of taking registered fair rent comparables, that does not make reliance on the latter unlawful. Here, the committee, having considered both sets of comparables, would have been entitled to assess the fair rents 'in the round' or by reference to fair rent comparables only and without first identifying the market rent from the market rent comparables. In the event, the committee applied the *Spath Holme* principle of taking as their starting point market rent derived from market rent comparables and, in para 21 of their reasons, made the assessments on that basis.

(4) Rent assessment committees are in the position of valuers and may rely on their own knowledge, experience and expertise in assessing a fair rent. They do not have to give specific reasons and, certainly, are not bound to give figures to show how they have reached their decision. See a number of Divisional Court authorities in the 1970s in which Lord Widgery CJ gave the leading judgment (*Metropolitan Property Holdings Ltd v Laufer, Guppys (Bridport) Ltd v Sandoe* (1975) 30 P & CR 69 and *Guppys Properties Ltd v Knott (No 1)* [1978] EGD 255), the observation of Harrison J in the *Spath Holme* case (1994) 27 HLR 243 at 260 that a committee need not quantify the scarcity element 'in any precise way', and the passage I have cited from the judgment of Macpherson J in the *Northumberland and Durham Property Trust Ltd* case. In any event, the committee had given reasons, which amounted to a sufficient 'working-through' of their decision making process.

(5) Inadequacy of reasons is not a ground for quashing an assessment or for remitting it for redetermination unless the inadequacy leads the court to infer that a committee have determined the matter irrationally or otherwise unlawfully (*Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689). Here, even if the reasons are inadequate, they do not justify such an inference.

CONCLUSIONS

The nature of a fair rent

In my judgment, a fair rent is a market rent adjusted for scarcity and disregards, as Morritt LJ held as part of the ratio in the *Spath Holme* case (1996) 28 HLR 107 at 118–119 and 121–122, and as Lord Widgery CJ analysed it as long ago as 1975 in *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389 at 392–394, [1975] 1 WLR 349 at 351–353 (see also *BTE Ltd v Merseyside and Cheshire Rent Assessment Committee* (1991) 24 HLR 514 at 516–517 per Hutchison J and *Western*

Heritable Investment Co Ltd v Husband [1983] 3 All ER 65 at 68 and 71, [1983] 2 AC 849 at 856 and 860 per Lord Keith and Lord Brightman). The concept of 'fair' in such a context is elusive unless it is tied to particular criteria. Section 70 of the 1977 Act contains those criteria. Its scheme is to set out, in s 70(1), a number of circumstances which together would identify a market rent and, in s 70(2) and (3), the required adjustments where appropriate. It hardly needs saying that the assumption of a hypothetical absence of scarcity required by s 70(2) presupposes that the starting point in s 70(1) is market rent. Although I agree with the judgment of Harrison J indorsed by this court in the *Spath Holme* case, that, depending on the material available, there may be more than one route to determine a fair rent, every route must have that starting point. That is so, whether reliance is placed on market or fair rent comparables or on return on capital. In each of the former two methods there is a need to reassess their validity and applicability at the time of their use as comparables (as is implicit in the reasoning of Morritt LJ in the *Spath Holme* case (1996) 28 HLR 107 at 124). In the case of return on capital, which seems to be rarely used, the criteria in s 70(1) cannot be bypassed; the exercise must in some way identify a market rent en route to assessing a fair rent.

Market rent comparables, the best evidence

Clearly, rent officers and rent assessment committees should rely on the best evidence of fair rents; that has always been the approach of the courts (*Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304, [1969] 1 QB 577, *Tormes Property Co Ltd v Landau* [1970] 3 All ER 653, [1971] 1 QB 261, *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689 and *Waddington v Surrey and Sussex Rent Assessment Committee* [1982] 2 EGLR 107). Before the introduction of assured tenancies by the 1988 Act the best evidence available was usually registered fair rent comparables. Now, with the advent and growing volume of assured tenancy market rent comparables, they are most commonly relied on as the best evidence of the starting point for determining a fair rent. The 1988 Act has not changed the law as to the assessment of fair rents. But, by preventing the creation of new regulated tenancies and introducing assured tenancies at actual market rents, it set in train the progressive diminution in numbers of fair rent comparables and brought into being an ever increasing supply of market rent comparables. Market rents are thus the natural successors to the declining regime of registered fair rents. As Hirst LJ put to Mr Lewison in the course of his submissions, they are 'a much more potent way of assessing market rent' and hence fair rent.

Where close market rent comparables are available, it makes sense that they should be treated as the best evidence for the purpose. That is clearly how Morritt LJ regarded the matter in the *Spath Holme* case (1996) 28 HLR 107 at 123, in observations, which I have set out, flowing necessarily from the part of the ratio of his judgment that market rent is the starting point for assessment of fair rent. This approach is not a change of law or principle; it is consistent with that of the courts to registered fair rent comparables before the 1988 Act. Only the material has changed. It is for that reason, as Morritt LJ also indicated, that earlier judicial observations about the primacy of registered rent comparables (see *Tormes Property Co Ltd v Landau* [1970] 3 All ER 653 at 655, [1971] 1 QB 261 at 267, *Mason v Skilling* [1974] 3 All ER 977 at 979, [1974] 1 WLR 1437 at 1439 per Lord Reid, *Western Heritable Investment Co Ltd v Husband* [1983] 3 All ER 65 at 71, [1983]

2 AC 849 at 859 per Lord Brightman, and *London Rent Assessment Committee v St George's Court* (1984) 48 P & CR 230 at 233 and 235, 236–237 and 238 per Griffiths, Slade and Browne-Wilkinson LJJ), as to reliance on them unless they can be demonstrated to be wrong (*Metropolitan Properties Co (FGC) Ltd v Lannon, Tormes Property Co Ltd v Landau, Mountview Court Properties Ltd v Devlin* and *Waddington v Surrey and Sussex Rent Assessment Committee*) and of combining one or more method of assessment (*Mason v Skilling* [1974] 3 All ER 977 at 978–980, [1974] 1 WLR 1437 at 1438–1440 per Lord Reid, *Guppys (Bridport) v Sandoe* (1975) 30 P & CR 69 at 70–71 per Lord Widgery CJ and *Guppys Properties Ltd v Knott (No 1)* [1978] EGD 255 at 258 per Lord Widgery CJ), are now inapplicable where there are market rent comparables on which a fair rent assessment may be based. The best evidence of the starting point for assessment of fair rents is now that of market rent comparables where they are available.

In this case, just as in the *Spath Holme* case, market rent comparables were available and were close. The committee accepted four of them as good enough to form the basis of their fair rent assessment, subject to individual differences that they identified between some of them and the subject premises. In that circumstance, was it necessary or logical for them to turn also to the previously determined registered fair rents for the subject premises and/or to fair rent comparables? In my view, if there are market rent comparables enabling the identification of a market rent as a starting point, there is normally no need to refer to registered fair rent comparables at all, still less to engage in an arid exercise of verifying or reconsidering their soundness as current indicators of an adjusted market rent. Such an exercise is circular, since it can only be done by reference to market rent comparables or some other yardstick which a committee is prepared to accept as an indicator of the current market rent of the subject property. As I have said, I do not believe that that is what Morritt LJ ((1996) 28 HLR 107 at 124) intended in his observations about reassessment of the soundness of registered fair rent comparables. His clear intention, with which I agree, is that if reliance is to be placed on registered fair or market rent comparables, their current validity and applicability as comparables for the subject premises must be reassessed.

In my view, where there are good market rent comparables upon which a committee can act in identifying market rent of the subject premises it can only cause confusion to attempt to use the two regimes of market and fair rent comparables, calibrating one against the other, to determine a fair rent. It follows, a fortiori, that to rely in such a circumstance on registered fair rents, whether generally or particularly, unless one or other party can dislodge them as suitable comparables is wrong. Such an approach would freeze the fair rents by reference to precedent rather than achieve what is intended by the legislation, an exercise of 'valuation', an assessment of current fair rents by knowledgeable and experienced committees responsive to the particular characteristics of the subject property and to changing market levels (cf the *North Western Estates* case), in which Turner J, rightly in my view, criticised the committee there for preferring a single fair rent determination to market rent comparables on the ground they 'had no reason to believe that it was suspect'.

Process of assessment

The assessment of a fair rent is routinely described as more of an art than a science. Lord Keith, in *Western Heritable Investment Co Ltd v Husband* [1983] 2 All ER 65 at 70, [1983] 2 AC 849 at 858, called it 'an exercise of [the valuer's]

professional skill'. The members of a rent assessment committee, at least one of whom is normally a chartered surveyor, are expected to be experienced in such valuation and to know and to have a 'feel' for the rental property market in their area. But, however much experienced 'feel' or judgment the exercise requires and is given, the end product is a figure for rent of particular premises. Where the comparables are not exact and/or where there is a need to make disputed adjustments for hypothetical lack of scarcity or for disregards (where there are no such disputed issues it may be possible for a committee to take a short cut; see *GREA Real Property Investments Ltd v Williams* [1979] 1 EGLR 651 at 653 per Forbes J), it necessarily involves some working through—some sums, however few and approximate—some arithmetical markers whether in percentage form or otherwise on the way to the final figure. There is no other rational way of giving effect to the scheme of assessment set out in s 70 of the 1977 Act.

That is not to say that the committee should have no recourse to its general knowledge and experience of local market rentals, of the appropriate adjustments to make for differences between comparables and the subject premises, of the existence and degree of local scarcity, if any, and of their treatment of disregards where necessary. It does mean, however, where there is a significant difference between registered fair rent comparables and close market rent comparables accepted by a committee as providing current market rental evidence for the subject premises, they should not normally have regard to the former at all, and cannot, in any event, properly prefer them to the latter without explanation. Such an explanation would necessarily require some analysis, not simply assertions of the general nature criticised by Latham J in *Curtis and Susands'* cases (1996) 28 HLR 841 and of the sort employed by this committee in paras 19 and 22 of their reasons. It follows that, where there is a significant issue as to a fair rent turning on rival comparables, I do not agree with McCullough J's description of the exercise as analogous to the sentencing function of a judge who may have regard to his general knowledge of sentencing levels.

Reasons

Rent assessment committees are required, if requested, to state the reasons for their determination in writing: s 10 of and Sch 1 to the Tribunals and Inquiries Act 1992 and reg 10A of the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065.

From examples of rent assessment committees' written reasons that I have seen in the authorities and in material put before the court, many, if not most, committees clearly see their task as working through the requirements of s 70 of the 1977 Act in some arithmetical way and giving, in their reasons, a summary account of their workings. According to this committee's written reasons, they started with the landlord's market rent comparables and, in para 21 of them, made 'appropriate deductions' from them to mark the differences between them and the subject flats and a scarcity element. That, I assume, is what they meant in referring, in the concluding words of the paragraph, to their entitlement 'to rely upon a broad but well-founded assessment approach'. If indeed they did work through the exercise in that way, I do not understand why they could not give some arithmetical indication of their workings, rather than merely concluding that 'they saw no reason to disturb the Rent Officer's registrations'. And I share McCullough J's puzzlement as to why, if they had made 'appropriate deductions', they felt it necessary to declare the inappropriateness of offering, inter alia, 'artificial calculations' or 'hypothetical percentages'. If they had made

appropriate deductions they could have identified them in summary form without recourse to artificialities, which, as I understand their wording, had not been their approach. As to 'hypothetical percentages', it should be remembered that s 70(2) required them to make an assumption of a hypothetical absence of scarcity, a hypothesis which would normally require articulation in percentage terms.

It is well established that the adequacy of reasons in any case depends upon the facts of and the issues in the case. See e g *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 2 All ER 10 at 23–24, [1991] 1 WLR 153 at 167 per Lord Bridge of Harwich and per Morritt LJ in the *Spath Holme* case (1996) 28 HLR 107 at 123. Whilst there are decisions of the Divisional Court in rent assessment cases in the 1970s asserting the sufficiency of general conclusions, without any or any detailed reasons, based on committees' great experience and local knowledge (*Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172, *Guppys (Bridport) Ltd v Sandoe* (1975) 30 P & CR 69 and *Guppys Properties Ltd v Knott (No 1)* [1978] EGD 255. Cf *Albyn Properties Ltd v Knox* 1977 SLT 41 at 43 per the Lord President (Emslie) '... they must explain how their figures of fair rent were fixed'), they appear to have overlooked the Divisional Court's decision in *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689, acknowledging the well-known statement of principle by Megaw J in *Re Poyser and Mills' Arbitration* [1963] 1 All ER 612, [1964] 2 QB 467 that proper, intelligible and adequate reasons should be given and that in their absence the court may infer an error of law justifying the quashing of the decision.

In those cases where a committee's determination is close to the market rent indicated by good market rent comparables and there is no actual scarcity, little or no arithmetical explanation may be necessary. But where a committee's assessment of a fair rent differs significantly from the market rent indicated by market rent comparables, I agree with Morritt LJ's and Harrison J's reasoning in the *Spath Holme* case and that of Latham J in *Curtis and Susands'* cases (1996) 28 HLR 841 at 848, that they must have good reasons for it and they must explain them. As Mr Bonney submitted, this is consistent with the pre-1989 approach of the courts in relation to registered fair rent comparables (e g in the *Mountview* case and *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304, [1969] 1 QB 577); there is no change in approach, only as to the available evidence on which it operates. In most such cases, certainly those where there have been important issues on the comparables and/or on the appropriate adjustments to the market rent figure (thus meeting the criterion of Lord Lloyd in *Bolton Metropolitan DC v Secretary of State for the Environment* [1995] 3 PLR 37 at 43 that the reasons must condescend to 'the principal important controversial issues'. See also *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 2 All ER 144 at 151–152 and 157–158, [1996] 1 WLR 1037 at 1044–1045 and 1050–1051 per Aldous and Hobhouse LJJ), an explanation will require some 'working through', as Morritt LJ put it in the *Spath Holme* case. It will require some use of figures to demonstrate the committee's workings towards, or calculation of, the final fair rent figure. In Megaw J's words in *Re Poyser & Mills' Arbitration* [1963] 1 All ER 612 at 616, [1964] 2 QB 467 at 478, the reasons must be proper, intelligible and adequate. And, as McCullough J observed in a passage to which I have already referred:

> 'If adequate reasons are not given for the decision of a rent assessment committee the fact that its members have knowledge and experience of their

subject provides, in my judgment, no excuse. Rather should it facilitate the explanation of the reasoning used.'

It is trite law that rent assessment committees, like other tribunals, are not required to articulate their reasons to the exacting standards and with the accuracy and precision required of a court (see *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304 at 311 and 312, [1969] 1 QB 577 at 601 and 603 per Danckwerts and Edmund Davies LJJ). I am conscious too of the many cases with which committees may have to deal in the course of a day, of the speed at which they have to work and of the need to avoid over-burdening their chairmen and chairwomen in stating their reasons. However, as I have said, in cases where their assessment of fair rent differs significantly from that, on the face of it, indicated by market rent comparables, that exercise, if rational, must involve some sums. The committee says that it did so here, because they claim to have made 'appropriate deductions' from the market rent comparables. It should have been no great burden for them to have indicated their thought process by a brief indication of their arithmetic. Mr Bonney has told us that many committees do so, and referred in particular to the practice of the Southern and South Western Assessment Panels, citing examples of their assessments. The scheme of each is similar and they seem to me to be adequate for the purpose. That was the view of McCullough J in relation to an example of the Southern Panel, of December 1994, put before him. He set it out in his judgment with words of approval which, for convenience, I repeat:

> 'Those dissatisfied with decisions of rent assessment committees do not ask for anything artificial or hypothetical; they want to know how the committee reached its conclusion. I would be surprised if any complicated mathematics was ever needed; some simple subtraction and perhaps the odd percentage should surely do. An example is provided by a decision of the Southern Rent Assessment Panel in December 1994. They said:
>
> "We set out our calculations for the information of the parties.
>
> | | | |
> |---|---|---|
> | The market rent, to reflect age, character and condition of property | | £80·00 p.w. |
> | *Less* allowance for scarcity (5%) | £4·00 | |
> | *Less* allowance for kitchen in basic condition | £5·00 | |
> | *Less* allowance for lack of central heating | £5·00 | £14·00 |
> | | | £66·00" |

An example of the South Western Panel, of October 1996, produced to us is similar. The statement of reasons, which relates to a large number of properties referred to the committee, sets out in narrative form their conclusions under a series of headings, namely: market rent, scarcity, tenant's obligations and other deductions. Then, in an attached schedule, they set out against each property and under each of those heads the figure leading to its assessment.

I respectfully share McCullough J's view that this committee's statement of their reasons is inadequate. In my view, this was a classic case for the committee to explain, with some use of figures, how they reached their fair rent determinations. Those determinations were substantially below those indicated by market rent comparables accepted by the committee as providing current market rental evidence for the subject premises. As to the 'appropriate deductions', they have clearly had regard in some unexplained way to their previous determinations and to their general knowledge of registered rent

comparables. The obvious deficiencies of explanation are not, in my view, compensated for in committee's full narrative treatment of the differences between the market rent comparables and the subject premises or in their explanation of their rejection of the landlord's case on the issue of scarcity.

Inference of irrationality or other unlawfulness from inadequacy of reasons

In *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689 the Divisional Court held that a failure by a rent assessment committee to give adequate reasons, though entitling the court to remit the matter to the committee for them to give adequate reasons, was not on its own a ground for quashing the assessment unless the inadequacy gave rise to an inference that the committee had erred in law in reaching their decision.

As Woolf LJ said in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 507–508, the law in this respect has moved on considerably:

> 'I would ... regard the *Mountview* case as being the main authority to be applied. However, it has to be applied in the light of the ten years which have elapsed since that case was decided. Over that period of ten years the approach of the courts with regard to the giving of reasons has been much more definite than they were at that time and courts are now much more ready to infer that because of inadequate reasons there has been an error of law, than perhaps they were prepared to at the time that the *Mountview* case was decided ... in practice I think that there will be few cases where it will not be possible, where the reasons are inadequate, to say one way or another whether the tribunal has gone wrong in law. In some cases the absence of any reasons would indicate that the tribunal had never properly considered the matter (and it must be part of the obligation in law to consider the matter properly) and that the proper thought processes have not been gone through.'

As I have said, I agree with McCullough J as to the inadequacy of the committee's stated reasons for their determinations, but I do not agree with his view that they were not so inadequate as to lead to an inference that their decision making process was irrational or otherwise unlawful.

The committee's ready recourse in paras 17 and 19 of their reasons to their previous determinations in respect of the subject premises and to their general knowledge of registered rent comparables to support in each case the rents registered by the rent officer is inconsistent with their claimed reliance, in para 21, on appropriately adjusted market rent comparables. As I have said, they do not indicate how they have had regard to their previous determinations, other than to state in para 17 that the landlord had not demonstrated them to be unsound and that they presumed them to have reflected the scarcity element at the time they were made. Nor have they given their workings giving rise to, or identifying, the 'appropriate deductions' which they say they have made from the market comparable rents they claim to have taken as their starting points. In my view, this goes beyond inadequacy of reasons; it has all the signs of the adoption of an irrational or otherwise unlawful approach to the exercise. It suggests that the committee have preferred their previous determinations and their unparticularised knowledge of registered rent comparables to the market rent comparables, and they have not adequately explained why, save to indicate that the landlord had not demonstrated that the former were unsound. In short, they

appear to have treated the previously determined fair rent of the subject premises and the registered rent comparables as prima facie the closest to the fair rent figures that they had to assess.

OTHER GROUNDS OF APPEAL

That leaves a number of other complaints by the landlord.

The first is the refusal of the committee, through the chairwoman, to have regard to the judgment of Latham J in *Curtis and Susands'* cases (1996) 28 HLR 841 quashing a decision of the same committee because the order had not been sealed and an approved copy of the transcript was not available. Whilst I deprecate that refusal, I agree with McCullough J that in the circumstances, it does not in itself vitiate the committee's decision. It adds nothing material to that which was already before them from the judgment of Morritt LJ in the *Spath Holme* case. Nor is it material to the appeal, the point of which is to give guidance for the re-determination of the matter by a differently constituted committee.

Next, the landlord made a number of complaints about the committee's treatment of the case on scarcity. The only one that deserves mention in this judgment is his suggestion that the committee wrongly imposed a burden of proof on him to show that there was no actual scarcity. He relied on the opening words of para 14 of the committee's reasons to the effect that, as he had contended that there was no scarcity, he had to demonstrate it. In my view, there is no merit in this complaint. Section 70(2) requires an assumption of a hypothetical absence of scarcity in the exercise of assessing a fair rent. The landlord sought to neutralise the effect of such an assumption by maintaining that it was the reality and that his market rent comparables reflected that. It seems to me that, however the committee expressed the matter in para 14, they were entitled to test his case in that respect and to balance the evidence on both sides. They concluded that he had not made out his case because, inter alia, his evidence related only to the immediate locality, not to a broader area as required by *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389, [1975] 1 WLR 349. In addition they considered other aspects of his evidence and also material relied upon by the rent officer before finally determining the matter three paragraphs later in para 17. This is an area in which a committee's own knowledge and experience of the locality is of particular value, and I would be reluctant to introduce into the exercise any hard and fast rules of a forensic nature as to where the burden of proof lies.

Finally, the landlord complained about the committee's statement that they had had regard to the conclusion of the rent officer in her report that there was scarcity, a conclusion based on her own market research and database which he had not seen. The rent officer had discussed this material with the landlord at a consultation in June 1995 before she registered the rents the subject of the reference, but had refused to show him the database material on the ground that it contained confidential information. However, the rent officer did not put the research or database material before the committee and the landlord did not repeat his request to see it at the hearing of the reference. He had access to the rent officer's report to the committee and to all other material that she put before them and had an opportunity to comment on it, which he did.

The landlord now complains that the committee should not have had regard to the rent officer's report in this respect without considering the primary material on which it was based and without giving him access to that material. I do not consider that the committee were necessarily wrong in the circumstances

in referring to the rent officer's report in the way they did on the issue of scarcity. Such an issue, both as to the presence and degree of scarcity over a broad local area, is not amenable to the same precision of analysis as is the assessment of a market rent for the subject premises. It inevitably turns on an accumulation of knowledge and experience of the pattern and speed of lettings in an area, which is what the rent officer's report in this respect amounted to. It is to be contrasted with the more mechanical exercise of assessing fair rent by reference first to market rent comparables, often in the immediate locality, and as to the valuation of individual differentials and the fixing on allowances for particular disregards. In any event, the rent officer's reported view on this issue was just one of a number of matters on which the committee relied in concluding that there was scarcity. The landlord had an opportunity to explore her report and test it before the committee, which he did without seeking, at that stage, to examine the primary material. I would not criticise the committee's approach in this respect.

For the reasons that I have given, I would allow this appeal so as to remit the references for determination by a differently constituted committee in accordance with the judgments of this court, and the relevant part of McCullough J's judgment.

HIRST LJ. I agree.

BUTLER-SLOSS LJ. I also agree.

Appeal allowed. Leave to appeal to the House of Lords refused.

Dilys Tausz Barrister.

R v North West London Mental Health NHS Trust and others, ex parte Stewart

COURT OF APPEAL, CIVIL DIVISION

SIR STEPHEN BROWN P, SAVILLE AND SCHIEMANN LJJ

30 JUNE, 25 JULY 1997

Mental health – Admission of patient to hospital – Admission for treatment – Compulsory admission – Compulsory admission after conditional discharge of patient by mental health review tribunal – Whether hospital entitled to compulsorily detain conditionally discharged restricted patient – Whether conditionally discharged patient only capable of compulsory detention in hospital if recalled to hospital by Secretary of State – Mental Health Act 1983, ss 3, 37, 41, 42, 73.

In 1991 the appellant was convicted of an offence of assault occasioning actual bodily harm and the court made a hospital order and a restriction order under Pt III, ss 37[a] and 41[b], of the Mental Health Act 1983. In 1993 a mental health review tribunal conditionally discharged the appellant pursuant to s 73[c] of the 1983 Act. However, in 1995 the respondent trust admitted the appellant to hospital and detained him there for treatment under Pt II, s 3, of the Act. The appellant applied for judicial review of the respondent's decision to detain him on the grounds that Pts II and III of the Act were mutually exclusive, and that since at the time of his detention under s 3 he was a conditionally discharged restricted patient liable to be detained under s 37, he could only be compulsorily detained in hospital pursuant to recall by the Secretary of State under s 42(3)[d] of the Act. The judge dismissed the application, holding that the appellant could be lawfully detained under s 3 of the Act. The appellant appealed to the Court of Appeal.

Held – On their true construction, Pts II and III of the 1983 Act were not mutually exclusive but contained powers which could co-exist and operate independently of each other. Accordingly, a conditionally discharged restricted patient could lawfully be detained pursuant to s 3 of the Act, notwithstanding that at the time he remained liable to be detained pursuant to s 37. It followed that the respondent had had power to detain the appellant under s 3 and therefore the appeal would be dismissed (see p 875 *a* to *c*, p 877 *h* to p 878 *h* and p 879 *c d*, post).

Dlodlo v Mental Health Review Tribunal for the South Thames Region (1996) 36 BMLR 145 considered.

Notes

For compulsory admission for treatment and hospital and restriction orders, see 30 *Halsbury's Laws* (4th edn reissue) paras 1261, 1290, 1295.

For the Mental Health Act 1983, ss 3, 37, 41, 42, 73, see 28 *Halsbury's Statutes* (4th edn) (1996 reissue) 854, 909, 916, 918, 946.

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a Section 37, so far as material, is set out at p 873 *c* to *e*, post

b Section 41, so far as material, is set out at p 873 *e f*, post

c Section 73, so far as material, is set out at p 873 *g* to *j*, post

d Section 42(3) is set out at p 874 *a b*, post

Cases referred to in judgments

Dlodlo v Mental Health Review Tribunal for the South Thames Region (1996) 36 BMLR 145, CA.

S-C (mental patient: habeas corpus), Re [1996] 1 All ER 532, [1996] QB 599, [1996] 2 WLR 146, CA.

Cases also cited or referred to in skeleton arguments

B v Croydon Health Authority [1995] Fam 133, CA.

McFeelley v UK (1980) 4 EHRR 188, ECt HR.

R v Hallstrom, ex p W [1985] 3 All ER 775, [1986] QB 1090, CA.

R v Lord Chancellor, ex p Witham [1997] 2 All ER 779, DC.

R v Merseyside Mental Health Review Tribunal, ex p K [1990] 1 All ER 694, CA.

Appeal

The appellant, Cleveland Percival Stewart, appealed with leave from a decision of Harrison J given on 19 July 1996, whereby, in proceedings brought by the appellant against the respondents, North West London Mental Health NHS Trust, the Secretary of State for the Home Department and the Secretary of State for Health, he dismissed the appellant's notice of motion for judicial review of (1) the decision of the first respondent dated 1 June 1995 to detain the appellant pursuant to s 3 of the Mental Health Act 1983; (2) the Notes for the Guidance of Supervising Psychiatrists in relation to the Supervision and After-care of Conditionally Discharged Restricted Patients, issued by the second and third respondents in 1987 in so far as they advised, at para 49 thereof, that individuals who were restricted patients and who had been granted conditional discharge might be lawfully detained under s 3 of the 1983 Act; and (3) the Code of Practice to the Mental Health Act 1983, issued by the third respondent, in so far as it advised, at para 28.2 thereof, that individuals who were restricted patients and who had been granted conditional discharge might be lawfully detained under s 3 of the 1983 Act. The second and third respondents took no part in the appeal. The facts are set out in the judgment of Sir Stephen Brown P.

Richard Gordon QC and *Paul Bowen* (instructed by *Alexander & Partners*) for the appellant.

Steven Kovats (instructed by *Le Brasseur J Tickle*) for the first respondent.

Cur adv vult

25 July 1997. The following judgments were delivered.

SIR STEPHEN BROWN P. This is an appeal from the judgment of Harrison J delivered on 19 July 1996. He then dismissed an application for judicial review against the managers of the North West London Mental Health National Health Service (NHS) Trust brought on behalf of a patient called Cleveland Stewart. By his notice of motion the applicant sought an order of certiorari to quash the decision of the North West London Mental Health NHS Trust to detain him in hospital pursuant to the provisions of s 3 of the Mental Health Act 1983. He also sought a declaration that there is no power under s 3 of the 1983 Act to detain a restricted patient who had been conditionally discharged and, secondly a declaration that the applicant's detention by the NHS Trust under s 3 of 1983 Act was unlawful. At the outset of the hearing the judge granted leave to the

applicant to amend his notice of motion to include a claim for two further declarations. The first of these sought a declaration that the Notes for the Guidance of Supervising Psychiatrists relating to the supervision and after-care of conditionally discharged restricted patients was erroneous in law in so far as the notes for guidance sought to advise that individuals who were restricted patients and who had been granted conditional discharge might lawfully be detained under s 3 of 1983 Act. He sought a further declaration that *The Code of Practice The Mental Health Act 1983* (2nd edn, 1993) in so far as it provided similar advice was also erroneous in law. A claim for damages for false imprisonment was adjourned by agreement pending the decision on the legality of the applicant's detention in hospital.

In 1991 the applicant had been convicted at the Central Criminal Court of an offence of assault occasioning actual bodily harm. The court made a hospital order pursuant to s 37 of the 1983 Act. Section 37(1) provides:

> 'Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order ...'

The court also made a restriction order under the provisions of s 41 of the 1983 Act. The restriction was imposed without limit of time. Section 41(3) provides:

> 'The special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows—(a) none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under section 42, 73, 74 or 75 below ...'

On 29 July 1993 a mental health review tribunal conditionally discharged the applicant pursuant to s 73 of the Act. Section 73 provides:

> '(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if satisfied—(a) as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
>
> (2) Where in the case of any such patient as is mentioned in subsection (1) above the tribunal are satisfied as to the matters referred to in paragraph (a) of that subsection but not as to the matter referred to in paragraph (b) of that subsection the tribunal shall direct the conditional discharge of the patient ...
>
> (4) Where a patient is conditionally discharged under this section—(a) he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection 2 of that section ...'

Section 42(3) provides:

> 'The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection (2) above by warrant recall the patient to such hospital as may be specified in the warrant.'

Prior to his conditional discharge on 29 July 1993 the applicant had in fact been previously conditionally discharged in January 1992 and recalled by the Secretary of State in March 1993 before being conditionally discharged again on 29 July 1993.

Sections 37 and 41 and 42 fall within Pt III of the 1983 Act, which deals with the admission and detention of patients concerned in criminal proceedings or under sentence.

On 19 May 1995 the applicant was admitted to hospital as an informal patient under the powers contained in Pt II of the Act. He discharged himself from hospital shortly afterwards on 27 May 1995. On 1 June 1995 the hospital trust admitted him and detained him in hospital under the powers contained in s 3, which provides:

> '(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as "an application for admission for treatment") made in accordance with this section.
>
> (2) An application for admission for treatment may be made in respect of a patient on the grounds that—(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in hospital; and (b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.
>
> (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners ...'

Section 17 gives power to the responsible medical officer to grant leave of absence from hospital to Pt II patients subject to such conditions as he considers necessary in the interests of the patient or for the protection of other persons.

Section 20 provides that a patient admitted for treatment under s 3 of the 1983 Act can only be detained for six months unless it is renewed, in the first case, for a further six months and thereafter for 12 months renewable annually.

Section 23 gives power to discharge a patient detained under Pt II of the Act. The discharge order in respect of a patient detained for treatment under s 3 is made by the responsible medical officer, by the managers, or, subject to certain restrictions, by the nearest relative of the patient.

In the statutory framework of the 1983 Act, Pt II deals with what may be called for shorthand purposes 'civil admissions' whilst Pt III deals with the admission of patients concerned in criminal proceedings or under sentence.

The case for the applicant which was rejected by the judge is that a conditionally discharged restricted patient cannot be compulsorily detained in hospital in any manner other than by way of recall by the Secretary of State under s 42(3). He contends that the two parts of the Act, that is to say Pts II and III are mutually exclusive. The single ground of appeal is in the following terms:

> 'The learned Judge was wrong in law in holding that the Applicant could lawfully be detained pursuant to the said Section 3, notwithstanding that, at the time of his detention pursuant to the said Section 3, as a conditionally discharged restricted patient he remained "liable to be detained" pursuant to sections 37 and 41 of the Mental Health Act, 1983 ...'

On behalf of the appellant, Mr Gordon QC submitted that s 37 is the *'font of authority'* for this applicant's detention and that at the time of his purported detention under s 3 he was a conditionally discharged restricted patient liable to be detained under s 37 and accordingly could only be detained in hospital pursuant to recall by the Secretary of State. He submitted that the applicant could not be detained under s 3 having regard to the provisions of s 40(4) which provided that the provisions of Pt II should have no application to patients detained or liable to be detained under Pt III save where expressly provided for under Sch 1 of the Act. He submitted that s 3 is not one of the provisions of Pt II which is specifically applied to Pt III by Sch 1. He further submitted that the mutual exclusivity of Pts II and III is demonstrated by the effect the *'special restriction'* in s 41(3) would have on a restricted patient who was subsequently detained under Pt II:

> '(a) any such Part II detention would be for an indefinite period; (b) the patient would be deprived of his right to apply to a Mental Health Review Tribunal ...'

He argued in favour of a construction of the Act in the event of ambiguity in the statutory wording in favour of the liberty of the person and the presumption against infringement of the appellant's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Mr Gordon developed these points in a skilful argument involving a detailed analysis of the provisions of the 1983 Act. He acknowledged that there was nothing in the Act which expressly excluded the operation of Pt II of the Act in the case of a restricted patient but submitted that it was excluded by necessary implication having regard to the various statutory provisions.

Mr Gordon placed particular reliance on the provisions of s 56(1)(c). He termed it his 'bull's eye'. Section 56(1) provides:

> 'This Part of this Act [Pt IV] applies to any patient liable to be detained under this Act except ... (c) a patient who has been conditionally discharged under section 42(2) above or section 73 or 74 below and has not been recalled to hospital.'

He argued that since Pt IV applies to a s 3 patient who may be subjected to compulsory treatment, the provisions of s 56(1)(c) clearly excluded a conditionally discharged patient who had not been recalled and that meant that he could not be treated compulsorily. In order to be treated compulsorily he would have to be recalled to hospital by the Secretary of State. Furthermore he

submitted that a conditionally discharged patient who had not been recalled but who was purportedly detained under s 3 of the Act would be denied access to mental health tribunals pursuant to s 66.

On 24 April 1996 the Court of Appeal presided over by Bingham MR gave judgment in *Dlodlo v Mental Health Review Tribunal for the South Thames Region* (1996) 36 BMLR 145, an appeal in relation to an application for habeas corpus. The appellant was Mandla Dlodlo. The respondents were: (i) the Mental Health Review Tribunal for the South Thames Region; (ii) the Secretary of State for the Home Department; and (iii) the Eastbourne and County Healthcare NHS Trust. The applicant had been found not guilty of murder by reason of insanity. An order for his detention was made under s 5(1)(a) of the Criminal Procedure (Insanity) Act 1964 and a hospital order was made under s 37 of the 1983 Act together with a restriction order under s 41. In due course the applicant's case was considered by a mental health review tribunal which ordered his conditional discharge pursuant to s 73(2) of the 1983 Act. Whilst living in a hostel his mental health subsequently deteriorated and an order was made for his admission to the unit in which he had been previously detained under s 3 of the 1983 Act. Section 3, of course, appears in Pt II, which deals with civil or non-criminal admissions. Whilst at the hospital unit pursuant to his detention under s 3 the Secretary of State issued a warrant for recall under s 42(3) of the Act. The point at issue in the appeal was whether having regard to the fact that the applicant was already in hospital a warrant for recall to the same hospital could properly be issued. The matter was dealt with in the context of habeas corpus and the Court of Appeal concluded that there was no reason why the warrant could not in fact be issued. The point at issue was different from that raised in this case but it is to be observed that the court considered the particular provisions of the Act in both Pts II and III with a degree of particularity and no question was raised as to the appropriateness of the admission under s 3 in Pt II of the Act notwithstanding that the applicant was already subject to an order for conditional discharge. Mr Kovats, for the respondent to this appeal, cited that case as an example of how the Pt II and Pt III regimes can operate independently resulting in detention under two separate powers.

As the judge pointed out in his comprehensive judgment, the case presented to him involved a detailed analysis of the framework and provisions of the 1983 Act. It is further to be observed that guidance provided in *The Code of Practice The Mental Health Act 1983* made under s 118 of the 1983 Act and laid before Parliament states (p 109):

> '28.2 If a conditionally discharged restricted patient requires hospital admission, it will not always be necessary for the Home Secretary to recall the patient to hospital. For example. a. The patient may be willing to accept treatment informally. In these circumstances, however, care should be taken to ensure that the possibility of the patient being recalled does not render the patient's consent to informal admission invalid by reason of duress. b. In some cases it may be appropriate to consider admitting the patient under Part II of the Act as an alternative.'

Further 'The Notes for the Guidance of Supervising Psychiatrists—Mental Health Act 1983—Supervision and Aftercare of Conditionally Discharged Restricted Patients', published by the Home Office and the Department of Health and Social Security in 1987 provides guidance for supervising psychiatrists if the

supervising psychiatrist has reason to fear for the safety of the patient or others he may decide to take immediate local action to admit the patient to hospital for a short period either with the patient's consent or using civil powers such as those under s 2, 3 or 4 of the 1983 Act. Whether or not such action is taken, and even if the social supervisor does not share the supervising psychiatrist's concern, the supervising psychiatrist should report to the Home Office at once so that consideration should be given to the patient's formal recall to hospital. Mr Gordon, of course, challenges the vires of the guidance provided in both those publications. It is to be observed however that there has been no effective challenge in the intervening years either to the guidance or the advice given in those publications. Whilst it was accepted that the applicant remained at all times a restricted patient nevertheless it was submitted by the respondent that the particular provisions in Pt III applied to the patient only as a restricted patient, whilst if he were to be admitted under s 3 in Pt II he could then be considered in the context of a liability to be detained under the civil provisions. The judge accepted that the two parts of the Act provided for independent regimes. He held that there was nothing in any of the sections of the Act which was inconsistent with the independent operation of those regimes. As to Mr Gordon's submission that if the applicant were to be detained under s 3 he would be denied access to the mental health review tribunal under s 66 the judge held that if he were to be detained under s 3 he would be able to exercise a right of access under s 66 if it were necessary. It was the fact that as a restricted patient the applicant was liable to more stringent restrictions than he would be if he were to be detained under s 3. As the guidance indicated it might be convenient and in the interests of the patient that the full stringency of recall would not be implemented in particular circumstances. The flexibility given to the supervising psychiatrist was something which could operate both in the interests of the patient and also in the interests of the public. The judge said that it was appropriate and desirable that the s 3 procedure under Pt II should be available as well as the recall power under Pt III. He said:

> 'I do not consider that Parliament could have intended to deprive a patient of treatment by admission under s 3 which is needed solely for his own health or safety simply because he had been convicted of an imprisonable criminal offence which resulted in him being made subject to a hospital order and a restriction attached. Admission of a person under s 3 in those circumstances would not in any way prejudice the exercise of the Secretary of State's power of recall for protecting the public from serious harm, that power being exercised in relation to the patient in his capacity as a restricted patient liable to be detained pursuant to the hospital order.'

The ability of the Secretary of State to exercise his power of recall even when the patient was already in hospital pursuant to detention under s 3 was recognised by the decision of the Court of Appeal in *Dlodlo*'s case. Mr Gordon's skilful argument must fail if the two parts of the Act are to be considered as capable of operating independently.

The judge reviewed the statutory provisions in great detail in the context of the submissions made and came to the clear conclusion that the powers provided by Pt II of the Act could be invoked in the case of a conditionally discharged restricted patient. He said:

> 'I accept the argument of Mr Kovats and Mr Kent [amicus curie instructed by the Treasury Solicitor] that the Pt II and Pt III powers can co-exist and operate independently of each other. The provisions relating to restricted patients relied on by the applicant are, in my view, dealing solely with patients in their capacity as restricted patients liable to be detained pursuant to a hospital order, a capacity which is not applicable to the power of admission and detention under s 3. That power is not excluded by the provisions of Pt III and the rights of a patient detained under that power exist, including those of access to the tribunal under s 66 whether or not he happens also to be a conditionally discharged restricted patient. If he were discharged by the tribunal it would be a discharge in relation to his liability to detention under s 3 which would in no way affect the Secretary of State's powers to recall him as a restricted patient. Such a conclusion ensures that patients and those treating them can take advantage of the benefits of treatment for the purposes mentioned in s 3(2)(c).'

I agree with the judge's conclusion, which he reached after detailed consideration of the statutory framework. I would, accordingly, dismiss the appeal.

SCHIEMANN LJ. Sections 2 to 4 of the Mental Health Act 1983, which deal with civil admissions (to adopt Sir Stephen Brown P's useful shorthand) are to be found in Pt II of the 1983 Act. They set out circumstances in which a person can be compulsorily admitted to and detained in a hospital on mental health grounds for the purposes of assessment or treatment. The essence of Mr Gordon QC's submission is that once a hospital order under s 37 has been made in respect of an offender, the only powers in Pt II of the Act which can be used are those in sections referred to in Sch 1 (which do not include ss 2 to 4). That submission is founded on the provisions in ss 40(4) and 41(3). Those subsections do not *expressly* prevent use being made of ss 2 to 4 in the case of restricted patients. I see no advantage to anyone—whether a restricted patient or anyone else—in holding that an inhibition on the use of ss 2 to 4 powers is *implicit* in ss 40(4) and 41(3) or in the scheme of the Act.

I am conscious of the need to safeguard the liberty of the individual and of the possible conflict between the use of Mental Health Act powers and such liberty. However, Parliament has seen fit to make the use of the powers in ss 2 to 4 available in respect of an individual who has not been convicted of any crime. I can see no need to place an inhibition on their use in respect of an individual who has been so convicted, has been subjected to a hospital order and has been conditionally discharged.

Construing the Act in the way for which Mr Gordon contends would be productive of considerable harm in certain circumstances. Consider the following situation. A patient who has been conditionally discharged shows signs of being severely mentally ill in such a way that he constitutes a danger to himself and others. His condition is spotted by a doctor or social worker who thinks it appropriate to take action under ss 2, 3 or 4 of the Act. If the law were as Mr Gordon argues, the doctor, in order to determine whether he is acting within the law, must establish whether the patient is an offender who has been conditionally discharged. That is not easily and quickly done without asking the patient. Such a question, based on an assumption that the patient had been convicted of crime, would be offensive to most persons. Moreover the patient, perhaps because of

his mental illness or general truculence, may well not inform the doctor of the fact that he has been conditionally discharged. If the doctor proceeds to be a party to his detention he will, if Mr Gordon's submissions are well founded, be acting illegally. The decision in *Re S-C (mental patient: habeas corpus)* [1996] 1 All ER 532, [1996] QB 599 may mitigate the consequences of the illegality but that hardly answers the point.

I do not regard Mr Gordon's submission that s 56(1)(c) makes it impossible lawfully to treat a conditionally discharged patient without his consent until such time as he has been recalled to hospital as one which militates strongly in favour of his proposed construction of the Act. Assuming, without deciding, the submission to be well founded, its only consequence would be that recall procedures would need to be activated prior to treatment. This would not prevent detention in the meanwhile.

I agree that this appeal should be dismissed.

SAVILLE LJ. I agree with the judgments delivered by Sir Stephen Brown P and Schiemann LJ.

Appeal dismissed. Leave to appeal to House of Lords refused.

Carolyn Toulmin Barrister.

Marshall v Gradon Construction Services Ltd

COURT OF APPEAL, CIVIL DIVISION

WARD AND MUMMERY LJJ

28 APRIL, 27 JUNE 1997

Practice – Parties – Adding defendant – Application by party added to be removed from proceedings – Second defendant joined as party to proceedings outside three-year limitation period – Second defendant applying to be removed from proceedings but not raising limitation as defence – Master dismissing application – Notice of appeal served ten months after decision of master – Judge refusing to grant extension of time for appealing on grounds of inexcusable delay only – Whether judge right to do so – RSC Ord 3, r 5, Ord 15, r 6, Ord 58, r 1.

On 20 February 1990 the plaintiff was injured at work when a ladder on which he was standing fell over and in May 1991 he issued proceedings for negligence and breach of statutory duty against the defendant, his employer. On 6 December 1994, on the plaintiff's application, an ex parte order was made joining M as a second defendant to enable an alternative case to be run that M was the plaintiff's employer at the time of the accident. On 13 March 1995 the master dismissed an application by M to be removed from the proceedings, although the fact that the three-year limitation period applicable had expired was not raised before him. On 23 January 1996, ten months out of time, as prescribed by RSC Ord 58, r 1(3)[a] M served a notice of appeal against the master's order. The deputy judge in chambers refused to grant an extension of time for appealing in the exercise of his discretion under RSC Ord 3, r 5[b] and dismissed the appeal on the sole ground of the length of delay, for which there was no good excuse, but indicated that he would otherwise have allowed the appeal. M appealed to the Court of Appeal.

Held – In exercising its discretion under Ord 3, r 5 to grant an extension of time for appealing under Ord 58, r 1, the court should view the matter in the round and make an overall assessment of what was required by the justice of the case. In the instant case, the judge had failed to do so and had erred by treating the absence of an excuse for the lengthy delay as the only matter to be taken into account in exercising his discretion and ignoring other factors which, had they been taken into account, would have justified the granting of an extension of time. Those factors included the right of M to raise the limitation issue on appeal to the judge in chambers, who could have allowed the point to be raised although it had not been raised before the master. Furthermore, by Ord 15, r 6(5)[c] no person was to be added as a party after the expiry of any relevant limitation period, and if such an addition was allowed to be made ex parte in the first place, it would not, on objection being taken by the person added, be allowed to stand. Accordingly, since on 6 December 1994 any claim against M was already statute-barred, the appeal would be allowed, an extension of time for appealing

a Rule 1(3), so far as material, is set out at p 883 *a*, post

b Rule 5, so far as material, is set out at p 883 *b c*, post

c Rule 6(5), so far as material, is set out at p 885 *j*, post

the master's order granted and the order joining M as a second defendant set aside (see p 882 *g* to *j*, p 883 *d* to *g*, p 884 *a b* and p 885 *d* to p 886 *b e f*, post).

Liff v Peasley [1980] 1 All ER 623 and *Costellow v Somerset CC* [1993] 1 All ER 952 applied.

Notes

For appeal from a Queen's Bench master to a judge in chambers, see 37 *Halsbury's Laws* (4th edn) para 649.

Cases referred to in judgments

Costellow v Somerset CC [1993] 1 All ER 952, [1993] 1 WLR 256, CA.
Gibbons v Greenwich London BC [1980] CA Transcript 592.
Liff v Peasley [1980] 1 All ER 623, [1980] 1 WLR 781, CA.
Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157, CA.
Schafer v Blyth [1920] 3 KB 140.
Vann v Awford (1986) 130 SJ 682, [1986] CA Transcript 355.

Cases also cited or referred to in skeleton arguments

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc (The Saudi Eagle) [1986] 2 Lloyd's Rep 221, CA.
Cooper v Cooper, Parish (Intervener), Williams (party cited) [1936] 2 All ER 542, CA.
Crowther v Elgood (1887) 34 Ch D 691, CA.
Eaton v Storer (1882) 22 Ch D 91, CA.
Egerton v Jones [1939] 3 All ER 889, [1939] 2 KB 702, CA.
Erskine Communications Ltd (t/a Eskine West) v *Worthington* (1991) Times, 8 July, [1991] CA Transcript 725.
G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.
Ratnam v Cumarasamy [1964] 3 All ER 933, [1965] 1 WLR 8, PC.
Savill v Southend Health Authority [1995] 1 WLR 1254, CA.
Young v Thomas [1892] 2 Ch 134, CA.

Appeal

The second defendant, Thomas Frederick Mills (trading as Weldector), appealed from the decision of Michael Tugendhat QC sitting as deputy judge of the High Court in chambers on 12 March 1996 refusing his application for an extension of time for appealing from the order of Master Creightmore on 13 March 1995 dismissing Mr Mills' application to be removed as a defendant from the proceedings between the plaintiff, William Marshall, and the first defendant, Gradon Construction Services Ltd. The first defendant took no part in the proceedings. The facts are set out in the judgment of Mummery LJ.

Paul Parker (instructed by *Bazley White & Co*, agents for *Crosse & Crosse*, Exeter) for Mr Mills.

Allan Gore (instructed by *Thompsons*) for Mr Marshall.

Cur adv vult

27 June 1997. The following judgments were delivered.

MUMMERY LJ (giving the first judgment at the invitation of Ward LJ). This case is a chapter of accidents beginning on 20 February 1990 at Isleport Industrial Estate at Highbridge in Somerset with a falling ladder on which the plaintiff, Mr William Marshall, a steel erector, was standing.

On 14 May 1991 he issued a writ against Gradon Construction Services Ltd claiming negligence and breach of statutory duty by them as his employers. A statement of claim followed on 14 November 1991. Years went by until 6 December 1994 when an ex parte application was made to Master Eyre for leave to join a second defendant, Mr Thomas Mills (trading as Weldector), on an alternative case that he was Mr Marshall's employer at the time of the accident. Despite the fact that Mr Marshall's cause of action (if any) against Mr Mills had accrued on the 20 February 1990 and that the three-year limitation period for an action in respect of personal injuries had already expired, the order for joinder was made. It is not apparent from the documents before the court or from the terms of the order itself whether an affidavit was sworn in support of the application, as required by RSC Ord 15, r 16(3), unless dispensed with by leave of the court. Nor is it clear whether those who attended on behalf of Mr Marshall alerted the master to the limitation point. Mr Gore, who appears for Mr Marshall in the action and on this appeal, submitted that it was unnecessary to draw the master's attention to the point on such an application, as limitation is a matter of defence and it was not known at that stage whether Mr Mills would take the limitation point. He was not bound to take the point. Indeed, it was not taken at first. After the amended writ and statement of claim were served, Mr Mills served a defence on 10 February 1995. The limitation point was not pleaded in the defence nor was it raised on his behalf on an unsuccessful application to Master Creightmore on 13 March 1995 to remove Mr Mills from the proceedings.

The time for appealing against Master Creightmore's dismissal of what he described as a misconceived application passed without the service of a notice of appeal. Mr Mills' legal advisers discussed what steps should be taken next and ultimately, on the 23 January 1996, about ten months out of time, a notice of appeal was issued.

That appeal was heard on 21 February 1996 by Mr Michael Tugendhat QC, sitting as a deputy judge in chambers. For the reasons stated in his judgment of 12 March 1996 he refused to grant an extension of time for appealing, though he added that he would not have dismissed the appeal if it had been proper for him to grant an extension.

On 26 June 1996 leave to appeal was granted by the Court of Appeal. By the time that appeal was heard on 28 April 1997 over seven years had passed since the ladder fell to the ground.

On this appeal the following possible courses are open to the court.

(1) To dismiss the appeal, as urged by Mr Gore on Mr Marshall's behalf, on the ground that the judge properly exercised his discretion in accordance with well-established principles and that his order is not obviously wrong. If that course is taken, Mr Mills will remain a party in the action.

(2) To allow the appeal, as submitted by Mr Parker on behalf of Mr Mills, on the ground that the judge's exercise of discretion was erroneous, and to remit the matter for rehearing on the issues (a) whether an extension of time should be granted and (b) whether an order should be made that Mr Mills ceases to be a party to the action. This course would lead to further expense and delay in proceedings now six years old.

(3) To allow the appeal, to exercise the discretion to extend the time for appealing and to determine whether or not the order joining Mr Mills as a defendant should be quashed.

In my judgment, this court should take the third course for the following reasons.

The appeal from Master Creightmore to the judge in chambers is governed by RSC Ord 58, r 1(3), which provides:

> 'Unless the Court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made ...'

The court's discretion to enlarge the time for appealing must be read with Ord 3, r 5, which provides:

> '(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1), although the application for extension is not made until after the expiration of that period ...'

The object of that rule is 'to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice' (see *Schafer v Blyth* [1920] 3 KB 140 at 143 per Lush J).

As Bingham MR observed in *Costellow v Somerset CC* [1993] 1 All ER 952 at 959, [1993] 1 WLR 256 at 263–264, the very general discretion in Ord 3, r 5 is 'to be exercised in accordance with the requirements of justice in the particular case'.

He warned against attempts to exercise this discretion 'by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate'. He emphasised the importance of doing justice to both parties and of making 'an overall assessment of what justice requires'. He advised that in these circumstances 'the case is best viewed in the round' (see [1993] 1 All ER 952 at 959–960, [1993] 1 WLR 256 at 263–264).

Although that case was concerned with dismissal for want of prosecution (the plaintiff had, without excuse for delay, failed to serve documents in accordance with time limits laid down by the rules) the observations on the exercise of discretion in cases of failure to observe time limits are valuable and, in my view, relevant to the proper approach of the court in this case.

The judge adopted an approach which led him to refuse an extension of time, when a proper exercise of the discretion would have led to a grant of an extension. The extension was refused on the sole ground of the length of the delay for which there was no good excuse. The judge said:

> 'Clearly the delay in the present case is very long in the context of the five days allowed by the rules. The affidavit sworn on behalf of the second defendant makes clear, and I unreservedly accept, that there has been no procedural abuse or questionable tactics in this case. But it is equally clear that no good excuse is offered for the failure of the second defendant's legal advisers to raise the limitation point sooner than they did. From the point of view of the court and the plaintiff, there is no distinction to be drawn between an oversight by the second defendant personally and one by his legal advisers. I think the delay is so long that even in the absence of prejudice I should refuse the extension of time that is sought in this case. Accordingly, the application will be dismissed on that ground.'

Having reached that clear conclusion, the judge proceeded to consider the risk of prejudice to the plaintiff, lest he should be wrong in refusing the extension on the ground of delay. He held that there was no real risk of prejudice to the

plaintiff if he were to grant an extension of time and allow the appeal. On that approach he would not have refused the application for an extension and dismissed the appeal.

In my judgment, the judge erred in imposing a fetter on the exercise of his discretion. In refusing an extension of time on the sole ground of inexcusable long delay, he failed to view the matter before him in the round and did not make an overall assessment of what was required by the justice of the case. In the discussion preceding his conclusion the judge held that the principles laid down by this court in *Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256 do not apply to 'a very late application for an extension of time for appealing under Ord 58, r 1'.

He pointed out that, although the judgment in *Costellow*'s case referred to Ord 3, r 5, it did not refer to Ord 58, r 1. Further, that case was concerned with an application to dismiss proceedings for failure to comply with time limits and involved the court's inherent jurisdiction to dismiss for want of prosecution. In the view of the judge a less restrictive approach was appropriate in that type of case than was applicable to an extension of time for appealing.

The judge justified his approach by reference to the decision of this court in *Revici v Prentice Hall Inc* [1969] 1 All ER 772, [1969] 1 WLR 157 followed in *Gibbons v Greenwich London BC* [1980] CA Transcript 592. In *The Supreme Court Practice 1997* para 3/5/1 *Revici v Prentice Hall Inc* is cited as supporting this proposition:

> 'The R.S.C. as to time have to be observed, and if substantial delay occurs without any explanation being offered, the court is entitled, in the exercise of its discretion, to refuse the extension of time, *e.g.* to serve a notice of appeal from the master to the judge in chambers, even though the delay could be compensated for by costs and no injustice would be done to the other party ...'

That is contrasted in the editorial notes with 'the more liberal and less restrictive approach favoured in *Costellow v. Somerset County Council* ... in cases of procedural default not involving procedural abuse, questionable tactics, contumelious or repeated or persistent default in the face of a pre-emptory order'.

Revici's case was relied upon by Mr Parker on this appeal in support of the decision of the judge. That case bears certain similarities to the present case in that there was an unsuccessful attempt to appeal against the decision of a master to the judge in chambers out of time and the judge in chambers refused an extension of time to appeal. The special features of that case were that (a) no less than three extensions of time for appealing (totalling 11 weeks) were obtained by consent and (b) when the appeal was brought out of time, not a single ground or excuse was put forward to explain the delay or why no appeal had been brought in time. No limitation point was involved in that case. As pointed out in the later Court of Appeal case *Vann v Awford* (1986) 130 SJ 682, [1986] CA Transcript 355 no rigid rule was laid down in *Revici*'s case. Dillon LJ said that *Revici*'s case was—

> 'governed by its own facts, where there had already been two extensions of time conceded. In such a case it may be well be said that enough is enough and a further extension should not be granted without an explanation; but I do not read the case as deciding that there is a general rule that an extension of time must not be granted where a time limit prescribed by the rules has expired unless a satisfactory explanation of the delay is given. On the

a contrary, the case is rather a rejection of the opposite supposed rule that an extension will inevitably be granted if there has been no prejudice to the other side and costs thrown away are paid.'

A similar point was made by Nicholls LJ where, after reference to *Revici's* case, he said:

b 'I do not think that those decisions laid down as an immutable principle that if no excuse is offered no extension of a time limit prescribed by the Rules of the Supreme Court should ever be granted ... Of course, the absence of a reasonable explanation is a factor to be taken into account, and, depending upon all the circumstances, it may be a very weighty factor and c may be the decisive factor, but it is only a factor. So the absence of an explanation in the present case is not per se decisive of the question before the court.'

In my judgment, the judge was wrong in treating the absence of an excuse for the lengthy delay as the *only* matter to be taken into account by him in deciding d whether or not to grant an extension of time. There are other factors in the present case which ought to have been weighed in the balance. I have reached the conclusion , as did the judge himself, that if those other factors are taken into account, the extension of time should be granted and the appeal allowed.

Those other factors outweigh the point taken on inexcusable delay. An overall assessment of the justice of the case requires not only that an extension of time e be granted but also that this appeal be allowed and that the order joining Mr Mills as a defendant to these proceedings should be set aside on the ground that he was improperly joined.

The order which Mr Mills challenged before Master Creightmore and wishes to challenge on this appeal was made without giving him any prior notice, formal f or informal, of an intention to apply for it. Mr Mills had no prior opportunity to state his reasons for opposing the order. When that opportunity was available to him, an application was made on his behalf to Master Creightmore, but unfortunately the limitation point was not taken because Mr Mills' advisers overlooked it. It would, however, have been open to Mr Mills to take that point on appeal to the judge in chambers, which is by way of rehearing of the g application that led to the order under appeal. In his discretion the judge in chambers may, subject to contentions about costs, allow a point to be raised which was not taken before the master.

The ex parte order for the joinder of Mr Mills was made under RSC Ord 15, r 6(2)(b). That confers on the court a discretion to order a person to be added as h a party who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

Order 15, r 6(5) embodies a well-established general rule of practice: 'No person shall be added or substituted as a party after the expiry of any relevant j period of limitation ...' That practice was explained by Brandon LJ in *Liff v Peasley* [1980] 1 All ER 623 at 639, [1980] 1 WLR 781 at 799:

'It is an established rule of practice that the court will not allow a person to be added as a defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim. Alternatively, if the court has

allowed such addition to be made ex parte in the first place, it will not, on objection then being taken by the person added, allow the addition to stand.' a

Mr Mills is in the latter position. The claim against him (if any) was already statute barred on the 6 December 1994 when, by ex parte order, he was joined as a defendant. Now that he has taken the objection, on the limitation ground, to being added as a party, the court should not allow his joinder to stand.

Order 15, r 6(5)(a) and (b) provides for two cases in which a person may be b added or substituted as a party after the expiry of any relevant period of limitation. It is not suggested that this case falls within Ord 15, r 6(5)(a). It cannot be said that it is ' necessary for the determination of the action' that Mr Mills should be added as a party, in view of the restricted circumstances in which a party may be treated as necessary for the purposes of para (5)(a) (see Ord 15, c r 6(6)). This case does not fall within any of the sub-paras (a) to (e) of r 6(6). Under para (5)(b) a person may be added after the expiry of a relevant period of limitation where the relevant period arises under the provisions of ss 11 or 12 of the Limitation Act 1980 and the court directs that those provisions should not apply to the action by or against the new party. Section 11 provides that the three-year limitation period is applicable to actions in respect of personal injuries. d There is no material before the court which would enable a direction to be made under s 33 of the 1980 Act that the provisions of s 11 should not apply to this action. If Mr Marshall wished to argue for such a direction, it was incumbent on those advising him to put the necessary material before the court. The opportunity to do that before the judge was not taken and no application was e made on this appeal to introduce material relevant to those provisions of the 1980 Act.

For those reasons, I would (a) grant an extension of time in which to appeal from Master Creightmore's order of 13 March 1995, (b) allow this appeal and (c) set aside the order of 6 December 1994 joining Mr Mills as a second defendant to this action. f

WARD LJ. I agree.

Appeal allowed.

Kate O'Hanlon Barrister. g

Taylor and another v Serious Fraud Office and others

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, MILLETT LJJ AND SIR BRIAN NEILL

23 JUNE, 22 JULY 1997

Action – Immunity from suit – Witness – Plaintiffs bringing defamation action in respect of documents forming part of criminal investigation by defendants into activities of third party – Whether action barred – Whether defendants enjoying absolute immunity from suit.

On 4 May 1994 the second defendant, an investigating lawyer employed by the first defendant, the Serious Fraud Office (the SFO), wrote to the Attorney General for the Isle of Man proposing to interview the plaintiff, a solicitor in the Isle of Man and England, in connection with the SFO's investigation into the allegedly fraudulent activities of D and F. She thereafter went to the Solicitors Complaints Bureau and spoke to the fourth defendant, who was employed by the third defendant, the Law Society, and made a file note of the discussion which took place. Following the commencement of criminal proceedings against D and F, the SFO disclosed to their solicitors 'unused material' which included the letter of 4 May and the file note. Counsel representing F subsequently requested the plaintiff's assistance and disclosed to him the letter and the file note. The plaintiff and the company of which he was the managing director subsequently issued proceedings against the first to fourth defendants, contending that the words used in the letter and the file note, in their natural and ordinary meaning, were defamatory, since they portrayed the plaintiff as a conspirator in the alleged fraud. The defendants applied for the proceedings to be struck out on the ground that they disclosed not reasonable cause of action or were an abuse of the process of the court. The judge held that the plaintiff, when shown the documents, was subject to an implied undertaking to the court, which was entitled to control them, and that the use of the documents for the purposes of the defamation action constituted a breach of that undertaking and therefore the action should be struck out. The plaintiffs appealed.

Held – There was no implied undertaking restricting the use of documents disclosed to a defendant by the prosecution in criminal proceedings, to those proceedings. However, since the administration of justice would be seriously impeded if investigators could not operate freely without the fear of becoming involved in litigation, where those documents had been prepared as part of the process of investigating a crime or possible crime with a view to a prosecution or possible prosecution, the person who had done so enjoyed absolute immunity from suit. In the instant case, the letter and file note on which the plaintiffs' action for defamation was based formed part of the investigation being carried out by the SFO into the activities of D and F. It followed that the plaintiff's action was therefore barred and the appeal would accordingly be dismissed (see p 892 *d e*, p 895 *d* to *g*, p 899 *h*, p 900 *g* to *j*, p 901 *c d*, p 902 *e j*, p 903 *f* to *j* and p 904 *j* to p 905 *a f g j* to p 906 *f*, post).

Dicta of Drake J in *Evans v London Hospital Medical College* [1981] 1 All ER 715 at 720, 721, dictum of Simon Brown LJ in *Silcott v Comr of Police of the Metropolis* (1996) Times, 9 July and *Mahon v Rahn* [1997] 3 All ER 687 applied.

Notes

For protection from proceedings in respect of things said in the course of preparing evidence, see 17 *Halsbury's Laws* (4th edn) para 261.

Cases referred to in judgments

Arrows Ltd, Re (No 4), Hamilton v Naviede [1994] 3 All ER 814, [1995] 2 AC 75, [1994] 3 WLR 656, HL.

Coventry Newspapers Ltd, Ex p [1993] 1 All ER 86, [1993] QB 278, [1992] 3 WLR 916, CA.

Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips [1975] 1 All ER 41, [1975] QB 613, [1974] 3 WLR 728.

Evans v London Hospital Medical College [1981] 1 All ER 715, [1981] 1 WLR 184.

Hasselblad (GB) Ltd v Orbinson [1985] 1 All ER 173, [1985] QB 475, [1985] 2 WLR 1, CA.

Home Office v Harman [1982] 1 All ER 532, [1983] 1 AC 280, [1982] 2 WLR 338, HL.

Lincoln v Daniels [1961] 3 All ER 740, [1962] 1 QB 237, [1961] 3 WLR 866, CA.

Mahon v Rahn [1997] 3 All ER 687, CA.

Marcel v Comr of Police of the Metropolis [1992] 1 All ER 72, [1992] Ch 225, [1992] 2 WLR 50, CA; *rvsg* [1991] 1 All ER 845, [1992] Ch 225, [1991] 2 WLR 1118.

Marrinan v Vibart [1962] 3 All ER 380, [1963] 1 QB 528, [1962] 3 WLR 912, CA; *affg* [1962] 1 All ER 869, [1963] 1 QB 234, [1962] 2 WLR 1224.

Morris v Director of Serious Fraud Office [1993] 1 All ER 788, [1993] Ch 372, [1993] 3 WLR 1.

Munster v Lamb (1883) 11 QBD 588, [1881–5] All ER Rep 791, CA.

Prudential Assurance Co Ltd v Fountain Page Ltd [1991] 3 All ER 878, [1991] 1 WLR 756.

R v Keane [1994] 2 All ER 478, [1994] 1 WLR 746, CA.

R v Ward [1993] 2 All ER 577, [1993] 1 WLR 619, CA.

Richards v Naum [1966] 3 All ER 812, [1967] 1 QB 620, [1966] 3 WLR 1113, CA.

Saif Ali v Sydney Mitchell & Co (a firm) (P, third party) [1978] 3 All ER 1033, [1980] AC 198, [1978] 3 WLR 849, HL.

Silcott v Comr of Police of the Metropolis (1996) Times, 9 July, [1996] CA Transcript 562.

Watson v M'Ewan, Watson v Jones [1905] AC 480, [1904–7] All ER Rep 1, HL.

X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL; *affg* [1994] 4 All ER 602, [1995] 2 AC 633, [1994] 2 WLR 554, CA.

Cases also cited or referred to in skeleton arguments

British Coal Corp v Dennis Rye Ltd (No 2) [1988] 3 All ER 816, [1988] 1 WLR 1113, CA.

Miller v Scorey, Miller v Forrest [1996] 3 All ER 18, [1996] 1 WLR 1122.

Rogers v Secretary of State for the Home Dept, Gaming Board for Great Britain v Rogers [1972] 2 All ER 1057, [1973] AC 388, HL.

Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, CA; *affd* [1946] 1 All ER 98, [1946] AC 163, HL.

Appeal

The plaintiffs, Thomas Denton Patrick Taylor and Monarch Assurance plc, appealed from the decision of Sir Michael Davies sitting as a judge of the High Court in the Queen's Bench Division on 27 June 1996 striking out the plaintiffs'

action against the defendants, the Serious Fraud Office (the SFO), Katherine McKenzie, the Law Society and Neil Rogerson, for defamation in respect of written material which formed part of the SFO's investigation into the allegedly fraudulent activities of a third party. The facts are set out in the judgment of Kennedy LJ.

Leolin Price QC and *Julian Knowles* (who did not appear below) (instructed by *Jeffrey Green Russell*) for the plaintiffs.

Andrew Caldecott QC and *Catrin Evans* (instructed the *Treasury Solicitor*) for the first and second defendants and (instructed by *Crockers*) for the third and fourth defendants.

Cur adv vult

22 July 1997. The following judgments were delivered.

KENNEDY LJ.

(1) This is the plaintiffs' appeal from a decision of Sir Michael Davies, sitting as a judge of the High Court in the Queen's Bench Division, who on 27 June 1996 ordered that the plaintiffs' action be struck out against all four defendants.

(2) *Facts*

For the purposes of this appeal the facts can be briefly stated. In 1994 the Serious Fraud Office (the SFO) was investigating the activities of Charles Deacon, James Fuller and John Patrick Savage, who were alleged to have committed a serious and complex fraud. The investigations resulted in January 1996 in Deacon and Fuller being convicted of conspiracy to defraud, by which time Savage had died. But on 4 May 1994, during the course of the investigations, Katherine McKenzie, an investigating lawyer employed by the SFO, wrote to seek the assistance of the Attorney General for the Isle of Man in relation to the investigation. It had apparently emerged that Mr Taylor, a solicitor in the Isle of Man (and in England) had, on behalf of clients, invested money with Deacon and Savage, and the letter proposed that Mr Taylor be interviewed, and that Ms McKenzie and Det Con Walker of the Staffordshire Police be given authority to undertake their inquiries in the Isle of Man.

On 17 May 1994, as part of the investigation, Ms McKenzie and Det Insp Hulse of the Staffordshire Police went to the Solicitors Complaints Bureau at Leamington Spa to see Neil Rogerson, a Law Society employee, who explained how the compensation fund worked and its application to the instant fraud inquiry. A file note was made. By that date the criminal proceedings against Deacon and Fuller had already been transferred to the Crown Court and on 24 October 1994 the SFO disclosed to the defendants' solicitors in the criminal case 'unused material' which included the letter of 4 May 1994 and the file note of 17 May 1994.

In May 1995 Mr Taylor was asked by counsel representing Fuller if he would be prepared to assist, and a meeting was arranged. To enable him to prepare for that meeting he was shown amongst other documents the letter of 4 May 1994 and the file note of 17 May 1994 and he was, he says, concerned because in those documents he was being portrayed by Ms McKenzie as a conspirator.

(3) *The defamation action*

By a specially indorsed writ issued on 24 March 1996 Mr Taylor and Monarch Assurance plc, of which he is managing director, commenced this action against the director of the SFO, Ms McKenzie, the Law Society and Neil Rogerson. The plaintiffs were subsequently given leave to amend the writ and all subsequent proceedings to show the SFO as the title of the first defendant, and nothing now turns on that. The statement of claim sets out in full the letter of 4 May 1994, and asserts that the words used, in their natural and ordinary meaning, were defamatory of the plaintiffs. In para 4 of the statement of claim the word defendant is persistently used in place of the word plaintiff, but the meaning is clear. Similar allegations are made in relation to the meeting of 17 May 1994, based on the file note, although here again the misdescription of the parties makes it difficult to disentangle what precisely is being alleged. In para 11 of the statement of claim criticism is made of disclosure of the file note to Fuller's legal advisers.

On 1 May 1996 the Treasury Solicitor, acting for the first and second defendants, took out a summons which sought an order that the writ and statement of claim be struck out pursuant to RSC Ord 18, r 19 or under the inherent jurisdiction of the court, on the grounds that—

> '(a) as against the first defendant they disclosed no reasonable cause of action and/or are embarrassing; (b) as against each of the first and second defendants they are scandalous and/or an abuse of the process of the court.'

On 29 May 1996 solicitors acting for the third and fourth defendants also took out a summons seeking an order that the action against those defendants be struck out pursuant to Ord 18, r 19 or under the inherent jurisdiction of the court. Thus the matter came before Sir Michael Davies on 26 July 1996, when he made the order to which I have already referred.

(4) *The decision under appeal*

As the judge pointed out:

> 'All the causes of action derived from the letter, the file note, and any oral statements which led to them and the plaintiffs only acquired access to them because they were disclosed as unused material by the Crown to Fuller's legal advisers. These were documents which were prima facie confidential and private, and this, I think, maybe important, neither of the documents or the oral conversations were read out or referred to at the criminal trial.'

The judge found: (i) that it was the duty of the prosecution to disclose the two documents without formal order; (ii) that in civil proceedings there is an implied undertaking that documents disclosed on discovery must not be used for any purpose other than the purposes of the case in which they are disclosed (in this court it has been common ground that such an undertaking extends to a third party who sees documents as a result of discovery and knows that they have been available in that way—as the plaintiff Mr Taylor saw them in the present case); (iii) that it is not in the interests of the public that there should be opened up the possibility of countless defamation cases arising from situations like those in the present case; (iv) that when shown the documents Mr Taylor was subject to an implied undertaking to the court, which was entitled to control the documents, and that it was a breach of that undertaking for him to use them for the purposes of this action; and (v) that if such documents are to be used for any purpose other

than that for which they are disclosed an application should be made to the Crown Court to release the undertaking.

In arriving at his conclusion the judge referred to various authorities including, in particular, the decision at first instance of Brooke J, as he then was, in *Mahon v Rahn* (19 June 1996, unreported). That decision was reversed by another division of the Court of Appeal ([1997] 3 All ER 687) on 23 May 1997 and Mr Leolin Price QC, who has appeared for the plaintiffs before us, contends that because of the way in which *Mahon*'s case was decided by this court we must now allow this appeal. Before I turn to consider what was decided by this court in *Mahon*'s case, and the extent to which this court is bound by that decision, it is in my judgment appropriate to consider how Mr Caldecott QC, for the defendants, puts his case in relation to the main issue, namely whether, in the absence of recent binding authority, this court should say that these plaintiffs were entitled to start proceedings on the basis of documents disclosed to Mr Taylor in the way that I have described.

(5) *Why maintain confidentiality?*

Unfortunately no prosecuting authority was a party to *Mahon*'s case, so this court did not have the advantage of the submissions which we have heard.

As Mr Caldecott pointed out, although it can be valuable to see what, if anything, is done in civil litigation to restrict collateral use of documents disclosed on discovery, the approach if carried too far can lead to error, because if the reasons for restriction which apply in relation to civil litigation are not present in the criminal field it does not necessarily follow that in relation to criminal litigation there should be no restrictions. There may be, and he submits that there are, quite separate and powerful reasons for imposing and maintaining restrictions in the criminal field.

The first and most obvious of those reasons is the need to sustain and encourage the free flow of information from informants both to initiate and to achieve progress with criminal inquiries. By informants I do not mean only those who operate close to criminals and give information for reward. I mean anyone in a position to give useful information, such as a neighbour who may have made a potentially significant observation, or an employer who may have suspected an employee of dishonesty. If informants are to be encouraged to be forthcoming and frank it is obviously essential for them to know that so far as possible the information which they give will remain confidential. In order to ensure that no injustice is done to a defendant in a criminal trial the information may have to be made available to that defendant, or to those acting for him, for the purposes of conducting his defence in that case, but the needs of justice require no wider disclosure. So long as the information does not actually become public as a result of it being used at a criminal trial it seems to me that, save in highly exceptional cases, no significant damage can be done to anyone's reputation as a result of the very limited disclosure to which I have just referred, and so the common good clearly requires that the documents disclosed should go no further. Otherwise not only will there be a real danger of informants being stifled by the threat, if not the reality, of civil litigation, but there will also be a risk of their being ostracised or subjected to violence and intimidation from those sympathetic to the criminal's cause. To say that informants have nothing to fear because a prosecutor can always seek a special order to safeguard particularly sensitive information and that if the action against them should happen to take the form of a claim for damages for defamation they can, if not malicious, sustain a defence

of qualified privilege or even absolute privilege is, in my judgment, a wholly inadequate response. No one, least of all a bona fide potential informer, wishes to be dependent upon the prosecutor's view of what is sensitive, or to be sued (especially if the cause of action is one for which legal aid is not available), and if he can avoid those risks by withholding information he will do so.

A second compelling reason in favour of maintaining confidentiality as far as possible is that the material gathered in during the course of a criminal investigation and properly disclosed on discovery will often affect others who may never even have given a statement to anyone, and who may not even be aware of the disclosure. For example, disclosed material may show that someone other than the defendant was originally suspected of the crime, or a letter properly written in confidence by A to B may exist which is disparaging to C. Long after the letter was written a prosecution of B may lead to the disclosure of that letter as unused material. If C obtains access to it and sues A it is, in my judgment, plain that justice is not being done if A is simply left to avail himself if he can of such defence as he can raise to an action in defamation. Similarly, if it is not C who obtains access to the letter but a newspaper, which refuses to reveal its source, C's reputation may be seriously damaged before he can do anything to stop it. It may be information affecting his private life, it may even affect vulnerable children.

A third reason for maintaining confidentiality, demonstrated by the facts of this case, is the need to enable those investigating crime to operate freely, to follow leads, to consider suspects, and to record their thoughts without the fear of parasitic litigation.

I have therefore no hesitation in concluding that the interests of justice are best served if material which is disclosed to a defendant by the prosecution as part of the criminal process is subject to the restriction that it can only be used for the purposes of conducting the defence in those proceedings, at least until it enters the public domain by being referred to in open court. I accept, as will become apparent, that at present, even since the implementation of the Criminal Procedure and Investigations Act 1996 the restriction is not precisely as I have suggested that it should be, but it is Mr Caldecott's submission that long prior to the Act the law had demonstrated in many fields, including in particular in the field of defamation, a policy against allowing, without the leave of the court, collateral use of information which it required to be disclosed for the purposes of particular proceedings where such information had not been referred to in open court. Mr Caldecott submits that it was because it was not alerted to the existence of that well-established policy that this court in *Mahon's* case fell into error.

(6) *Relevant authorities*

It is said that only limited assistance can be gained from cases concerning the alleged misuse of material disclosed in criminal proceedings because there are few such cases. No doubt that is because extensive disclosure by the prosecution of material other than that relied on in open court is a recent development (see *A-G's Guidelines (Disclosure of information to the defence in cases to be tried on indictment)* (1981) 74 Cr App R 302, *R v Ward* [1993] 2 All ER 577, [1993] 1 WLR 619 and *R v Keane* [1994] 2 All ER 478, [1994] 1 WLR 746). Bearing that in mind Mr Caldecott submits that the policy of the law can be seen in many cases in other fields of law to which we were referred. Those cases show, he submits, a recognition that private law remedies, such as seeking an injunction, or raising a

defence of privilege, are inadequate. As I have already indicated the injured party may not know of the collateral publication until serious damage has been done. He may not know who to proceed against because he may not know how the information became public, he may not have the necessary means, his opponent may be impecunious, or if he takes proceedings in defamation he may be met by a defence of justification, in which event no interlocutory injunction will normally be granted.

Mr Caldecott submits, and I accept, that by granting the defence of absolute privilege to every advocate and every witness in a trial in respect of what is said in court, and in respect of fair and accurate reports thereof, the courts have long recognised the need to protect the trial process from extraneous influences, and, he submits, that privilege, which arises from public policy, is more widely available than was recognised by this court in *Mahon's* case. In *Munster v Lamb* (1883) 11 QBD 588, [1881–5] All ER Rep 791 the defendant to the action in defamation was a solicitor who had used the words complained of when conducting a defence at Petty Sessions. The Court of Appeal held that he was entitled to the protection of absolute privilege and explained why. Brett MR said (11 QBD 588 at 604):

> 'To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting bonâ fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.'

In other words qualified privilege was not a sufficient safeguard because of the dangers of being 'harassed with suits', one of Mr Caldecott's arguments in the present case. Fry LJ (11 QBD 588 at 607) made the same point:

> 'The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they have not spoken with malice, in which they have not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty.'

In *Watson v M'Ewan, Watson v Jones* [1905] AC 480, [1904–7] All ER Rep 1 the House of Lords held that the privilege which protects the witness from an action in slander in respect of his evidence in the witness box also protects him against the consequences of statements made to the client and his solicitor when preparing the case for trial. Earl of Halsbury LC said ([1905] AC 480 at 487):

> 'It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove.'

Mr Caldecott invites us to note the thinking which is there articulated. In *Lincoln v Daniels* [1961] 3 All ER 740, [1962] 1 QB 237 this court made it clear that the decision in *Watson's* case must not be read too widely, but Devlin LJ reiterated the reasons for the rule of absolute privilege saying ([1961] 3 All ER 740 at 748, [1962] 1 QB 237 at 256):

> 'The rule of absolute privilege, as has so often been pointed out, has not been devised so as to protect malicious persons but to ensure that judges and others engaged in the administration of justice should be free from the fear of proceedings and "the vexation of defending actions" ...'

In *Marrinan v Vibart* [1962] 3 All ER 380, [1963] 1 QB 528 the cause of action was conspiracy, the plaintiff alleging that two police constables had conspired to defame him in a report to the Director of Public Prosecutions (the DPP), in evidence given at a trial, and in testimony to an inquiry ordered by the benchers of an Inn of Court. On a preliminary issue Salmon J ([1962] 1 All ER 869, [1963] 1 QB 234) held that each publication was absolutely privileged, and that decision was upheld by this court. Sellers LJ said ([1962] 3 All ER 380 at 383, [1963] 1 QB 528 at 535):

> 'Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.'

Mr Caldecott submits that there is an obvious parallel between that case and the position of the second and fourth defendants in the present case. Of course we are not concerned with the defence of absolute privilege—no defence has yet been served. The problem is that even if such a defence is available it does not prevent proceedings being started, and if there is any doubt as to the availability of the defence of absolute privilege it will not be considered as a preliminary issue (see *Richards v Naum* [1966] 3 All ER 812, [1967] 1 QB 620).

The present case also raises the question of the extent to which confidentiality or privilege attaches to material disclosed so as to restrain someone other than the defendant. In *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] 1 All ER 41, [1975] QB 613, in the context of civil litigation, that problem was addressed. An expert who was advising some claimants in their action against Distillers was given access to material disclosed by the defendants in that action. He agreed to sell the material to a newspaper, and refused to return it after the claimants' action had been settled. The court ordered that it be returned, Talbot J saying ([1975] 1 All ER 41 at 48, [1975] QB 613 at 621):

> 'Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced. I am further of the opinion that it is a matter of importance to the public, and therefore of public interest, that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case.'

Mr Caldecott of course submits that the same line of reasoning should be adopted in relation to material disclosed to the defence as unused material in the course of a criminal prosecution.

In *Evans v London Hospital Medical College* [1981] 1 All ER 715, [1981] 1 WLR 184 the plaintiff had been arrested and charged with the murder of her five-month-old son by morphine poisoning, on the basis of post-mortem investigation results provided by the defendants. Further investigations led to no evidence being offered, and she was acquitted. She then commenced civil proceedings against the defendants alleging negligence, thus illustrating, as Mr Caldecott has pointed out, that a person who starts civil proceedings on the basis of material disclosed during the course of a criminal prosecution will not always seek damages for defamation. He or she may select a different cause of action. The defendants successfully moved to set aside the statement of claim on the basis that they were at all times acting in the course of preparing evidence for a possible criminal prosecution, and for that reason were immune from any civil proceedings arising from their acts. Drake J reviewed the line of authority to which I have already referred, and having referred to a test used by the House of Lords in *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All ER 1033, [1980] AC 198, said:

> '... I would alter it to apply it to the immunity attaching to a witness or possible witness in a criminal investigation, thus: "The protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated."' (See [1981] 1 All ER 715 at 721, [1981] 1 WLR 184 at 192.)

If that is right then it would appear to have direct application to the facts of the present case. The importance of the decision in *Evans'* case is two-fold: (i) the immunity from suit is not the same as absolute privilege because the cause of action was one for which absolute privilege would not have afforded any defence; (ii) the immunity did not arise out of the way in which the plaintiff obtained the information which enabled her to sue. It arose out of the nature of the activity being undertaken by the defendants at the time of the acts complained of.

In *Mahon's* case Otton LJ did refer briefly at the end of his judgment to *Evans'* case and to two other decisions, namely *Hasselblad (GB) Ltd v Orbinson* [1985] 1 All ER 173, [1985] 1 QB 475 and *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, saying that it was 'at least arguable' that the respondents in *Mahon's* case could raise the defence of absolute immunity. But it had not been pleaded or argued, either in the Court of Appeal or in the court below, so Otton LJ considered that it would not be appropriate to maintain the first instance decision on that ground. That, is not our position. We have had the benefit of argument, in particular at an adjourned hearing, in relation to that defence and the relevant cases have been cited to us. The decision in *Hasselblad's* case is sufficiently far away from the facts of the present case for me not to need to pause to consider it, but *X and ors (minors) v Bedfordshire CC* is a decision to which I will later refer.

The Criminal Justice Act 1987 established the SFO and gave to the director certain investigative powers, but only for the purposes of an investigation (see s 2(1)), and the Act in s 3(5) sets out the purposes for which information obtained may be used. In *Morris v Director of Serious Fraud Office* [1993] 1 All ER 788, [1993] Ch 372 the court considered a liquidator's application under s 236 of the

Insolvency Act 1986 for an order that the SFO produce certain documents in its possession, and Nicholls V-C said ([1993] 1 All ER 788 at 794–795, [1993] Ch 372 at 380–381):

> '... I can see no justification for implying a general power for the SFO to disclose information, *obtained in the exercise of compulsory powers conferred by the Act*, to persons not named in s 3 ... When information is obtained in exercise of those powers the SFO may use the information for those purposes and purposes reasonably incidental thereto and such other purposes as may be authorised by statute, but not otherwise.' (Nicholls V-C's emphasis.)

Mr Caldecott submits first that the 1987 Act gives some useful indication how Parliament expects confidence to be respected so far as practicable when documents are brought to light during the course of criminal investigations, and, secondly, that it would be curious, to say the least, if a responsible investigating authority such as the SFO were unable to make or permit collateral use of any documents revealed in the course of an investigation, but if criminal proceedings were commenced and those documents were then disclosed to the defendant, he and those to whom he revealed the documents would be free to use the documents as they chose.

In *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, [1991] 1 WLR 756 Hobhouse J considered the extent to which a party to whom documents had been disclosed during exchanges before trial of a civil action could make use of those documents after the action had been settled. Having reviewed some of the authorities he said that an undertaking to the court not to use material supplied in the course of discovery, or allow it to be used, for any purpose other than the proper conduct of the instant action will be implied ([1991] 3 All ER 878 at 885, [1991] 1 WLR 756 at 764). The judge continued:

> 'The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purpose ...' (See [1991] 3 All ER 878 at 886, [1991] 1 WLR 756 at 765.)

Obviously it involves some straining of language to apply that reasoning to disclosure by the prosecution in the course of criminal proceedings. There is no relevant rule of the court, and normally the prosecution does not disclose because the defence obtains an order. Prior to the implementation of 1996 Act disclosure was made because, in the light of the authorities, that was known to be what was required, and if the court did make an order it could not be said to invade the prosecutor's rights.

In *Marcel v Comr of Police of the Metropolis* [1992] 1 All ER 72, [1992] Ch 225 the court had to consider how to deal with documents which came into the hands of the prosecution during the course of a criminal investigation. The solicitor for the defendant in a civil action was allowed to inspect and copy some documents

seized by the police from those who were to be witnesses in that action. A subpoena duces tecum was then taken out requiring the police to produce the documents at court, but a witness from whom documents had been seized asked the court to order, inter alia, that the copies of the documents be returned to the police and that the subpoena be set aside. At first instance Browne-Wilkinson V-C ([1991] 1 All ER 845, [1992] Ch 225) held that s 22 of the Police and Criminal Evidence Act 1984 does not expressly state the only purposes for which documents seized can be used, and he continued ([1991] 1 All ER 845 at 851–852, [1992] Ch 225 at 234–235):

> 'However, there manifestly must be *some* limitation on the purposes for which seized documents can be used. Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy—fundamental human rights. Where there is a public interest which requires some impairment of those rights, Parliament legislates to permit such impairment. But, in the absence of clear words, in my judgment Parliament cannot be assumed to have legislated so as to interfere with the basic rights of the individual to a greater extent than is necessary to secure the protection of that public interest ... In my judgment, subject to any express statutory provision in other Acts, the police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner. Those investigations and prosecutions will normally be by the police themselves and involve no communication of documents or information to others. However, if communication to others is necessary for the purpose of the police investigation and prosecution, it is authorised.' (Browne-Wilkinson V-C's emphasis.)

Those passages, in so far as they relate to voluntary disclosure by the police, were expressly approved by Dillon LJ in this court. The Court of Appeal declined to set aside the subpoena, but stressed also the need to recognise the private law rights of the owner of the documents seized. Nolan LJ said ([1992] 1 All ER 72 at 85, [1992] Ch 225 at 261):

> 'In the context of the seizure and retention of documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. The private law duty ... arises from the relationship between the parties. It matters not, to my mind, that in this instance, so far as the owners of the documents are concerned, the confidence is unwillingly imparted.'

Sir Christopher Slade said ([1992] 1 All ER 72 at 86–87, [1992] Ch 225 at 262–263):

> 'In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation ... I agree

with Sir Nicolas Browne-Wilkinson V-C that these documents and information were disclosed in breach of confidence ...' a

So I come to *Ex p Coventry Newspapers Ltd* [1993] 1 All ER 86, [1993] QB 278, a decision of the Court of Appeal, Criminal Division, on unusual facts. B was convicted of unlawful wounding. The evidence against him included that of two police officers who were alleged to have behaved improperly. A complaint was made about their conduct which was investigated by the Police Complaints Authority (the PCA). A newspaper then published an article which was said to be defamatory of the two officers, and they took civil proceedings against the newspaper. At that stage the conviction of B was referred to the Court of Appeal, Criminal Division by the Home Secretary, and for the purposes of that hearing the court ordered disclosure to B of all witness statements and documents in the possession of the PCA. The appeal succeeded, and the newspaper then asked the Court of Appeal, Criminal Division to release B from his implied undertaking pursuant to which discovery of the PCA documents to him was given. It was, said Lord Taylor CJ— b c

'an implied undertaking, analogous to that arising on discovery in civil proceedings, not to use the disclosed documents otherwise than for the purposes for which discovery was given, here the pursuance of the criminal appeal ...' (See [1993] 1 All ER 86 at 90, [1993] QB 278 at 285.) d

It was accepted, both by experienced counsel and by the court, that an implied undertaking had been given to the Court of Appeal, Criminal Division which alone had power to vary it, but it was significantly different from such an undertaking arising as a result of discovery in civil proceedings. Counsel for the PCA argued against any variation of the undertaking, and the court said that his argument 'would, we accept, be formidable indeed had the implied undertaking with which we are concerned been one given in the usual way in civil proceedings' (see [1993] 1 All ER 86 at 95, [1993] QB 278 at 291). The court went on to recognise that in civil proceedings the concept of the implied undertaking is a necessary way of underpinning the integrity of the discovery process, but whereas in private litigation discovery is 'a very serious invasion of the privacy and confidentiality of the litigant's affairs' (per Lord Keith in *Home Office v Harman* [1982] 1 All ER 532, [1983] 1 AC 280) that is less obviously apt in relation to an order made by the Court of Appeal, Criminal Division. The court held that the implied undertaking added little to the public interest immunity attaching to the PCA documents, and that both should yield to the countervailing public interest which required that the newspaper be able to mount a proper defence. e f g

In *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353, [1995] 2 AC 633 one of the actions considered by the House of Lords was *M (a minor) v Newham London BC* in which an infant and her mother claimed damages for negligence and breach of statutory duty against the local authority and others. It was said that a psychiatrist and a social worker employed by the local authority had erred in diagnosing sex-abuse and in concluding that the child's mother's cohabitee was the abuser. The master granted an application to strike out the claim as disclosing no cause of action on the basis that the psychiatric injury complained of could not found a claim for damages in negligence, and that the psychiatrist was protected from suit by a witness's immunity from actions in negligence. The Court of Appeal ([1994] 4 All ER 602, [1995] 2 AC 633) disagreed, but in the House of Lords Lord Browne-Wilkinson, with whom the other members of the House agreed, h j

said that the Court of Appeal 'placed too narrow a limit on the principle of witness immunity' (see [1995] 3 All ER 353 at 385, [1995] 2 AC 633 at 754). He referred to the decision of the House of Lords in *Watson*'s case, to which I have already referred, and cited this passage from the decision of Drake J in *Evans v London Hospital Medical College* [1981] 1 All ER 715 at 720, [1981] 1 WLR 184 at 191:

> 'The immunity given to a witness or potential witness is because—"the administration of justice would be greatly impeded if witnesses were to be in fear that persons against whom they gave evidence might subsequently involve them in costly litigation": see per Salmon J in *Marrinan v Vibart* [1962] 1 All ER 869 at 871, [1963] 1 QB 234 at 237. If this object is to be achieved I think it essential that the immunity given to a witness should also extend to cover statements he makes prior to the issue of a writ or commencement of a prosecution, provided that the statement is made for the purpose of a possible action or prosecution and at a time when a possible action or prosecution is being considered. In a large number of criminal cases the police have collected statements from witnesses before anyone is charged with an offence; indeed sometimes before it is known whether or not *any* criminal offence has been committed. If immunity did not extend to such statements it would mean that the immunity attaching to the giving of evidence in court or the formal statements made in preparation for the court hearing could easily be outflanked and rendered of little use. For the same reason I think that the immunity must extend also to the acts of the witness in collecting or considering material on which he may later be called to give evidence.' (See [1995] 3 All ER 353 at 385–386, [1995] 2 AC 633 at 755; Lord Browne-Wilkinson's emphasis.)

Lord Browne-Wilkinson then continued ([1995] 3 All ER 353 at 386, [1995] 2 AC 633 at 755):

> 'My Lords, I find the reasoning of Drake J compelling at least in relation to the investigation and preparation of evidence in criminal proceedings. In my judgment exactly similar considerations apply where, in performance of a public duty, the local authority is investigating whether or not there is evidence on which to bring proceedings for the protection of the child from abuse, such abuse frequently being a criminal offence. I express no view as to the position in relation to ordinary civil proceedings ...'

In my judgment the last sentence quoted by Lord Browne-Wilkinson from the decision of Drake J plainly applies to the letter and to the file note which are at the heart of this case, and to the discussion which the file note was intended to summarise. It is also important to note that it was precisely because it was potentially a criminal and not a civil investigation that the witness was granted immunity in the *Newham* case.

In *Re Arrows Ltd (No 4), Hamilton v Naviede* [1994] 3 All ER 814, [1995] 2 AC 75 the liquidators of a company applied to a judge for directions, having received a request from the SFO for transcripts of the examination of the chairman and managing director under s 236 of the Insolvency Act 1986. The judge ordered that the transcripts be released on certain undertakings being given, but the Court of Appeal released the SFO from undertakings, and the appeal to the House of Lords was dismissed. The case is really concerned with the extent of the powers of the SFO, and although cited to us in my judgment it is not really of assistance in the present case.

In *Silcott v Comr of Police of the Metropolis* (1996) Times, 9 July this court considered a plaintiff's appeal against an order that his action for conspiracy to pervert the administration of justice and misfeasance in public office be struck out. The third cause of action—for malicious prosecution—was not affected by the order. The factual basis of the case was that, according to the plaintiff, two police officers had conspired together to produce false notes of interview which indicated that the plaintiff was the murderer of Pc Blakelock, with the result that he was wrongly convicted of that offence. The issue on appeal was identified by Simon Brown LJ as being—

> 'whether the alleged actions of the police officers are protected from any civil action for conspiracy to pervert the course of justice or misfeasance in a public office by reason of a cloak of absolute immunity conferred as a matter of public policy.'

Simon Brown LJ set out the immunity rule which protects parties and witnesses from any action arising out of anything said or done in the ordinary course of any proceedings in a court of justice. He referred to *Munster v Lamb*, *Marrinan v Vibart* and *Evans v London Hospital Medical College* as indicating the width of the rule and its limitations, and he said that 'protection must extend to the preparation of evidence equally as to its presentation'. He said:

> 'In my judgment, Drake J was correct in *Evans'* case to have held that the immunity covers all conduct that can fairly be said to be part of the investigatory and, I would add, preparatory process. To Lord Williams' submission that there is no public interest in protecting those who create false evidence or, for that matter, those who destroy sound evidence, I would answer that that misses the essential point: the public interest is in the protection of those who might otherwise be falsely accused of such conduct.'

That answer, as it seems to me, must be the same if the cause of action happens to be in defamation.

(7) *Conclusions from authorities*

In my judgment five propositions can be extracted from that rather lengthy examination of authorities.

(i) Whatever the form of action it will be barred if it is founded upon what a witness has said in the witness box, or upon what has been said or done in preparing the evidence for a trial (see *Watson v M'Ewan*, *Marrinan v Vibart*).

(ii) This immunity is not, like absolute privilege, limited to actions alleging defamation. In criminal cases it applies to prevent any form of parasitic litigation (other than an action like malicious prosecution which relates directly to criminal proceedings) where the statement or conduct relied upon is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution (see *Marrinan*'s case, *Evans'* case, *X and ors (minors) v Bedfordshire CC* and *Silcott*'s case).

(iii) Documents seized by the police or other prosecuting authority during a criminal investigation must be treated as confidential. The owners of the documents are entitled to expect that they will only be used for the specific purpose for which they have been seized (i e to further the criminal investigation) and the courts will if necessary act to support that expectation (see *Marcel*'s case).

(iv) In civil proceedings a party who obtains discovery is required in return to give an implied undertaking to the court not to use material supplied in the

course of discovery or allow it to be used for any purpose other than the proper conduct of the action in which discovery is obtained. That is to encourage full discovery, and to ensure that the invasion of the rights of the party giving discovery is restricted to what is necessary to do justice in the instant case (see *Prudential Assurance Ltd v Fountain Page Ltd*).

(v) When the prosecution discloses material to the defence in the course of a criminal prosecution, whether it be used material or unused material, the authorities prior to *Mahon*'s case are silent as to whether that gives rise to an implied undertaking of the kind to which I have just referred. Some such undertaking may well be implied if the Court of Appeal, Criminal Division orders specific disclosure of documents normally protected by public interest immunity (see *Ex p Coventry Newspapers Ltd*) but the reasons for the undertaking will not be the same as in relation to a civil action.

Those propositions are not quite the policy for which Mr Caldecott contended, but unless there is anything in the 1996 Act or *Mahon*'s case which compels me to take a different view I regard the first and second propositions as determinative of this appeal.

(8) *Criminal Procedure and Investigations Act 1996*

Part I of the Act creates for the first time a statutory scheme for prosecution and defence disclosure in criminal proceedings. As part of that scheme s 17 makes provision for protecting unused material that is disclosed by a prosecutor to an accused or to his or her legal adviser. It has to be treated as confidential, and cannot be used, except with the permission of the court other than for the purposes of the criminal proceedings to which it relates. As we discovered during the course of argument, it is by no means easy to see how Pt I of the Act will apply to persons in the position of the appellants in the present case, but fortunately that is not something we have to decide, because the material parts of the Act did not come into force until April 1997, and so they have no direct application to this case. We were really invited to consider the Act because it was thought it might assist us as to the state of the law before it came into force. I confess that I have not been able to find any such assistance in the Act. Much of the procedure which it lays down is new, and s 17(8) provides:

> 'Nothing in this section affects any other restriction or prohibition on the use or disclosure of an object or information, whether the restriction or prohibition arises under an enactment (whenever passed) or otherwise.'

(9) *Mahon v Rahn*

I return now to the case which Mr Price has submitted that we must follow in deciding this appeal. The plaintiffs were London stockbrokers and the defendants were partners in a Swiss bank. The defendants instructed the plaintiffs to purchase certain shares for $C 5m, but provided only $3m. They were pressed for the balance before the SFO and the Securities Association (the SA) began to investigate the plaintiffs. As part of that investigation the defendants were approached and they wrote a letter to the SA. Criminal proceedings were commenced, and the letter was read out in court. The criminal proceedings were dismissed and the plaintiffs claimed damages for libel on the basis of the letter. The defence served a defence in which they claimed qualified (but not absolute) privilege. They then issued a summons to strike out on the grounds that the letter had been obtained by the plaintiffs by way of disclosure in criminal

proceedings against them. Brooke J (as he then was) held that when the prosecution discloses material in criminal proceedings that gives rise to an implied undertaking by a defendant similar to that which arises in civil proceedings. The undertaking is to be implied whether the disclosure is voluntary or pursuant of an order of the court. It continues to apply even if the document is read or referred to in court and if a libel action is commenced in breach of the undertaking the court may strike it out. On appeal Otton LJ examined the scope of the implied undertaking as it exists in civil proceedings, and concluded that 'in the absence of a public interest immunity ruling to the contrary there never has been a fetter on the subsequent use of documents which have been "used" in the criminal process' (see [1997] 3 All ER 687 at 707). He was not satisfied that it was appropriate to imply an undertaking in criminal proceedings by analogy with the implied undertaking which exists in civil proceedings and found that to be decisive of the appeal, but then added the postscript to which I have already referred, but which it is now appropriate to quote verbatim. He said that on the basis of the decisions in *Hasselblad*'s case, *Evans*' case and *X and ors (minors) v Bedfordshire CC*—

> 'it would appear at least arguable that the respondents in this case could raise the defence of absolute immunity. However, this has not been pleaded, nor was the point argued below or before this court. Thus it would not be appropriate for this court to maintain Brooke J's decision to strike out on this ground.' (See [1997] 3 All ER 687 at 712.)

As I hope I have made clear, it is the plea of absolute immunity which I regard as being entitled to succeed in the present case. It follows that the judgment of Otton LJ in *Mahon*'s case is in no way decisive because it does not address the issue. Schiemann LJ simply agreed, and Staughton LJ emphasised that in that case the court was dealing with a document which was disclosed to the plaintiffs 'because it formed part of the material which the prosecution wished to put before the court'. That, of course, is not the position in this case. He did not consider that the defendant in a criminal trial is under any implied undertaking as to material 'disclosed to him as part of the prosecution case whether or not it is read out or referred to in open court'. So Mr Caldecott submitted to us that Staughton LJ, having made no finding in relation to unused material, and Schiemann LJ not having made it clear with whom he agreed, we are free to decide that an implied undertaking does arise in relation to unused material. That is not a decision which I have to make in order to reach a conclusion in relation to this appeal. More significant from my point of view, is what Staughton LJ said at the end of his judgment, namely (at 717):

> 'Otton LJ, in his penultimate paragraph, has referred to cases which elucidate the privilege that is available to witnesses. We heard no argument on that topic, but clearly it may be relevant if this action proceeds further. I agree that we should not rule upon it at the present stage. It is not pleaded, the full facts may not be known, and we would have to recall the parties for further argument. It must be considered, if at all, on some other occasion.'

Contrary to the submissions made by Mr Price I do not regard the decision in *Mahon*'s case as being determinative of this appeal, which I would dismiss.

(10) *Does Mahon's case apply to unused material?*

Were it not for the decision in *Mahon's* case I would have had a second reason for dismissing this appeal, namely that Sir Michael Davies was right for the reasons which he gave. It seems to me that:

(i) Where the needs of criminal justice involve, as they do, invasions of privacy and confidentiality—as, for example, by the seizure of documents during the course of an inquiry, and the disclosure of documents to the court and to the defence (both used and unused material)—the extent of the invasion should be no greater than the needs of criminal justice in the instant case require. That is necessary not only to encourage and protect informants and investigators, but also because those whose privacy and confidentiality have been invaded have a right to expect the law to protect them from any unnecessary exposure.

(ii) It follows that save in two exceptional cases the court should be prepared to act so as to ensure that documents created or collected during the course of a criminal inquiry are used only for the purposes of that inquiry, and of any prosecution which arises out of it.

(iii) The first exceptional case is where a document is used in a criminal court in such a way that the contents of the document become public knowledge. It then becomes no longer practicable for the court to protect the privacy or confidentiality so far as that document is concerned.

(iv) The second exceptional case is where the court is persuaded that the overall interests of justice require that the document or documents in question be available for use in other proceedings (e g where someone released soon after being charged seeks damages for wrongful arrest and false imprisonment, or a problem arises of the kind considered in *Ex p Coventry Newspapers Ltd*).

(v) In circumstances where there is n· ·ction to be derived from the immunity which in my judgment applies in t.s case the reasons for restricting the use of documents which come to light in the course of criminal investigations and criminal trials are therefore different from those which underpin the well-established implied undertaking which arises on discovery in civil proceedings, but they are no less powerful, and it can be persuasively argued that they should lead to the same result, namely confirmation of the existence of an implied undertaking in all cases other then those where the document has come fully into the public domain during the criminal trial.

(vi) However, this court in *Mahon's* case decided not to follow that route so far as used material was concerned. The way in which the matter was dealt with by Otton LJ and Staughton LJ (even allowing for the latter's more restricted approach) seems to me to leave no room for a meaningful distinction to be drawn between used material and unused material, nor would such a distinction constitute an adequate response to the reasoning in favour of an implied undertaking which I have attempted to summarise. Although, as I have said, the court in *Mahon's* case did not have the benefit of submissions from a prosecuting authority I cannot accept Mr Caldecott's submission that an established policy was overlooked, and even if I could accept it I am not persuaded that this court could decline to follow *Mahon's* case on that ground.

In conformity with the decision in *Mahon's* case I must therefore accept that in this court Sir Michael Davies' finding as to the existence of and breach of an implied undertaking cannot now be sustained, but for the reasons I have given that, in my judgment, has no effect on the outcome of the appeal.

MILLETT LJ. I would be very concerned if private and confidential material, such as bank statements, medical records and tax returns, belonging to private individuals and seized by the police or provided to them voluntarily and in confidence, and which was then served on an accused as part of the prosecution case or supplied to him by the prosecution as unused material in order to assist him with his defence, but which was not then used or referred to in open court, could be used by the accused for his own purposes free from restriction. In my opinion this would be contrary to basic legal policy derived from principles which I regard as fundamental in a free society. In my view:

(1) The seizure or compulsory disclosure of material is an interference with the owner's privacy. The invasion of his privacy can only be justified by the public interest in ensuring that all relevant material should be available to a court of justice and that an accused person should have made available to him all material which may assist him to meet the case against him. It follows that the use to which the material may lawfully be put should be limited by the purpose for which its compulsory production is justified.

(2) Persons who voluntarily supply material in confidence are entitled to have their confidence respected save only in so far as they must be taken to have consented to the use of the material. Members of the public who volunteer information to the police are entitled to expect that it will be used only for the purpose of the investigation and subsequent criminal proceedings. Their expectations should be respected.

(3) Nothing should be done to discourage members of the public from voluntarily assisting the police or prosecuting authorities. This applies with particular force to informers, but it is not confined to them. The risk that material which they provide will come into the public domain by being used or referred to in open court may discourage co-operation but is unavoidable. But there would be a further and unnecessary disincentive to co-operation if material of only peripheral relevance to the proceedings but disclosed by the prosecution to the accused in conformity with its duty should thereafter be freely available for use for any purpose.

(4) A person who is supplied with material for a limited purpose is not entitled without the consent of the person who supplied it to use it for any other purpose.

To a large extent these principles are given effect by the doctrines of public interest immunity and immunity from suit. But these doctrines do not give complete protection. The prosecution may not claim public interest immunity, and even if it does its claim may be refused. Immunity from suit does not extend to pre-existing documents, that is to say documents which are not brought into existence in the course of the criminal investigation, and does not prevent the use of material otherwise than for the purpose of civil proceedings.

In my view, those who volunteer information to and those whose documents are seized by the police are entitled to protection from improper use of their material. So, too, are those who are responsible for creating documents in the course of a criminal investigation. If, therefore the matter were res integra, I would agree with Kennedy LJ that the accused ought to be subjected to a legal obligation similar to that which arises under the implied undertaking in civil proceedings in relation to documents obtained on discovery. We are, however, bound by the recent decision of this court in *Mahon v Rahn* [1997] 3 All ER 687 to hold that material supplied to the accused as part of the prosecution case is not subject to any restriction on its subsequent use, even though it has not become

public knowledge, and even though it may have been seized under compulsory powers or obtained in confidence.

I have not found the reasoning in that case persuasive. In the first place, I cannot accept the proposition that persons who take part in the administration of justice are sufficiently protected by qualified privilege. This would be contrary to a long line of authority. It is the policy of the law to protect such persons against baseless allegations of malice, and this requires nothing less than absolute immunity from suit. In the second place, a very narrow view was taken of the scope of privacy, and no regard appears to have been paid to the fact that it is the privacy of the individual witness or investigator, not the prosecution, which is invaded when his material is supplied to the accused. Thirdly, in my view no support can be derived from the terms of s 17 of the Criminal Procedure and Investigations Act 1996. The section is limited to unused material, but the reason for this is self-evident: other material was beyond the scope of the Act. It is not possible to deduce what Parliament considered to be the position in relation to material served on the accused as part of the prosecution case. It is possible though unlikely that Parliament thought that such material should be at the free disposition of the accused. But it is at least possible that Parliament assumed that the existing law prevented this.

The position in relation to unused material was expressly left open in Mahon. I agree with Kennedy LJ, however, that it is not open to us to distinguish the case on that ground. To do so would be to introduce an indefensible distinction between used and unused material. It would mean that a member of the public whose information undermined the prosecution case would be protected, whereas one whose information advanced it would not. Such a policy would have no rational basis.

Accordingly, I reluctantly agree that it was not open to the judge to strike out the proceedings on the ground that they were brought in breach of an implied undertaking to the court. But I am also relieved to find that the proceedings should be struck out on the ground that they infringe the defendants' immunity from suit and that to continue them would be an abuse of the process of the court.

I agree that the appeal should be dismissed.

SIR BRIAN NEILL. In these proceedings for defamation the plaintiffs rely on: (a) a letter dated 4 May 1994 from Ms McKenzie of the Serious Fraud Office to the Attorney General for the Isle of Man; (b) a discussion which took place on 17 May 1994 in Leamington Spa at a meeting attended by Ms McKenzie, Det Insp Hulse of the Staffordshire Police and Mr Rogerson of the Law Society; (c) a file note dated 17 May 1994 in which Ms McKenzie made a record of the discussion referred to in (b).

The claims in respect of (a) and (c) are for damages for libel. The claims in respect of (b) are for damages for slander.

In the course of the hearing in this court Mr Caldecott QC advanced two arguments as to why these claims should be struck out.

(1) Because the documents and the terms of the discussion on 17 May only came to the knowledge of the plaintiffs by reason of the fact that the letter and the file note had been disclosed by the prosecution in accordance with the modern practice in criminal proceedings to a defendant in such proceedings for the purpose of the preparation by him of his defence.

(2) Because the documents came into existence and the discussion took place in the course of and for the purpose of a criminal investigation.

These two arguments raise quite separate considerations. Thus the first argument, if correct, would mean that the documents which were disclosed by the prosecution to the defence in criminal proceedings could not be used as the basis of a subsequent civil action irrespective of the circumstances in which the documents first came into existence.

If the matter were free from authority I would be disposed, for the reasons explained by Kennedy and Millett LJJ, to uphold this argument. The law of confidence recognises that there are circumstances in which the protection of the court can be invoked to prevent the use of documents for purposes other than those for which they first came into the possession of a defendant. The limited use that can be made of 'without prejudice' documents provides a similar example. It seems to me that on grounds of public policy the court should be able to intervene to prevent the misuse of what are in effect its own processes. But I have come to the conclusion that there is no satisfactory way in which the recent decision of this court in *Mahon v Rahn* [1997] 3 All ER 687 can be distinguished. Accordingly, had the first argument been the only material available to Mr Caldecott, I would have felt obliged to allow the appeal.

On the facts of the present case, however, I am satisfied that neither the documents nor the words used in the course of the discussion of 17 May 1994 can found an action for defamation at the suit of the plaintiffs. The documents came into existence and the discussion took place in the context of the investigation of suspected crime. Public policy requires, for the reasons explained by Kennedy LJ, that such documents and such discussions should be immune from suit. In this context I say nothing of course about the exceptional remedies of malicious prosecution and malicious arrest.

A decision on this second ground does not meet the concerns voiced by Mr Caldecott. In my judgment, however, in the light of the decision in *Mahon v Rahn* this is the only ground on which this appeal can be dismissed. I therefore concur in the order proposed by Kennedy LJ.

Appeal dismissed. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Re Yorke (deceased)
Stone and another v Chataway and another

CHANCERY DIVISION
LINDSAY J
18, 19, 20 JUNE, 8 JULY 1997

Administration of estates – Distribution – Retention of assets to meet future liabilities – Executors of deceased Lloyd's name wishing to distribute residue of estate – Deceased name's Lloyd's liability reinsured into Equitas – Executors applying for directions of court to protect against personal liability – Whether executors under duty to distribute without making retention in respect of future Lloyd's liability – Whether court would sanction distribution relying on adequacy of Equitas as reinsurer – Whether executors should make a retention in respect of future Lloyd's liability.

The plaintiffs were the executors of Y, who had been a 'name' at Lloyd's of London insurance market from 1983 until his death in 1991. As a result of the implementation of the Lloyd's 'reconstruction and renewal' plan in August 1996, reinsurance of all Lloyd's 1992 and earlier non-life business was reinsured into Equitas for all names and the estates of deceased names. In that way, Y's estate had the benefit of reinsurance into Equitas in respect of every possible Lloyd's risk to which it would or might otherwise be vulnerable. Having settled the debts and liabilities of Y's estate, other than the unascertained or contingent liabilities arising from his position as a Lloyd's name, the plaintiffs wished to complete their administration by distributing the residue. However, they wished to be sure that distribution would not involve them in personal liability should creditors in respect of Y's position as a name emerge. They applied to the court therefore for directions as to whether, given the protection of Equitas, they were under a duty to distribute to the remaining beneficiaries without any retention and free of all risk of personal liability; or whether they should retain something (and, if so, how much and for how long) against the emergence of one or more policyholders with a claim or claims against Y's estate.

Held – The personal representatives of Lloyd's names protected by Equitas were not under a general duty to distribute to beneficiaries without retention, such that they could be obliged to distribute without first obtaining the sanction of the court. Moreover, those personal representatives who did rely on Equitas did not thereby obtain complete freedom from the risk of personal liability unless they obtained and acted on the sanction of the court in that behalf, even where they could later show that they would probably have obtained that sanction had they asked for it. In the instant case, the court would give the plaintiffs liberty to distribute to the beneficiaries without further retention or security, having balanced the injustice of beneficiaries being kept out of benefit on account of unascertained liabilities which might never come to anything against the risk of the unknown and contingent creditors who had paid for cover finding their matured debts unmet and determined (i) that there was no reason to think that Equitas was likely to fail, either wholly or in part, and (ii) that the sanction of the court could properly be given even where the provision for future creditors was not assuredly and in all possible events complete (see p 922 *j* to p 924 *c*, p 925 *b* to *d f* to p 926 *a g* and p 927 *j* to p 928 *c*, post).

Per curiam. On the taking of the directions of the court argument on behalf of unknown or contingent creditors can be heard (see p 927 *h*, post).

Re Arnold, Calvert v Whelan [1942] 1 All ER 501 followed.

Re King, Mellor v South Australian Land Mortgage and Agency Co [1907] 1 Ch 72 not followed.

Notes

For executors' discharge of liabilities not presently due, see 17 *Halsbury's Laws* (4th edn) paras 1160–1162.

Cases referred to in judgment

Arnold, Re, Calvert v Whelan [1942] 1 All ER 501, [1942] Ch 272.
Barnato (decd), Re, Joel v Sanges [1948] 2 All ER 585, [1949] Ch 21.
Bennett, Re, Midland Bank Executor and Trustee Co Ltd v Fletcher [1943] 1 All ER 467.
Blow, Re, Governors of St Bartholomew's Hospital v Cambden [1914] 1 Ch 233, CA.
Davies, Re, Davies v Davies (1888) 38 Ch D 210.
Dean v Allen (1855) 20 Beav 1, 52 ER 502.
Dobson v Carpenter (1850) 12 Beav 370, 50 ER 1103.
Dodson v Sammell (1861) 1 Drew & Sm 575, 62 ER 498.
Fletcher v Stevenson (1844) 3 Hare 360, 67 ER 420.
Hargreaves, Re, Dicks v Hare (1890) 44 Ch D 236, [1886–90] All ER Rep 1017, CA.
Hawkins v Day (1753) Amb 160, 27 ER 107.
Johnson, Re, Johnson v King Edward Hospital Fund for London [1940] WN 195.
King, Re, Mellor v South Australian Land Mortgage and Agency Co [1907] 1 Ch 72.
King v Malcott (1852) 9 Hare 692, 68 ER 691.
Knatchbull v Fearnhead (1837) 3 My & Cr 122, 40 ER 871.
Lawley, Re, Jackson v Leighton [1911] 2 Ch 530.
Lewis, Re, Jennings v Hemsley [1939] 3 All ER 269, [1939] Ch 232.
March v Russell (1837) 3 My & Cr 31, [1835–42] All ER Rep 501, 40 ER 836, LC.
Newcastle Banking Co v Hymers (1856) 22 Beav 367, 52 ER 1149.
Nixon, Re, Gray v Bell [1904] 1 Ch 638.
Owers, Re, Public Trustee v Death [1941] 2 All ER 589, [1941] Ch 389.
Simmons v Bolland (1817) 3 Mer 547, 36 ER 210.
Smith v Smith (1861) 1 Drew & Sm 384, 62 ER 426.
Spode v Smith (1827) 3 Russ 511, 38 ER 667.
Taylor v Taylor (1870) LR 10 Eq 477.
Waller v Barrett (1857) 24 Beav 413, 53 ER 417.

Cases also cited or referred to in skeleton arguments

Marley v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All ER 198, PC.
Royle, Re, Royle v Hayes (1890) 43 Ch D 18, CA.

Application

The plaintiffs, Richard Frederick Stone QC and Michael Edwards-Ker, the executors of Richard Michael Yorke QC (decd), a former underwriting member of Lloyd's, applied by originating summons dated 7 May 1997 for the determination of the court whether they were under a duty to the persons interested in the estate to distribute the same without retention to meet any claim which might in future arise under a contract of insurance or reinsurance underwritten by the deceased; alternatively whether any, and if so what, retentions should be made out of the estate to meet any such claims and for what

period or periods any such retention should endure and whether any and, if so, what other provisions should be made as against such potential claims. The executors joined as respondents to their originating summons, Lady Carola Cecil Chataway, a residuary legatee, and Giles Neville Clarke, who had the benefit of a contract of insurance or reinsurance partly underwritten by the deceased. The facts are set out in the judgment.

Christopher McCall QC and *Shan Warnock-Smith* (instructed by *Reynolds Porter Chamberlain*) for the plaintiffs.

Alexandra Mason (instructed by *Reynolds Porter Chamberlain*) for Lady Chataway.

W R Stewart-Smith (instructed by *Laytons*) for Mr Clarke.

Cur adv vult

8 July 1997. The following judgment was delivered.

LINDSAY J. Richard Michael Yorke was a Queen's Counsel with a substantial practice, largely in commercial cases. The last four years or so of his life were blighted with serious illness and he died on 12 April 1991. The two executors named in his will relating to his property in this jurisdiction, the plaintiffs, Richard Frederick Stone QC and Michael Edwardes-Ker (the executors), were granted probate on 19 September 1991. All the inheritance tax liabilities of the estate have been finalised and discharged; only minimal adjustments remain before a certificate of discharge can be applied for. Mr Yorke, a bachelor, left a good number of specific and pecuniary legacies amongst his many friends and the executors have already paid or satisfied them with the exception of three legacies totalling £3,500 left to the executors themselves and to the testator's accountant. His residuary English estate, no distribution of which has yet been made, is to be shared between a number of individuals, including a group of godchildren, and, as to a quarter, is destined to go to familiar established charities. All debts and liabilities other than the particular unascertained or contingent liabilities I shall presently describe, have, with minor exceptions in respect of small accruing debts, already been met. The estate is now largely liquid; as at 5 April 1997 the executors held net assets of some £620,000 consisting almost exclusively of cash on deposit. Not unnaturally, the executors now wish to move towards a completion of their administration by distributing the residue. Only one possible impediment stands in their way.

It is this. Mr Yorke was a 'name' at Lloyd's of London. In manner I shall need to explain, his estate could therefore find itself liable to pay policyholders both in respect of present debts (albeit ones which have not yet come to notice nor have been quantified) and also (depending on the terms of the policies) in respect of truly contingent liabilities, the maturing of which into debts immediately payable still depends on events which may or may not happen. In recent years the difficulties experienced at Lloyd's have been notorious and the executors find themselves in a position in which they conceive it to be their duty to make as early as practicable a distribution to their beneficiaries yet also recognise it to be right that they should provide for the debts of their testator before such a distribution. They acknowledge, in respect of Mr Yorke's position as a name, that there are potential claims, the amounts of which (severally or in aggregate) they can no more estimate than they can estimate whether or when they will arise. They have no reason to believe the protection, which I shall describe, which the

estate has against such claims is or will be inadequate but, of course, they do not wish to find themselves vulnerable to claims from any creditors who emerge and in respect of whom that protection proves inadequate. They do not wish to have to retain the estate against the risk of such creditors emerging (which would in the meantime deny beneficiaries enjoyment of their gifts) yet also do not wish to be held to have fallen short in whatever due consideration is owed to such creditors.

Whilst the particular details of such a dilemma will, as I shall explain, vary from case to case, the position the executors are in is, unhappily, far from rare; the executors believe there may be some 3,000 estates faced with similar questions. The executors' solicitor, Mr Colin Russell of Messrs Reynolds Porter Chamberlain, is also chairman of the central London branch of STEP, the Society of Trust and Estate Practitioners, through whom some cost-sharing arrangements have been made whereby the executors would in these proceedings raise questions which, whilst arising in Mr Yorke's estate, might lead the court to give answers helpful or even determinative in other estates as well. In that way Mr Yorke's executors look beyond being given liberty to distribute and hope instead to be recognised as being under a duty of so general a nature that it might safely be acted on not only in this but also in other cases. To that end they have joined as respondents to their originating summons not only Lady Chataway, a residuary legatee, but also Mr Giles Neville Clarke, a person who has the benefit of a contract of insurance or reinsurance partly underwritten by Mr Yorke in the course of business as an underwriting member of Lloyd's of London, asking also for appropriate representation orders in each case. Whilst the argument has ranged beyond it, the executors' originating summons of 7 May 1997 asks, so far as material for present purposes, as follows:

> 'The Plaintiffs seek the determination of the Court on the following directions and orders, namely: 1. That it may be determined whether the Plaintiffs are now as such executors and trustees under a duty to the persons interested in the said estate to distribute the same without retention to meet any possible claim which might otherwise be made against them in the event that any claims arise at any time in the future under any such contract of Insurance or reinsurance; 2. In the alternative it may be determined (a) whether [any] and if so (b) what retentions should be made out of the estate to meet any such claims and (c) for what period or periods any such retention should endure and (d) whether any and if so what other provision should be made as against such potential claims ...'

The scheme of this judgment will be first to describe the way in which executors can find themselves liable should they distribute to beneficiaries ahead of creditors and then to describe the position of Mr Yorke as a name, the possibilities of liability which that has led to and the protection which the executors have against the emergence of such liability. Then I will turn to the law in this area and finally draw together the facts and the law so described so as to answer such of the questions which the originating summons and the argument have raised as require an answer.

So far as concerns the application of assets coming to the hands of executors in that capacity they are required to deal with them in an order of priorities which in the broadest terms provides that debts and liabilities are to be paid ahead of gifts. If a creditor sues an estate where there has been a distribution such that the executor has insufficient funds left to meet the creditor's debt then the executor

is able to answer that he has already duly administered the estate (plene administravit). If the creditor is not satisfied that the administration of the estate in question had truly recognised the due order of priority and wishes to pursue the matter then the burden is upon him to prove a devastavit, namely, in the example being considered, that assets came to the executors' hands and existed or should have existed in those hands at the time the creditor's writ was issued. An executor who distributes to legatees is taken to have admitted he has had assets sufficient to meet debts. Amongst the various possible forms of devastavit is that which occurs where an executor has paid obligations of an inferior degree ahead of a superior one; where, for example, he has paid legatees ahead and to the detriment of creditors. Where such a devastavit is proved, the executor concerned becomes personally liable in respect of the assets so misapplied. He may be liable for interest thereon. He is also very likely to become personally liable to the creditors in respect of costs. Such a claim against an executor is not the only remedy open to an unpaid or underpaid creditor; he may also sue the overpaid beneficiaries, but such a claim is available and only open to him if and to the extent that he is without remedy against the wrongdoer executor: see *Snell's Equity* (29th edn, 1990) p 359. Executors are entitled to look to the persons to whom they have made distributions for a refund or an indemnity in respect of their overpayment.

Mr Yorke's executors wish, of course, to be sure that the distribution to beneficiaries which they want to embark upon would not involve them in a devastavit nor, in turn, to personal liability should creditors in respect of Mr Yorke's position as a name emerge, they being the only persons or class of persons whom the executors can now foresee as likely to be unpaid or underpaid creditors.

As to the position of names, I have received evidence, none of which has been challenged, from Mr William David Robson, a director and the chairman of Anton Jardine Members Agency Ltd, a leading Lloyd's members' agent; he has been involved in the Lloyd's market since 1963. He is chairman of the Lloyd's Underwriting Agents' Association. He explains that each individual member of a syndicate, names such as Mr Yorke, agrees to assume a proportion of the risks underwritten by that syndicate. The liability of an individual for that agreed part is unlimited, but there is no liability upon him for the failure of any fellow member of the syndicate to bear that other's proportion.

From 1927 there was a central fund, a principal function of which has been to assume responsibility for claims where the members concerned have failed to meet their liabilities. On becoming a name each individual signs a general undertaking to the effect that he and his personal representatives shall be bound by the rules of Lloyd's. Each syndicate is, in a sense, an annual venture; it exists for a year of account but syndicates are accounted for under a three-year accounting system. A syndicate's profit or loss is calculated only at the end of three years. However, at the end of any three years there are nowadays very likely still to be unsettled claims and the possibility of future ones. In order to achieve finality in respect of any accounting period of three years there is what is called 'reinsurance to close' (RITC). Members of a syndicate for a year which is to become a 'closed year' pay a premium to and assign their rights in relation to the 'closed year' to members of a syndicate for a later year who, in return, assume the liability of the members for the 'closed year' for all the known and unknown liabilities attributable to the 'closed year'. Until the year of account is closed by RITC it remains an 'open year', but once closed it is not reopened. By way of

successive assignments by which syndicates for later years have year after year thus assumed responsibility for the risks of earlier years, any given syndicate which has become a reinsurer by way of RITC may find itself liable for late emerging or late-settled claims in respect of risks run many years before. In 1992, for example, there were still risks covered in respect of policies written before the 1939–45 war. The representative creditor, Mr G N Clarke, a past or present name, has the RITC for one of his years insured by a syndicate which included Mr Yorke; it is in that way in which he comes to be a possible future creditor of the estate.

If there is, in respect of a given year, a material degree of uncertainty about the appropriate figure to be fixed for its RITC, the syndicate's accounts will remain open; the syndicate is then in 'run-off'. The syndicate itself continues to pay claims and to debit its members until its present and future liabilities are felt to be sufficiently quantifiable to make a closure by RITC equitable as between the syndicate for the closing year and that of the year which proposes to take over the risk by becoming the reinsurer under the RITC.

Subject to the other reinsurance methods I shall mention, so long as any of his years remains open a name remains at risk of being required personally to pay in respect of policies, as does his estate. He may reinsure by taking out a personal 'stop-loss' policy and, more materially to present consideration, he may subscribe or have subscribed to an 'EPP', an estate protection plan. An EPP is designed to protect a name's estate against claims in respect of such of his years as are open at his death, namely such years as are open because their three years of account have not expired and years in respect of which RITC has not been achieved and which are therefore in 'run-off'. The indemnity afforded by the EPP will differ from case to case depending upon the terms of the policy, but EPPs have been found very valuable as personal representatives of names who had had generally in the past felt able safely to distribute the estates in their charge knowing that should there transpire to be some liability to policyholders in respect of open years they would have, from the EPP, a reliable total or specified indemnity. But at the material times the EPPs were themselves written at Lloyd's. The reliability of recovery under EPPs has therefore itself been put in question.

A policyholder with a claim insured or reinsured at Lloyd's submits his claim to Lloyd's which then passes it on to the appropriate syndicate. The syndicate then meets it out of its reserves, including its RITC. If a syndicate has inadequate reserves to meet its claims before it is closed then its members will be required to inject cash by way of 'calls'. If a 'call' is not met, a syndicate's managing agent may sue the member or his estate for the 'call' plus interest or the central fund I mentioned earlier may discharge the debt on the member's behalf and, where appropriate, then sue the member or estate concerned.

A member ceases to be a member at his death. He does not participate in the syndicates for the year in which his death occurs. His personal representatives, however, are bound by the general undertaking which the name made upon his joining Lloyd's. The general practice in the past has been that estates protected by an EPP have distributed without making any further provision in respect of open years but in cases where the estates have not had the protection of EPPs, the executors not uncommonly, I am told, have made retentions of the whole or part of their estates against the risks of liabilities in respect of open years.

In the period 1988-1992 Lloyd's suffered enormous losses. There have been years of anxiety, uncertainty, difficulty and litigation leading, in late July 1996, to the circulation of the 'settlement offer document' giving details of the 'Lloyd's

reconstruction and renewal'. A reinsurance group was to be formed, Equitas, into which all liabilities for 1992 and earlier years were to be reinsured. By late August 1996 the settlement offer had become unconditional and thereupon reinsurance of all Lloyd's 1992 and earlier non-life business was reinsured into Equitas for all names and the estates of deceased names, whether or not they had accepted the settlement offer.

In that way Mr Yorke's estate has acquired the benefit of reinsurance into Equitas in respect of every possible Lloyd's risk to which it would or might otherwise be vulnerable. But, needless to say, reinsurance is only as good as the relationship between the funds available or to become available to the reinsurer and the claims it has to meet. That leads to the questions of how reliable, how adequately financed, is Equitas as a reinsurer?

The Equitas group includes two companies, Equitas Reinsurance Ltd and Equitas Ltd, both of which are authorised by the Department of Trade and Industry (the DTI) pursuant to the Insurance Companies Act 1982. The former reinsures and is to act as a conduit for the collection of payments and will cede its reinsurance into the latter, its subsidiary, Equitas Ltd, which has been required by the DTI to show an appropriate surplus of assets over liabilities on its balance sheets. A third company, Equitas Policyholders Trustee Ltd, is to hold the rights of names under the reinsurance contracts for the benefit of the underlying policyholders. The reserves required to be held by Equitas were arrived at as a result of a comprehensive project which involved Lloyd's, Equitas itself, their respective financial and actuarial advisers, the DTI and the Government Actuary's Department. Equitas was given interim authorisation from the DTI in March 1996 and final authorisation in September 1996. The authorisation has not been revoked.

Equitas's opening accounts as at 4 September 1996 were published in April 1997. For the time being they are its most recently available accounts. They are heavily qualified by the auditors, Coopers & Lybrand. The publication of the accounts generated press comment, some of it very pessimistic as to the adequacy of Equitas. I shall deal later with the implications of authorisation from the DTI and with the evidence which I have received as to the import of the comments made by the auditors.

The mechanics of Equitas are such that the liability of the EPPs in relation to years up to 1992 have been compulsorily reinsured into Equitas. A 'finality bill' (so-called) has been sent to names and to the personal representatives of deceased names under which, upon payment of the sums specified, the years in question attain RITC through Equitas. The DTI has accepted that reinsurance into Equitas can be treated as an RITC and that upon payment of the relevant 'finality bill' the names and the executors concerned may cease to be members of Lloyd's.

Should Equitas fail, liability would revert to the relevant names. Policyholders, under the arrangements now made, are unable to look to Lloyd's as they were in the past but rather would ultimately need to go directly against the particular names. Even should Equitas fail there are remedies or palliatives which may suffice to satisfy or head off the claims of policyholders before any individual name or any estate of a name might come to be sued. First, at the request of the DTI the Equitas arrangements contain a proportionate cover plan which would enable it to pay claims at a reduced rate rather than going into insolvent liquidation. So long as a policyholder feels he has been treated fairly in relation to all other claims, his recovery of a proportion only of his debt might suffice to head him off from pursuing the matter further. Secondly, Equitas would be able

to propose a scheme under s 425 of the Companies Act 1985 under which a policyholder may have to be satisfied with less than a payment in full. In addition, some policyholders might have recourse to the deposits required by some regulatory authorities in other jurisdictions, which deposits might then be renewed by the then members of Lloyd's in order that Lloyd's could continue to do business in that jurisdiction, thus conferring on policyholders in such jurisdictions a possibility of recoupment out of deposits, possibly even beyond the extent of the deposit as it was at the time of failure. Beyond that there would be a strong commercial pressure upon Lloyd's, rather than to allow any Lloyd's policy to be dishonoured, for it to inject hitherto uncovenanted funds into Equitas to ensure that, even should Equitas at first have failed, its obligations would none the less be met. A policyholder still unsatisfied after the above measures had been exhausted and persistent in his wish to recover to the full might then embark on suits against the particular names within the particular syndicates covering his risk, a course fraught with difficulty on the part of the policyholder leading, to a persistent policyholder, to proceedings which, as against any one name, when identified, would be likely to be only for a relatively small proportion of the policyholder's overall and thus far still unsatisfied claim.

Mr Yorke became an underwriting member of Lloyd's in 1983 and remained one until his death in April 1991. Accordingly the last year of account with which his estate is concerned is that for 1990. He was a member of one syndicate which still has an open year for 1985, two syndicates which have open years for 1989 and 21 syndicates which have open years for 1990. Those are the only open years with which his estate is concerned. Significant calls, amounting in all to over £675,000, have already been made in respect of Mr Yorke's open years and have been met in full by the underwriters of the EPP, save that one call, the largest, has been reinsured into Equitas. Some of the syndicates in which Mr Yorke was involved were amongst those which are or have been or are likely to be exposed to the most substantial deterioration in respect of old years' liabilities. Others of his syndicates are thought to be much less exposed. I have evidence from Mr John Robson, managing director of Anton Jardine Members Agency, evidence to which no challenge has been made, that there is, in his view:

> 'Nothing particularly unusual about the syndicates in question which would distinguish this estate from others so far as Equitas is concerned and I see no particular reason why this estate should face liabilities in any event other than that of the total failure of Equitas.'

There are no syndicates in which Mr Yorke participated that have been left outside of the Equitas agreement. Mr W D Robson (the two deponents are brothers) has made a study of the particular portfolio syndicates of which Mr Yorke was a member. Two of the syndicates were amongst the largest in the market and were supported by several thousand names. Mr W D Robson's view is that because of the particular syndicates of which Mr Yorke was a member his estate has more exposure than most names to United States liability. He concludes, however:

> 'Having regard to the exposure of the portfolio of syndicates in comparison to Names as a whole, I consider that the estate's exposure is above average on the market, although there are likely to be a number of Names and deceased Names' estates with a much greater exposure.'

I have no evidence of there being any maximum calculable of the liability which could, should Equitas totally fail, become that of Mr Yorke's executors, nor as to anything being calculable as a maximum should Equitas fail only as to part. If the executors have to retain out of the estate in order to meet some theoretical possible maximum liability then there is no evidence other than that in the executors' own words:

> 'We are faced with a stark choice between either retaining the entire estate indefinitely which we think would be grossly unfair to the beneficiaries (unless it is something which it is our duty to do) or distributing on the basis that the creditors have no right to expect us to make such an indefinite retention when they have protection which has been assessed to be commercially appropriate.'

As for the assessment of the protection as being commercially appropriate, I have mentioned both the authorisation given by the DTI and the nature of the auditor's report to the most recent accounts of Equitas. In order to achieve their respective authorisations, each of the Equitas companies which have it must have submitted proposals to the Secretary of State for Trade and Industry as to the manner in which each respectively proposed to carry on business and each must also have supplied the financial forecasts prescribed by regulation: Insurance Companies Act 1982, s 5(1). The Secretary of State is required not to issue an authorisation unless he is satisfied it ought to be granted: s 5(1)(b). There are specified criteria of sound and prudent management which must appear to the Secretary of State to be fulfilled: s 5(1A) and s 5(4) and Sch 2A. Prescribed margins of solvency are required to be kept up (s 32) in respect of which both the value of the assets and the amount of liabilities are to be determined in prescribed manner: s 32(5)(a) and see the Insurance Companies (Reserves) Act 1995. Liabilities are to be covered by assets of appropriate safety, yield and marketability: s 35A(1). The Secretary of State can, in an appropriate case, require an actuarial investigation of, or other information as to, a company's business: ss 42, 43A and 44. His authorisation can be withdrawn if, inter alia, it appears to the Secretary of State that any such criteria of sound and prudent management may not be fulfilled: s 11(1) and (2)(a), (b). As I mentioned earlier, the two Equitas companies have been granted authorisation and it has not been withdrawn.

The report and accounts of Equitas Reinsurance Ltd for the period ended 4 September 1996 disclosed that it then had net claims reserves of £10·8bn. It had the benefit of more than 248,500 reinsurance policies with 2,900 reinsurers. The accounts show a surplus of assets over liabilities of £588m after prudent provision. The chairman's report itself emphasises the uncertainties inherent in the company's business, especially so far as the business concerned reinsurance of risks deriving from asbestos, pollution and health hazards of a 'long-tail' nature. The report of Coopers & Lybrand as auditors notes that there are significant uncertainties, including uncertainty as to the accuracy of the provisions for claims, and noted also that by reason of the matters which the auditors explain, they had not obtained all the information and explanations that they considered necessary for the purpose of their audit. I have received unchallenged evidence as to the auditors' report from Mr Frank Attwood, a partner in Robson Rhodes who was from 1980 to 1984 a member of the Auditing Practices Committee of the Consultative Committee of Accountancy Bodies and who from 1984 to 1992 chaired the working party which produced that committee's audit brief on Lloyd's syndicates. He has studied the language of the

Coopers & Lybrand report. He notes, from the fact that Coopers & Lybrand have not commented in their report on the use of the going concern basis there employed, that, in the context of the requirements of the Statement of Auditing Standards (130), it is to be inferred that the auditors did not consider that there was a significant level of concern about Equitas's ability in the foreseeable future to continue as a going concern.

Against the background of fact which I have described the executors pose the questions in their originating summons as amplified in oral argument. The originating summons does not seek to distinguish between what, if only all facts were known, could be seen to be present albeit as yet un-notified debts or liabilities on the one hand and truly contingent ones or prospective ones on the other; nor has the argument before me sought to say that the solution appropriate to one is not the solution as to all. The question is thus this: are the executors, given the protection of the kind I have described which they have from Equitas, now duty bound to distribute to the remaining beneficiaries without any retention so that, performing that duty, they will be entirely free of all risk of the personal liability which is consequent upon a devastavit? Are they, if not under that duty, at least to be given liberty by the court to distribute, similarly free of that risk? Or must they retain something (and, if so, how much and for how long) against the emergence of one or more policyholders with a claim or claims against Mr Yorke's estate? I should add (to deal with what will occur to many as a further possibility) that the evidence before me is that no market for policies to protect against the total or partial failure of Equitas has yet been developed. I must now turn to the law.

It is an unfortunate feature of the law in this area that it has frequently been described as unsatisfactory or curious: see *Smith v Smith* (1861) 1 Drew & Sm 384, 62 ER 426, *Dodson v Sammell* (1861) 1 Drew & Sm 575, 62 ER 498 and *Re Hargreaves, Dicks v Hare* (1890) 44 Ch D 236, [1886–90] All ER Rep 1017. Contradictions are readily found; in 1907 it was argued that retention by executors against possible further liability had as a practice been discontinued (see *Re King, Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72 at 75) yet it was still being sanctioned in 1937, 1941, 1942 and 1943 (see *Re Lewis, Jennings v Hemsley* [1939] 3 All ER 269, [1939] Ch 232, *Re Owers, Public Trustee v Death* [1941] 2 All ER 589, [1941] Ch 389, *Re Arnold, Calvert v Whelan* [1942] 1 All ER 501, [1942] Ch 272 and *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467). Sometimes the presence of a contingent creditor at the hearing before the court is discountenanced (*Re King*), but yet at another time the perceived weakness in another case is explained by reference to the fact that such creditors were not then represented: see *Re Arnold*, where such creditors were heard. Sometimes it is said that the order of the court confers total protection upon the executor who acts upon it (*Fletcher v Stevenson* (1844) 3 Hare 360, 67 ER 420), yet at another that no such protection is conferred (*Simmons v Bolland* (1817) 3 Mer 547, 36 ER 210). Moreover, the youngest case on the subject cited to me is over half a century old; Miss Mason, on behalf of the beneficiaries under Mr Yorke's will, rightly says there is difficulty in discerning the principles underlying the authorities.

In the past the question of how executors should deal with late emerging creditors or contingent creditors whose debts matured into present ones only late in an administration generally arose in relation to leases where a deceased lessee, be he the original lessee or an assignee, might find himself liable for rent or under covenants such as repairing covenants upon the failure of the tenant for the time

being. Where the lease was a long one and the death occurred early in the term, the executors had to contemplate the possibility of debts arising 80 and more years after the death. Another situation one commonly finds in the authorities is where the estate held partly paid shares which either by choice or because no transferee acceptable to be registered by the company could be found, had remained in the estate. A call on such shares could thus be made as to the unpaid-up part many years after the death. So far as concerned some of the late emerging liabilities in the landlord and tenant relationship, they were in part dealt with in the Law of Property Amendment Act 1859 (Lord St Leonards' Act). It was retrospective: *Smith v Smith*. It provided at s 27, so far as here relevant, that if an executor, 'liable as such' for rent or under covenants in a lease which had been either granted or assigned to his testator satisfied such liabilities thereunder as had accrued and had been claimed at the time of such assignment, then, upon his assigning the lease 'to a purchaser thereof, he shall be at liberty' to distribute the residuary personal estate without making any retention to meet any future liability thereunder. It will be noted, though, first, that an executor who distributed to, say, a legatee was at first not so protected; 'a purchaser' meant only a person to whom the lease was sold and who paid a price in money: *Re Lawley, Jackson v Leighton* [1911] 2 Ch 530. Secondly, the Act merely gave liberty to the executor; it imposed no duty upon him so to distribute. It was s 30 of the same Act under which the ability of executors to obtain the guidance of the court in proceedings short of a full administration suit was brought into existence. An executor acting upon such guidance was, under the 1859 Act, deemed to have discharged his duty as such (other than in cases of fraud, wilful concealment or misrepresentation). Furthermore, the Act by no means attempted to deal with all types of contingent liability and not even all types of contingent liability in the landlord and tenant context. In particular, cases in respect of later calls on partly paid shares continued unabated. However, in the landlord and tenant area to which it applied the court began to make distributions without retention where earlier it might have done otherwise: *Smith v Smith*. Section 26 of the Trustee Act 1925 further extended the relief granted by Lord St Leonards' Act so as to cover cases where the lease was assigned not only to a purchaser 'but to a legatee, devisee or other person entitled to call for a conveyance thereof'. Still the provisions were left such that executors satisfying the requirements of s 26 'may' rather than 'shall' distribute the residue without any retention. Even in 1926 Parliament left unaffected cases falling outside the limited range of s 26 of the 1925 Act as to which one has to revert to the law as it developed in the cases over the years.

As to that an executor could be made personally liable in respect of a late maturing contingent debt even though he had not been told by the creditor of the existence of it nor known of it when he had earlier made a distribution to creditors of an inferior degree: *Hawkins v Day* (1753) Amb 160, 27 ER 107 and *Newcastle Banking Co v Hymers* (1856) 22 Beav 366, 52 ER 1149. Again, if an executor distributed to a lower class without the *absolute certainty* that he would have in hand funds to meet the superior one he could be liable even if at the time of his distribution to the lower class he had honestly and reasonably believed that sufficient funds to pay the superior class would come to hand: *Spode v Smith* (1827) 3 Russ 511, 38 ER 667. He could be made personally liable in respect of a breach of trust by his testator, committed years before, even where he had not even known that the testator was a trustee let alone had not known that there was a breach of trust: *Knatchbull v Fearnhead* (1837) 3 My & Cr 122, 40 ER 871.

It is possible to find dicta which suggest even with respect to contingent creditors, that, should they not come in and claim in response to advertisement, then their only remedy would thereafter be against the legatees and that their remedy against the executors personally would have gone: *Waller v Barrett* (1857) 24 Beav 413, 53 ER 417. Such a view not only conflicts, in my judgment, with the earlier broad approach in such cases as *Knatchbull v Fearnhead* and *Hawkins v Day* (where the executors' ignorance of the claims was no defence) but with basic notions of justice and common sense. Especially is that so in the context of claims against a Lloyd's name where a policyholder (who could be anywhere in the world) could not reasonably be expected to know, at the time of any advertisement, even if it came to his notice or could be expected to have done so, that he had or might have a claim against some particular deceased. I do not propose to place any reliance on a possibility that in any case such as that before me executors could escape personal liability (be it for un-notified insurance or reinsurance claims based on events which have already happened or for future maturing continent liabilities) by the simple expedient of placing an advertisement and finding it to have yielded no response.

The cases show that as the risk to executors was so serious the court would not order a distribution which left an executor at any personal risk: *Simmons v Bolland*. However, the severity of the risk to executors was tempered by the ability in the executor to obtain and to act upon the directions of the court. There are some observations that support a view that the executor could not obtain absolute protection by way of an application to court: *Simmons v Bolland*. However, that may have depended on the particular form of procedure there used and it may simply have referred to the fact that absent, at all events, some other material restriction upon the creditor, there was nothing to stop the creditor from suing the executor, even if that executor, upon being sued, would have no personal liability. The better view is that if the executor has laid all information before the court and acts under its order he will achieve complete protection: *Dean v Allen* (1855) 20 Beav 1, 52 ER 502. Of course, the court may have permitted or sanctioned a distribution on some particular basis of fact specified by the personal representatives concerned, for example that the estate did have assets sufficient to meet all liabilities standing prior to, say, a certain legacy. If that legacy was thus paid under an order of the court made on such a basis then the order would not protect the executor if the basis predicated by the executors proved unfounded: the *Newcastle Banking* case. However, it is implicit in *Knatchbull*'s case that if only the executor had passed his accounts in court and had obtained a decree he would have been left free of any personal risk. *Fletcher v Stevenson*, too, and many later cases have held that an executor would be entirely safe after acting upon the direction of the court.

Although in considering the making of an order giving protection to executors the court would not look to create for a creditor some security which he had not stipulated for by his contract and would not act upon an attempt by a creditor in such a behalf (*King v Malcott* (1852) 9 Hare 692, 68 ER 691), the court would none the less, in making such orders, consider whether any and if so what indirect protection should be extended to creditors including contingent creditors: *Fletcher v Stevenson* and *Dean v Allen*; see *Re Nixon, Gray v Bell* [1904] 1 Ch 638 at 694.

As for the forms of protection to be given to executors, they seem principally or exclusively to have consisted on the one hand of a retention by the executors out of the estate or, alternatively, the provision of an indemnity from the

beneficiaries by whom (usually) a distribution without retention was sought. Whether the indemnity from a beneficiary would, in order to have any value, need support from security beyond the personal security of the beneficiary would depend on all surrounding circumstances. The means of the recipient could thus be relevant: *Dean v Allen*. If there was sufficient security from the legatee then no retention by the executor would be necessary as the price of obtaining the sanction of the court to the particular proposal put before it. Although any such reasoning in the case is invisible in the brief report, it may have been that it was because the personal covenant of the King Edward Hospital Fund (as residuary legatee) was regarded as a sound personal covenant that no retention was required in *Re Johnson* [1940] WN 195: see *Re Arnold*.

As for retention by the executors, as early as 1753 at the latest a retention out of the estate was seen as a possible way of protecting executors against the risk of contingent debts maturing: see the executors' argument in *Hawkins v Day*. In *March v Russell* (1837) 3 My & Cr 31 at 41, [1835–42] All ER Rep 501 at 505–506 it was said that an earlier practice of the court of requiring a legatee to give the executors security for a refund in case other debts were discovered was no longer observed. However, in practice, retentions were frequently made by executors but when any was challenged by a beneficiary the court would be willing, in order to avoid locking up funds for long and unknowable periods to the disadvantage of the beneficiaries, instead to see the executors protected by way of their being secured by the beneficiaries: *Simmons v Bolland* and *Dobson v Carpenter* (1850) 12 Beav 370, 50 ER 1103. Security from the beneficiaries was thus perhaps not strictly *required* by the courts, but, if it was not offered, the beneficiaries might suffer a retention and hence, no doubt, they saw their way to offering the security where it was possible. Furthermore, although the operation of limitation in devastavit cases divided the Court of Appeal in *Re Blow, Governors of St Bartholomew's Hospital v Cambden* [1914] 1 Ch 233, it may be that retention or security was after 1880 needed for only six years: see also *Re Lewis* [1939] 3 All ER 269, [1939] Ch 232. Despite observations which suggest retentions were no longer ordered they were, as I have already indicated, being ordered as late as 1943.

If security was to be provided by a beneficiary to an executor so as to indemnify the executors in a secured way and, alternatively, where there was a retention by the executor in lieu of sufficient security from the beneficiary, then the question of the amount of the security or of the retention would be adjourned to be fixed by the master: *Simmons v Bolland, Dobson v Carpenter, Re Bennett* and *Re Owers*. That reference to the master was not it seems, by reason of any rule or principle requiring it but simply because the material for an assessment had not been put before the judge: see eg *Re Owers*.

The principle on which the master would act in fixing the amount or nature of the security or retention is not disclosed in the cases but it is nowhere suggested that the calculation had to be such that the security would necessarily and in all possible events suffice to meet in full whatever the executor might have to pay the creditors. In annuity cases there are familiar formulae but where the contingency was other than merely the survival of an annuitant the description of the security to be provided was that it should be 'proper' or 'due' or 'sufficient' without there being any indication that that meant only that it had necessarily in all events to be full: see *Dobson v Carpenter* and *Simmons v Bolland*. The court would look to what 'could itself be reasonably considered a sufficient security for the possible demands': *Fletcher v Stevenson* (1844) 3 Hare 360 at 370, 67 ER 420 at

425. Nor is it clear what, if any, rate of net growth the court took into account as appropriate to assume on whatever property was retained. Even though a contingent creditor had no strict right at law or in equity to insist upon a retention or upon security, the better view, in my judgment, is that the court would have in mind, in fixing a retention or security, that it was proper, as noted above, that creditors should to some extent be protected. However, in many cases the potential liability would be truly unascertainable, perhaps even unascertainable as to a theoretical maximum. An example would be the possible expenditure, as it would be at rates of building cost as they would be years hence, needed to make good dilapidations as yet long in the future but likely to be required to be made good under leases with, say, 80 years yet to run. Even so the master would fix the security to be provided by the beneficiaries. Thus in *Dobson v Carpenter* 12 Beav 370, 50 ER 1103 heard in 1850 the prospective or contingent liability in question arose under leases that could have run until 1879 or, it seems, even to 1922, yet only £1,000 was set aside after the master's inquiry. Without knowing what the rents provided for by the relevant leases were and without knowing all possible contingencies (such as dilapidations) and the cost of remedying them one cannot say for certain whether that £1,000 would necessarily and in all events suffice to pay whatever might become payable but the sum has all the appearance of a rounded figure which seemed to the master at the time to be not unreasonable in the circumstances. The £1,100 mentioned in *Dodson v Sammell* (1861) 1 Drew & Sm 575, 62 ER 498 has the same look to it. Only in annuity cases does one find unrounded sums being set aside, where familiar formulae could be used. The court in general looked at the 'reasonable probability' of there being future demands against the estate: *Dean v Allen*. A practical view would be taken. Thus if the rent for which the estate would be liable was greatly exceeded by the current and foreseeable rack rent currently paid for the premises, the court recognised that in practical terms liability for rent falling upon the estate would be negligible; any landlord would prefer to forfeit the lease for breach of covenant (thus recovering possession of premises he could relet at the higher rack rent) rather than asserting the lease and the estate's liability under it: *Dean v Allen* and *Waller v Barrett*. Accordingly there might be in an appropriate case no retention at all nor any secured indemnity required as the price of the court's sanction. In such cases there could, however, have been no true certainty that the rack rent would continue over long periods to be higher than the rent under the leases for which the testator was liable and accordingly there could have been no *certainty* that the estate would not find itself liable in the future. Yet the court could take a practical view, even against executors who asked for better protection, that no retention or security beyond the personal liability of the beneficiaries was needed and could decree accordingly, thus conferring the immunity which the executors had sought: see *Waller v Barrett* and *March v Russell*.

The whole point of the provision of security by beneficiaries to executors or of a retention was so that the executor could be wholly exonerated from any personal liability: *Dodson v Sammell*. One could therefore take it, where retention was ordered by the court (or fixed by the court as to its amount and then paid by agreement between the parties), that the position thus arrived at was intended to give executors total protection against any devastavit on account of a premature distribution to legatees or others of degrees inferior to that of the contingent creditor concerned. *Fletcher v Stevenson* suggests that security, had it been capable of being supplied by the widow life tenant in that case, would have led to the executor being totally free of personal risk. There is no authority dealing with the

position which arose or which would arise if a retention directed by the court later proved inadequate as events fell out. That absence of authority is of itself consistent with a view that where a retention or security was ordered by the court, that order, if acted upon, conferred total protection on the executors concerned: see also *Re Nixon* [1904] 1 Ch 638 at 646 and *Re King* [1907] 1 Ch 72 at 77.

There is no suggestion in the authorities, nor would business efficacy require, that the security to the executor could be given only by the recipient beneficiary himself. If, for example, a legacy to a wife was paid to her by an executor at risk of personal inability to a creditor, there would seem to be no reason, so long as the security given to the executor was appropriate in amount and kind, that it should not be given to him by, say, the wife's husband or father or perhaps be provided to the executors by their own arrangements at the expense of the estate or some part of it.

No case in the area decided in the last half century has been cited to me in the course of argument but the law and practice on the subject, so far as it can be derived from the cases, would seem to be as follows. First, a distribution made pursuant to a decree of the court affords a complete protection to the executor and the executor need not and indeed should not look, for example to a retention, for any protection beyond that. Secondly, it had long been the practice of the court to enable personal representatives to set apart 'a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach' of covenants in a lease held by the deceased: Kindersley V-C in *Dodson v Carpenter*. These observations can comfortably co-exist if the case was that where an executor during his administration knew of no likelihood of any contingent debt maturing he could, by having an account taken in court of all known liabilities, obtain a decree which permitted him to distribute to legatees without making any retention but which none the less gave him complete freedom from a devastavit (save in exceptional circumstances such, for example, as fraud, misrepresentation or concealment). Where that was done a creditor with a late maturing contingent debt would be able to recover, if at all, only against the legatees.

Conversely, if, during an administration some real possibility of some contingent debt maturing came to the executor's notice, the executor could, either of his own volition or under the guidance of the court, retain a sum out of the estate against that risk or seek security direct from the prospective recipient beneficiary. If there was a retention and if his retention was pursuant to a direction of the court, or if the security from the beneficiary was given under the direction of the court then, again, he would be protected against devastavit once the fund retained or the security so given was exhausted in application towards a risk against which it had been reserved. But if the executor failed to obtain the directions of the court in that he distributed with neither a retention, nor a security from a beneficiary, sanctioned by the court nor had obtained the sanction of the court upon the taking of an account and a decree then, in any such case, he remained at risk of personal liability.

Considerable importance was, it seems, attributed to the prior sanction of the court having been obtained to whatever course was then acted upon. That would explain why in *Taylor v Taylor* (1870) LR 10 Eq 477 Lord Romilly MR paid no attention in his judgment to the argument of Mr Jessel QC that the executors there (who, without obtaining any decree, had paid a legacy without making any retention against the possibility of a call on partly paid shares in the estate) had

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Conversely, if, during an administration some real possibility of some contingent debt maturing came to the executor's notice, the executor could, either of his own volition or under the guidance of the court, retain a sum out of the estate against that risk or seek security direct from the prospective recipient beneficiary. If there was a retention and if his retention was pursuant to a direction of the court, or if the security from the beneficiary was given under the direction of the court then, again, he would be protected against devastavit once the fund retained or the security so given was exhausted in application towards a risk against which it had been reserved. But if the executor failed to obtain the directions of the court in that he distributed with neither a retention, nor a security from a beneficiary, sanctioned by the court nor had obtained the sanction of the court upon the taking of an account and a decree then, in any such case, he remained at risk of personal liability.

Considerable importance was, it seems, attributed to the prior sanction of the court having been obtained to whatever course was then acted upon. That would explain why in *Taylor v Taylor* (1870) LR 10 Eq 477 Lord Romilly MR paid no attention in his judgment to the argument of Mr Jessel QC that the executors there (who, without obtaining any decree, had paid a legacy without making any retention against the possibility of a call on partly paid shares in the estate) had

if there were one (put in argument) which provided that it is the duty of executors to pay all existing debts and to make reasonable provision for future and contingent ones and that, having done so, the executors must then distribute the estate to the beneficiaries. But a duty so framed would not assist executors generally as, without going to court, they could not have achieved the certainty that they would desire that the provision they had made had, indeed, been reasonable, a thing which, possibly years later and after many events had happened, might be difficult to prove. In the circumstances which I have mentioned of Mr Yorke's case being partly funded as a pilot or test case I would have wished, if it were at all possible, to give guidance of such a nature that the costs and delays of applications to court in other estates were avoided; it is thus tempting to hold there to be a general duty such that references to the court need not be made. However, I am unable to hold that there is. I remind myself that both Lord St Leonards' Act and s 26 of the Trustee Act 1925, even whilst conferring a complete and statutory freedom from personal liability upon the personal representatives within their terms, confer only a discretion rather than a duty to distribute and that there is no hint in the cases I have been taken to of there being any such duty. Perhaps because the courts recognise, as a matter of public policy, the importance of a ready supply of individual executors willing to take on the often thankless tasks of that office, the courts entitle executors, if they insist upon it, to require and achieve absolute certainty of freedom from personal liability: consider *Spode v Smith*. Equitas of itself does not offer certainty to that degree. Whilst executors can reasonably choose, as many no doubt will, to rely upon it alone, it cannot be said in all cases that it would be wrong for an executor who is without the sanction of the court to decline to do so. There are very many variables which executors may properly wish to take into account in electing whether to rely upon Equitas without taking the directions of the court. Equitas's position may change from time to time; its forthcoming accounts, due shortly, for example, might show a different position or have annexed to them a qualifying auditors' report of a more pessimistic import. Willingness to rely on Equitas would, as another example, surely change amongst executors if it became known that the DTI was even considering, let alone acting upon, some withdrawal of authorisation. Moreover, in differing estates the risks represented by open years will vary greatly; some names will be exposed to few open years and some to many; some to syndicates at the lower end of risk and in others, especially those having done extensive business in the United States and in the environmental field, the personal representatives will be conscious of a risk of greater exposure should Equitas be found wanting. Even whether a deceased name's syndicates were those with few members or those with literally thousands of members would be likely to affect whether policyholders pursue an estate to the utterance and may hence affect a personal representative's assessment of the adequacy of Equitas. The likely timing of claims may be material as, were it to fail at all, it could be that Equitas would have met early claims and fail only as to later ones. Further, the size and nature and the dispositions made of the estate may need to be borne in mind; where the administration is, for example, in any event going to be spread over several years so that the representatives are not to be in a position to distribute significant parts of it for a long time then the representatives may be more willing to regard Equitas as adequate than they would where the whole estate would at an early stage otherwise pass from their hands. Further, given that personal representatives can require an indemnity from the beneficiaries to whom they

distribute, the means of the recipients are relevant to the nature to the risk of personal liability to which personal representatives expose themselves. A distribution to a beneficiary who is already a person of substance and who is likely to remain so is thus less risky than a disposition to someone of small means and who is likely to dissipate that which he receives. A disposition, for example, to an established endowed charity may, in practical terms, be regarded by some executors as free from any but a negligible risk. In other estates the personal representatives may be given expert advice quite different to that I have described as the unchallenged evidence adduced on behalf of Mr Yorke's executors. In some estates the cost of obtaining the directions of the court will be a negligible proportion of the net estate, in others a significant one. There may be cases where personal representatives, having regard to the known position of Equitas at the time as they shall not unreasonably have interpreted it and upon their conscientiously weighing as best they can the very many variables concerned, elect not to rely upon Equitas or not to do so without first obtaining the directions of the court. I cannot see either of those courses necessarily to be wrong and I thus cannot find there to be a duty of general application of the kind which Mr McCall QC and Mrs Warnock-Smith on behalf of the executors invite me to. It is far from the case that the position of all personal representatives to names can be taken to be the same as the position of Mr Yorke's executors.

It may be reasonably urged that if, as I have described, upon his obtaining and acting upon a direction of the court an executor relying upon Equitas obtains a complete freedom from personal liability (fraud etc apart) then why should he not obtain that same freedom where, to save money and time, he has not taken the directions of the court? Surely, it may be argued, the principles behind the administration of assets must be the same whether the administration is directed by the court or is conducted without that direction?

Surely, the argument would run, if the personal representatives have done only that which the court could at the time have sanctioned, then they should have the protection which they would have had if they had been given that sanction? I see the force of these arguments but (leaving aside the difficulty and uncertainty of proving what the court would probably have done, perhaps several years earlier and in different circumstances) I fear authority is against my acceptance of them. The former argument failed in the Court of Appeal in *Re Hargreaves* (1890) 44 Ch D 236, [1886–90] All ER Rep 1017 and the latter was not accepted by Lord Romilly MR in *Taylor v Taylor* (1870) LR 10 Eq 477 and, to judge from his obiter comments, failed to attract Cozens-Hardy MR in *Re Blow* [1914] 1 Ch 233 at 240. Even at times when, to obtain any direction from the court, personal representatives had to surrender the *whole* administration to court, it was regarded as significant that they had passed their accounts in court, thus obtaining the sanction of the court: see *Knatchbull v Fearnhead* (1837) 3 My & Cr 122, 40 ER 871. Now that the directions of the court can be taken with relatively less expenditure in costs and time by way of the raising of specific issues in an administration, then, a fortiori, the personal representatives can be expected to seek the court's directions, which represent the result of consideration of the estate's position and Equitas's position at the time and in a forum in which, as I shall turn to below, arguments on behalf of the absent, unknown or contingent creditors can be heard and balanced (and be seen to be) in an informed and objective way that is unlikely to be possible out of court. Accordingly, personal representatives of deceased names with open years who rely upon Equitas do not, in my judgment, thereby obtain complete freedom from the risk of personal

liability in respect of those open years unless they obtain and act upon the sanction of the court in that behalf, even where (as may be difficult and as may introduce the very uncertainty they wish to avoid) they can later show that they would probably have obtained that sanction had only they earlier asked for it. The imprimatur of the court confers a protection not otherwise obtainable. In the event of a beneficiary complaining in such a case that the executors had sought the guidance of the court unnecessarily and had thus unnecessarily subjected the estate to delays and costs, the executors would be able to point to the failure of that argument as long ago as 1837 in *Knatchbull's* case, even at a time when the 'crying evil' existed that if any question was required by the personal representatives to be decided by the courts then a general administration of the whole estate had to be sought.

This is not to say that the directions of the court have necessarily to be taken in each of the 3,000 estates in which, the evidence suggests, problems of open years are present. A person claiming as a creditor but who is not able to show he is owed an immediate payable and ascertained debt at the time cannot insist upon the directions of the court being taken: *King v Malcott*. Some executors may recognise, on the facts relating to their particular estates, that to insist upon *complete* freedom from risk would be unjustified and that such risk as they run of the failure of Equitas could in practical terms be regarded as negligible. Some may feel, having regard to the beneficiaries to whom they distribute, that an agreed indemnity from them, if necessary with security in support of it, will amply suffice. Some professional executors (corporate or not) may feel that not only is the risk negligible but that they would in any event be insured against it. Indeed, that market in insurance against the failure of Equitas which I am told is not yet developed may develop to give yet further protection to personal representatives. In the circumstances I would not be able to attach real weight to any argument that this judgment in Mr Yorke's case threatens the court with there being thousands of applications for directions. Even were I to do so, that argument would not be one that could, in my view, displace, at any rate at first instance, the authorities which indicate that it is only upon personal representatives obtaining and acting upon the directions of the court that they obtain (fraud etc apart) complete freedom from personal liability.

I have given Mr Yorke's executors liberty to distribute and I have, as earlier discussed, not found a duty of general applicability such that personal representatives protected by Equitas can be obliged to distribute without their obtaining the sanction of the court. But I have not indicated whether, on the particular facts of Mr Yorke's case, his executors are or are not under a duty now to distribute. However, that is not a real and present question; it will arise, if at all, only in the events that his executors, who keenly wish to distribute and who have been given liberty to do so, fail to do so and are then pursued by beneficiaries who assert that such a duty exists. I shall leave such an improbable collocation of events to be ruled upon if and when it arises.

I mentioned earlier that upon the taking of the directions of the court argument on behalf of unknown or contingent creditors could be heard. Mr Stewart-Smith on behalf of Mr Giles Neville Clarke (representing persons who in the future make claims under Lloyd's policies partly underwritten by Mr Yorke) draws attention to *Re King* [1907] 1 Ch 72, a case where the estate was at risk of calls being made on the partly paid shares which it held. The executors sought the directions of the court and joined as a party the company in which the shares were held. Counsel for that company (for reasons which are not apparent) took

the preliminary objection that the company had been improperly made a defendant. He accepted that contingent creditors might come *voluntarily* into a summons as to the administration of the estate but argued that the company could not be obliged to be before the court. Although the judge (at 77) noticed the unsatisfactory nature of cases where the rights of absent parties might be prejudicially affected, the objection succeeded; Neville J ruled the company had been improperly served and the proceedings against the company were dismissed with costs. Mr Stewart-Smith did not have instructions to raise such a preliminary objection in the case before me nor to oppose liberty being given to the executors to distribute although, to assist the court, he did raise doubts as to the general existence of a duty such as I have described. Indeed, if any such preliminary objection were to be taken it would need, if the objector is to avoid costs, to be taken early: see *Re Davies* (1888) 38 Ch D 210 and *Re Barnato (decd), Joel v Sanges* [1948] 2 All ER 585, [1949] Ch 21. Moreover, the authorities include a case after *Re King* in which contingent creditors (albeit annuitants) were heard: see *Re Arnold* [1942] 1 All ER 501, [1942] Ch 272 in which Simonds J commenting adversely and not following *Re Johnson* [1940] WN 195, said that *Re Johnson* was a case where there had been no argument on behalf of the creditor, an odd comment if there could properly have been none. Nor can *Re Arnold* be fairly put on one side as relating only to cases where the only contingency in issue is the survival of an annuitant as, although Simonds J mentioned that reason as a way of distinguishing *Re Johnson*, the future continuing debt to an annuitant although being capable of being provided for in a more readily calculable way, is quite as much a contingent debt as many others.

Nowadays under RSC Ord 85, r 2 personal representatives can raise 'any question arising in the administration of the estate'. The parties, where such a question is raised, are prescribed but not in an exclusive way; the provision in Ord 85, r 3(2) begins by providing that all persons having a beneficial interest in or claim against the estate need not be parties. It goes on: '... but the plaintiff may make such of those persons ... parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit.'

The rule does not in terms preclude others than 'such of those persons' being joined as parties and it is plain from the terms of Ord 15, r 13(1) that in proceedings concerning the estate of a deceased person the court may appoint a person to represent those who 'may be interested (whether presently or for any future, contingent or unascertained interest) in or affected by the proceedings'.

It would be nothing short of absurd if a person could be invited to court to argue for contingent creditors or ones with unascertained interests and yet the court was bound not to hear him. In my judgment *Re Arnold* is to be preferred to *Re King;* it is not only possible that respondents joined as parties to represent contingent or unascertained interests may nowadays be heard but, if the seeking and giving of directions is to be and to be seen to be the balanced and informed process that I have described, it is desirable that the position of unascertained and future creditors should be considered. Where without inconvenience suitable representatives can be found to put argument on their behalf it should be welcomed because their presence would absolve the executors from having to do so. I thus welcomed what Mr Stewart-Smith had to say to me.

To return to the questions in the originating summons, as developed in argument, I give the executors liberty to distribute without further retention or security, a form of relief which was an alternative which Miss Mason asked for should the general duty not be held to exist. For the reason I have mentioned, I

do not answer the question whether the particular executors before me are under a duty of the kind specified in question 1 of the summons but again for the reasons given I do not find there to be a general duty of such a kind. I do not understand costs to be in issue but, rather, to be agreed and I invite Mrs Warnock-Smith to prepare and circulate minutes of order including a representation order as to Lady Chataway. Given that Mr Stewart-Smith had no instructions to oppose the relief in the originating summons and given also that Mr G N Clarke, himself interested in the position of Equitas, is a representative in an ambivalent position, I have paused before making a representation order in his case. However, I believe the arguments that could be put on behalf of the class he has been asked to represent have been put as fully as any court could reasonably expect. Accordingly I make a representation order in his case also. Only if the terms of the minutes of order cannot be agreed need the matter be restored to me for further hearing.

Directions accordingly.

23 July 1997. Lindsay J, on a hearing as to the form of the order, indicated that it was no part of his ruling that the executors were required expressly to take any security from beneficiaries as a precondition either of their being given leave to distribute by the court or their obtaining that protection which acting under the direction of the court confers.

Celia Fox Barrister.

Sarrio SA v Kuwait Investment Authority

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD OF LLOYD OF BERWICK, LORD HOPE OF CRAIGHEAD, LORD CLYDE AND LORD SAVILLE

22, 23, 30 OCTOBER, 13 NOVEMBER 1997

Conflict of laws – Stay of proceedings – Discretion – Stay of proceedings in favour of court first seised of action – Related actions in different contracting states – Plaintiff company selling goods to company indirectly controlled by defendant – Plaintiff issuing proceedings against defendant in both Spain and England in relation to contract – Whether English proceedings should be stayed – Whether proceedings 'related actions' – Civil Jurisdiction and Judgments Act 1982, Sch 1, art 22.

In February 1991 the plaintiff, a Spanish company, agreed to sell its special paper business to T, a subsidiary of another Spanish company, G, which was indirectly controlled by the defendant. Under the sale agreement, to which G was a party, part of the consideration consisted of a payment of Ptas 36,600m into a bank account, out of which the plaintiff would immediately use Ptas 29,600m to acquire shares in T and other subsidiaries of G. However, the plaintiff was given a put option to require G to buy from it the shares in T and to pay for them in three instalments spread over the following three years. In December 1992 G went into 'suspension de pagos', a form of insolvency procedure, leaving substantial amounts unpaid under the then exercised put option. The plaintiff commenced proceedings in Spain against the defendant and others to recover those losses, contending that the defendant had undercapitalised G and wrongfully abused its legal entity, causing damage to its creditors. While those proceedings were pending, the plaintiff issued proceedings in England against the defendant claiming damages for negligent misrepresentations which it alleged had been made on the defendant's behalf to induce it to enter into the sale agreement. The defendant contended that the English proceedings fell within the provisions of art 22[a] of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (incorporated into English law by s 2(1) of the Civil Jurisdiction and Judgments Act 1982 and set out in Sch 1 thereto). Article 22 provided that where 'related actions' (ie actions so clearly connected that it would be expedient to determine them together to avoid the risk of irreconcilable judgments) were brought in the courts of different contracting states, any court other than the court first seised might stay its proceedings, or decline jurisdiction if the law of that court permitted the consolidation of related actions and the court first seised had jurisdiction over both actions. The judge stayed the proceedings, but the Court of Appeal held that, in determining whether there was a risk of irreconcilable judgments, the court only had to consider the 'primary issues', which were limited to those facts which were necessary to establish a cause of action. On that basis, the court lifted the stay, concluding that the primary issues of fact in the English proceedings were distinct from any raised in the Spanish proceedings and that accordingly there was no risk of irreconcilable judgments. The defendant appealed.

a Article 22 is set out at p 932 *d* to *f*, post

Held – Having regard to the objective of art 22 of the convention, which was to facilitate the proper administration of justice in the Community, its application was not to be limited to cases where there was a potential conflict between 'primary' issues. Rather, the court should apply the simple wide test set out in the article, which was designed to cover a range of circumstances, from cases where the matters before the courts were virtually identical to cases where the connection was close enough to make it expedient for them to be heard and determined together to avoid the risk in question. In the instant case, the allegations, common to both proceedings, in relation to whether the negotiations leading to the sale were conducted by or on behalf of the defendant, as well as the circumstances of G in Spain and the defendant's relationship with it, raised a risk of irreconcilable judgments. Accordingly, it was expedient that the two actions should be heard and determined together to avoid that risk. The appeal would therefore be allowed, but in the circumstances the court would decline jurisdiction (see p 931 *a* to *d*, p 932 *h* to p 933 *d h j* and p 935 *b c e* to p 936 *c*, post).

The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj (owners) Case C-406/92 [1995] All ER (EC) 229 considered.

Notes

For stay of proceedings under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, see 8(1) *Halsbury's Laws* (4th edn reissue) para 1090.

For the Civil Jurisdiction and Judgments Act 1982, Sch 1, art 22, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1148.

Cases referred to in opinions

Hoffmann v Krieg Case 145/86 [1988] ECR 645.

Maciej Rataj, The, Tatry (cargo owners) v Maciej Rataj (owners) Case C-406/92 [1995] All ER (EC) 229, [1994] ECR I-5439, ECJ.

Appeal

The defendant, Kuwait Investment Authority, appealed with leave of the Appeal Committee of the House of Lords given on 27 February 1997 from the decision of the Court of Appeal (Evans, Peter Gibson and Brooke LJJ) ([1997] 1 Lloyd's Rep 113) on 12 August 1996 allowing the appeal of the plaintiff, Sarrio SA, from the decision of Mance J ([1996] 1 Lloyd's Rep 650) on 12 October 1995 whereby he stayed proceedings issued in England by the plaintiff against the defendant for damages for negligent misrepresentation in relation to a contract between the parties, in respect of which proceedings issued earlier by the plaintiff in Spain were pending in Spain, on the ground that the two actions were 'related actions' within art 22 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. The facts are set out in the opinion of Lord Saville.

Nicholas Chambers QC, Andrew Popplewell QC and *Paul Wright* (instructed by *Baker & McKenzie*) for the defendant.

Peter Goldsmith QC, Charles Hollander and *Adrian Briggs* (instructed by *Linklaters & Paines*) for the plaintiff.

On 30 October 1997 their Lordships announced that the appeal would be allowed for reasons to be given later.

13 November 1997. The following opinions were delivered.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading a draft of the speech prepared by my noble and learned friend Lord Saville. For the reasons he gives, I too would allow this appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading a draft of the speech prepared by my noble and learned friend Lord Saville. For the reasons he has given, I too would allow this appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading a draft of the speech prepared by my noble and learned friend Lord Saville. For the reasons he has given, I too would allow this appeal.

LORD CLYDE. My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Saville. For the reasons he has given, I too would allow this appeal.

LORD SAVILLE. My Lords, the respondent plaintiff is a Spanish company carrying on the business of manufacturing and marketing cardboard in Spain. In February 1991 it agreed to sell its special paper business (including certain factory premises) to a company called Torraspapel SA. This company was a subsidiary of Grupo Torras SA as were two other companies called respectively Prima Immobiliara SA and Ebro Agricolas SA. All these four companies were also Spanish.

Under the agreements for this sale (to which Grupo Torras was a party as well as Torraspapel) part of the consideration consisted of a payment of Ptas 36,600m into a bank account, out of which the plaintiff would immediately use Ptas 29,600m to acquire shares in Torraspapel, Ebro and Prima. However the plaintiff was given a put option (which it later exercised) to require Grupo Torras to buy from it the shares in Torraspapel and to pay for them in three instalments spread over the following three years.

In December 1992 Grupo Torras went into 'suspension de pagos' (a form of insolvency procedure) leaving substantial amounts unpaid under the exercised put option. Two months later the plaintiff started proceedings in Spain against the appellant defendant and others in which it claimed that the defendant (a Kuwaiti legal entity) was liable for these amounts. The claim is based upon allegations that the defendant (who was indirectly the majority shareholder in Grupo Torras) was the 'decision centre' of this company, that there was a 'confusion of assets' between them, and that the defendant undercapitalised this company and wrongfully abused its legal entity, causing damage to its creditors. It appears to be common ground that if the plaintiff can establish these matters, then as a matter of Spanish law it will be entitled to recover the amounts in question from the defendant. In an endeavour to do so, the plaintiff has made detailed allegations relating not only to the general corporate structure of Grupo Torras and its subsidiaries, but also to how and by whom on behalf of the defendant and others it is said that the negotiations for the sale of the special paper business were conducted.

While these Spanish proceedings were pending the plaintiff also started English proceedings against the defendant, claiming damages for negligent misrepresentations alleged to have been made on its behalf to the plaintiff during

the course of these negotiations, which the plaintiff contends induced it to enter into the sale. In essence the plaintiff alleges that in those negotiations the defendant misstated the value and prospects of Prima and also falsely asserted that its clear policy was to stand behind its investments and provide funding where necessary. The plaintiff relies, among other things, upon the subsequent disastrous fall in the price of both the Prima and the Ebro shares, upon the insolvency of Grupo Torras and upon what it says is the self-evident failure of the defendant to stand behind its investment in these companies as demonstrating the falsity of the representations.

The defendant resisted these English proceedings on a number of procedural grounds. One of these, and the only one which is of relevance to this appeal, is the submission that the proceedings fall within the provisions of art 22 of the amended Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, incorporated into our law by the Civil Jurisdiction and Judgments Act of 1982 (s 2(1) and Sch 1).

Article 22 is in the terms:

> 'Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

It is common ground that if these two actions are related then the Spanish court is to be regarded as the court 'first seised' for the purposes of this article. The essential dispute between the parties is whether the actions are related, and the debate has concentrated on whether there is a risk of irreconcilable judgments resulting from the two sets of proceedings. Mance J in the Commercial Court ([1996] 1 Lloyd's Rep 650) considered that there was and stayed the English proceedings. The Court of Appeal (Evans, Peter Gibson and Brooke LJJ) ([1997] 1 Lloyd's Rep 113) took the opposite view and lifted the stay. The matter now comes before your Lordships.

In his judgment in the Court of Appeal, Evans LJ (with whom the other members of the court agreed) considered the approach of the Court of Justice of the European Communities (including the opinion of the Advocate General) in *The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj (owners)* Case C-406/92 [1995] All ER (EC) 229, [1994] ECR I-5439 and concluded that the issues which must be considered in order to decide whether or not there was a risk of irreconcilable judgments were—

> 'the issues of fact or law which have to be decided in order that the Court can reach its judgment in the particular case. These can be described as "primary" issues and they are limited to those facts which are necessary to establish a cause of action ... The Court's decisions on these primary issues represent the process of "reasoning" upon which its judgment is based, but they do not include, in my view, other issues of fact which the Court may or

a may not decide and which are not essential to its conclusion in this way.' (See [1997] 1 Lloyd's Rep 113 at 121.)

On this basis Evans LJ concluded that the primary issues of fact in the English proceedings were distinct from any raised in the Spanish proceedings and that accordingly there was no risk of irreconcilable judgments.

I cannot accept that art 22 should be interpreted or applied in this way.

b In the first place, I can find nothing in the opinion of the Advocate General or the judgment of the European Court of Justice in *The Maciej Rataj* which lends support to the suggestion that a distinction should be drawn between those facts necessary to establish a cause of action and other facts and matters on which conflicting decisions might arise. On the contrary it seems to me that the case

c leads to the opposite conclusion.

Both the Advocate General and the European Court of Justice were at pains to emphasise that the objective of art 22 is to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice in

d the Community (see the opinion of the Advocate General [1995] All ER (EC) 229 at 246–247, [1994] ECR I-5439 at 5457–5458 (para 28) and the judgment [1995] All ER (EC) 229 at 253, 256, [1994] ECR I-5439 at 5473, 5478, 5479 (paras 32, 52, 55)). On this basis the court rejected the argument that the phrase 'irreconcilable judgments' should be interpreted so as to confine it to cases where the decisions would have mutually exclusive legal consequences, as *Hoffmann v Krieg* Case 145/

e 86 [1987] ECR 645 had decided was the case under art 27(3). As the court pointed out, the objective of art 27(3) is different from the objective of art 22 (see [1995] All ER (EC) 229 at 256, [1994] ECR I-5439 at 5479 (para 55)) . Thus the court concluded ([1995] All ER (EC) 229 at 256, [1994] ECR I-5439 at 5478 (para 53)):

f 'In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.'

This reasoning does not suggest that the phrase 'irreconcilable judgments' in art 22 should be given a limited meaning. Indeed, to limit the application of art

g 22 to cases where there is a potential conflict between so-called 'primary' issues, so far from giving the article a broad interpretation, comes dangerously close to the argument rejected in *The Maciej Rataj*. If there are only to be irreconcilable judgments where one or more of 'the facts which are necessary to establish a cause of action' are potentially in conflict, then at least in cases where the parties

h are the same, the article will be likely to be confined to situations where there is a risk that the legal consequences will be legally exclusive.

In the second place, it seems to me that the words of the article itself militate against the suggested limitation. The actions, to be related, must be 'so closely connected that it is expedient to hear and determine them together' to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my

j mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of art 21) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. These words are required if 'irreconcilable judgments' extends beyond 'primary' or 'essential'

issues, so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together. The words would hardly be necessary at all if the article was to be confined as suggested. Indeed, in that event, it seems to me that quite different words would have been used.

In the third place, it seems to me that to adopt the suggested limitation would in truth be to give the phrase 'related actions' a special 'English' meaning, which would be contrary to what the court decided in *The Maciej Rataj*, where it was pointed out that since that phrase did not have the same meaning in all the member states, it was necessary to give it an independent interpretation (see [1995] All ER (EC) 229 at 256, [1994] ECR I-5439 at 5478 (para 52)). Evans LJ defined 'primary' issues as those necessary to establish a 'cause of action', and, it would seem, distinguished what he described as 'secondary' or 'non-essential' issues by reference to the principles of issue estoppel to be found in our common law. However, those who framed art 22 can hardly be suggested to have had in mind our English concepts of 'cause of action' or 'issue estoppel' when using the phrase 'irreconcilable judgments' any more than courts in other Community countries faced with interpreting or applying art 22.

In the fourth place, I take the view that to attempt to analyse actions so as to distinguish between different kinds of issues would be likely to add to the complexity of applications under art 22 and thus to the expense and delay in dealing with them. Instead of simply considering whether the actions were so closely connected that it was expedient that they should be heard and determined together to avoid the risk of conflicting decisions, the parties and the court would have to embark upon a sophisticated and difficult exercise of legal analysis, made more complicated by the fact that the court would be dealing not with actual judgments, but with what judgments yet to be given would be likely to contain. It must be borne in mind that art 22 is concerned not with the substantive rights and obligations of the parties, but with the ancillary and procedural question as to where in the Community those rights and obligations should be heard and determined. There is nothing in the 1968 convention that suggests that it is in the interests of the Community that litigation on this question should be made more expensive and time-consuming than is necessary. If, for example, the difficulties encountered by our courts in trying to apply our sophisticated law of issue estoppel are anything to go by, and such concepts are used for the purpose of art 22 applications, this would in my view be calculated to make such applications a peculiarly complicated kind of what the Lord Chief Justice has described as 'satellite litigation', for what in my view would be no good reason.

Finally, it is noteworthy that Evans LJ (at 120–121) drew attention to the fact that in *The Maciej Rataj* [1995] All ER (EC) 229 at 247, [1994] ECR I-5439 at 5457 (para 28) the Advocate General said:

> 'The court second seised should therefore be able to have recourse to the machinery envisaged by that provision [art 22] whenever it considers that the reasoning adopted by the court hearing the earlier proceedings may concern issues likely to be relevant to its own decision.'

Evans LJ considered that since the opinion referred to issues which arise in the earlier proceedings the word 'reasoning' should be read accordingly; and then seems to have relied on this when drawing the distinction between 'primary' and other issues to which I have already referred. In the Italian in which the opinion

was actually written, however, the word used is 'questioni' and though 'issues' is doubtless a perfectly acceptable translation, it would not appear that the Advocate General was using the words he did in any special legally technical sense.

For these reasons, I am of the view that there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in art 22 and refraining from an over-sophisticated analysis of the matter. It seems to me that this was the approach adopted by Mance J ([1996] 1 Lloyd's Rep 650), who concluded that the allegations (common to both proceedings) in relation to whether the negotiations leading to the sale were conducted by or on behalf of the defendant, as well as the circumstances of the Grupo Torras group in Spain and the defendant's relationship with it, raised a risk of irreconcilable judgments in circumstances where the two actions were so closely related that it was expedient that they should be heard and determined together to avoid that risk. In particular Mance J drew attention to the fact that one of the persons alleged in Spain to have been acting on behalf of the defendant in the negotiations and otherwise was the same individual who is alleged in the English action to have made the misrepresentations on behalf of the defendant in the same negotiations, in circumstances where these allegations are hotly denied in both sets of proceedings.

There remains the question whether the English action should be stayed or whether the court here should decline jurisdiction, since it seemed clear to Mance J that the Spanish court permits the consolidation of related actions and that that court has jurisdiction over both actions.

Mance J decided that the English action should be stayed, with liberty to apply. However, he did so in circumstances where the stance adopted by the plaintiff was that if it failed in its contention that art 22 was inapplicable, then it would seek to advance the misrepresentation claim in the Spanish proceedings; and sought only a stay until that was done, being apparently content that when that happened the English court should decline jurisdiction. This was what Mance J decided to do. However, the plaintiff has not applied to the Spanish court and the stance adopted by it has changed, for it is now submitted that the correct course would be for the English court to stay the action here until judgment is given in Spain. The point made is that in view of the time that has passed since the judgment at first instance, to seek to consolidate the actions now would, even assuming that it is still possible, be likely to lead to considerable delay in getting judgment in Spain.

To my mind it is clear that had the plaintiff taken up this position before Mance J or later taken up the liberty to apply in order to make this submission, the outcome would have been that the judge would have declined jurisdiction. The plaintiff submits that it can hardly be blamed for changing its mind, in circumstances where it exercised its right to appeal and indeed succeeded before the Court of Appeal. However, it seems to me that Mr Chambers QC (counsel for the defendant) gave the answer to this in his reply. When exercising its right to appeal the defendant must have had in mind that it might not (or ultimately might not) succeed and accordingly assumed the risk that delays might ensue. To stay the English action now only until judgment in the Spanish action would in truth allow the plaintiff to win despite having failed on the main issue between the parties. In these circumstances, to alter the order made by Mance J to one

declining jurisdiction is merely to do what the judge would have done had he been faced with the new stance adopted by the plaintiff and accordingly does not amount in any real sense to interfering with the discretion vested in the judge to choose between staying the action or declining jurisdiction. a

In conclusion I should make clear that I entertain no doubt at all about the proper interpretation or application of art 22 in this case and accordingly to my mind there is no question of referring the matter to the European Court of Justice. b

For the reasons that I have given I would allow the appeal and vary the order made by Mance J to one declining jurisdiction under the second paragraph of art 22.

Appeal allowed. c

Celia Fox Barrister.

Agnew and others v Lansförsäkringsbølagens AB

COURT OF APPEAL, CIVIL DIVISION
EVANS, HOBHOUSE AND SCHIEMANN LJJ
15 MAY, 31 JULY 1997

Conflict of laws – Jurisdiction – Challenge to jurisdiction – Contracts between parties domiciled in convention countries – Plaintiffs claiming jurisdiction of English court over defendant domiciled in Sweden – Plaintiffs seeking to avoid reinsurance contracts on grounds of misrepresentation or non-disclosure in breach of duty of good faith – Plaintiffs claiming entitlement to sue in matters relating to a contract in courts of place for performance of obligation in question – Whether duty of good faith 'obligation in question' – Whether plaintiffs' claim 'matter relating to a contract' – Whether plaintiffs 'insurer' and so required to bring proceedings in Sweden – Civil Jurisdiction and Judgments Act 1982, Sch 3C, arts 5(1), 11.

The plaintiffs, Lloyd's underwriters and other reinsurers operating in London, entered into reinsurance contracts with the defendants, an insurance company domiciled in Sweden. The plaintiffs claimed that they were entitled to avoid or cancel the contracts on the grounds of misrepresentation and non-disclosure of material facts, alleging that the defendants had breached their duty under English law to act in good faith during pre-contract negotiations. The plaintiffs issued proceedings against the defendants in England, relying on art 5(1)[a] of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (as set out in Sch 3C to the Civil Jurisdiction and Judgments Act 1982), which gave jurisdiction to the courts of the place of performance of the obligation in question in claims arising from matters relating to a contract. The defendants applied to set aside the writ for want of jurisdiction. The judge dismissed the application, holding that the plaintiff's claim constituted a 'matter relating to a contract' within the meaning of art 5(1) and that the duty of good faith when making reinsurance contracts constituted the 'obligation in question' for the purposes of that article. The defendants appealed to the Court of Appeal, contending (i) that the 'obligation in question' for the purposes of art 5(1) had to be a contractual obligation and that the plaintiffs' claim was not a 'matter relating to a contract' within the meaning of that article and (ii) that the word 'insurer' in art 11[b] of the convention, which provided that an insurer could bring proceedings only in the courts of the state in which the defendant was domiciled, included a reinsurer. They also applied for the issue of jurisdiction to be referred for a preliminary ruling by the European Court of Justice.

Held – For the purpose of art 5(1) of the 1988 convention, an action claiming avoidance of reinsurance contracts on the grounds of misrepresentation or non-disclosure was a 'matter relating to a contract', since it was meaningless to talk of the duty of good faith except by reference to a particular contract, and the duty of good faith owed by the reinsureds to the insurers was 'the obligation in question'. That obligation was the obligation in respect of which relief was

a Article 5, so far as material, is set out at p 940 *b c*, post
b Article 11, so far as material, is set out at p 943 *e f*, post

claimed and was not limited to a contractual obligation, since if that had been intended the draftsman could have so provided. Moreover, since the activities of reinsurance and insurance were conceptually distinct, not least as regards subject matter and the respective definitions of risk, the word 'insurer' in art 11 of the convention did not include a reinsurer. It followed that the court in the instant case had jurisdiction to entertain the proceedings and the judge had therefore correctly dismissed the defendant's application. Accordingly, since no question relating to the interpretation of the EC Treaty arose, the appeal would be dismissed and the application refused (see p 941 *b* to p 942 *h*, p 943 *c d*, p 944 *a* to *f* and p 946 *g* to *j*, post).

Trade Indemnity plc v Försäkringsaktiebølaget Njord (in liq) [1995] 1 All ER 796 considered.

Decision of Mance J [1996] 4 All ER 978 affirmed.

Notes

For insurer's duties of disclosure and good faith, see 25 *Halsbury's Laws* (4th edn reissue) paras 349–362, and for cases on the subject, see 29(2) *Digest* (2nd reissue) 9–21, *2967–3034*.

For jurisdiction of the courts under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (and parallel provisions under the Lugano Convention), see 8(1) *Halsbury's Laws* (4th edn reissue) paras 618–623, 631, and for cases on the subject, see 11(2) *Digest* (2nd reissue) 235–237, *1417–1421*.

For the Civil Jurisdiction and Judgments Act 1982, Sch 3C, arts 5, 11, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1168, 1172.

Cases referred to in judgments

Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck [1989] 3 All ER 628, [1990] 1 QB 818, [1990] 2 WLR 547, CA; *rvsd* [1991] 3 All ER 1, [1992] 1 AC 233, [1991] 2 WLR 1279, HL.

Banque Financière de la Cité SA v Westgate Insurance Co Ltd [1990] 2 All ER 947, [1991] 2 AC 249, [1990] 3 WLR 364, HL; *affg* [1989] 2 All ER 952, sub nom *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, [1989] 3 WLR 364, CA.

Boss Group Ltd v Boss France SA [1996] 4 All ER 970, [1997] 1 WLR 351, CA.

Custom Made Commercial Ltd v Stawa Metallbau GmbH Case C-288/92 [1994] ECR I-2913.

Ets A de Bloos SPRL v Société en commandite par actions Bouyer Case 14/76 [1976] ECR 1497.

Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co Case 189/87 [1988] ECR 5565.

Kleinwort Benson Ltd v Glasgow City Council [1996] 2 All ER 257, [1996] QB 678, [1996] 2 WLR 655, CA.

Merchants' and Manufacturers' Insurance Co Ltd v Hunt [1941] 1 All ER 123, [1941] 1 KB 295, CA.

Overseas Union Insurance Ltd v New Hampshire Insurance Co Case C-351/89 [1992] 2 All ER 138, [1992] QB 434, [1992] 2 WLR 586, ECJ.

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 All ER 581, [1995] 1 AC 501, [1994] 3 WLR 677, HL.

Shenavai v Kreischer Case 266/85 [1987] ECR 239.

Source Ltd v TUV Rheinland Holding AG [1997] 3 WLR 365, CA.

Trade Indemnity plc v Försäkringsaktiebølaget Njord (in liq) [1995] 1 All ER 796.

Cases also cited or referred to in skeleton arguments

Arcado SPRL v Haviland SA Case 9/87 [1988] ECR 1539.

Barclays Bank plc v Glasgow City Council [1994] 4 All ER 865, [1993] QB 429, [1992] 3 WLR 827; *affd in part* [1994] 4 All ER 865, [1994] QB 404, [1994] 2 WLR 466, CA.

Effer SpA v Kantner Case 38/81 [1982] ECR 825.

Gravier v City of Liège Case 293/83 [1985] ECR 593.

Industrie Tessili Italiana Como v Dunlop AG Case 12/76 [1976] ECR 1473.

Kolpinghuis Nijmegen BV Case 80/86 [1987] ECR 3969.

Marleasing SA v La Comercial Internacional de Alimentación SA Case 106/89 [1990] ECR I-4135.

Martin Peters Bauunternehmung GmbH v Zuid Nederlanse Aannemers Vereneging Case 34/82 [1983] ECR 987.

New England Reinsurance Corp v Messoghios Insurance Co SA [1992] 2 Lloyd's Rep 251, CA.

New Hampshire Insurance Co v Strabag Bau AG [1990] 2 Lloyd's Rep 61; *affd* [1992] 1 Lloyd's Rep 361, CA.

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 All ER 581, [1995] 1 AC 501, HL.

R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg [1994] 1 All ER 457, [1994] QB 552, DC.

Union Transport Group plc v Continental Lines SA [1992] 1 All ER 161, [1992] 1 WLR 15, HL.

Appeal and application

The defendants, Lansförsäkringsbølagens AB, appealed from the judgment of Mance J ([1996] 4 All ER 978) on 30 July 1996 whereby he dismissed their application under RSC Ord 12, r 8 for an order setting aside the writ in an action brought against them by ten plaintiffs, being Ian Charles Agnew, suing on his own behalf and in a representative capacity on behalf of all the members of several Lloyd's syndicates, and nine others, in which they sought to avoid contracts of reinsurance. They also applied to the court for an order that the European Court of Justice be requested to give a preliminary ruling pursuant to the 1977 Protocol to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 or under art 177 of the EC Treaty as to whether they should be sued in the courts of Sweden or the United Kingdom. The facts are set out in judgment of Evans LJ.

Michael Ashe QC and *Marie Kelly* (instructed by *Rosling King*) for the defendants.

Michael Crane QC and *Andrew Lydiard* (instructed by *Clyde & Co*) for the plaintiffs.

Cur adv vult

31 July 1997. The following judgments were delivered.

EVANS LJ. Three issues arise on this appeal from the judgment of Mance J ([1996] 4 All ER 978) in the Commercial Court on 30 July 1996. He dismissed the defendants' application to set aside the proceedings, made under RSC Ord 12, r 8, on the ground of want of jurisdiction in the court. The defendants appeal against that ruling on two grounds, one of which was not raised before the judge. They also apply to have the issue of jurisdiction referred for a preliminary ruling by the European Court.

The issue decided by the judge arises under art 5(1) of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (the convention) (see Sch 3C to the Civil Jurisdiction and Judgments Act 1982 as amended by s 1(3) of and Sch 1 to the Civil Jurisdiction and Judgments Act 1991). This provides an exception to the general rule that parties who are domiciled in a contracting state shall be sued in the court of that state (art 2(1)). Article 5(1) reads in part as follows, and 5(3) can conveniently be quoted also:

> 'A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question ... 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred ...'

The defendants are an insurance company domiciled in Sweden. They say that pursuant to art 2 they should be sued in Sweden. The plaintiffs, who are Lloyd's underwriters and other reinsurers of the defendants, say that art 5(1) applies. They bring proceedings here, they submit, in 'a matter relating to a contract' and that London was 'the place of performance of the obligation in question'. Mance J upheld the plaintiffs' contention. The defendants conceded before him that the first requirement of art 5(1) was satisfied: that the plaintiffs do sue 'in a matter relating to contract'. He was called on to decide only whether 'the obligation in question' brought the proceedings within art 5(1). If it did, then it is also conceded that the place of performance was in London.

The defendants reserved the right to withdraw the first concession on appeal, and they have done so. They submit, therefore, that the plaintiffs must bring their claim within both of the art 5(1) requirements.

The contracts in question are contracts of reinsurance which were made on different dates during the period from November 1993 until February 1994 covering risks attaching on or after 1 January 1994 (in one case 1 January 1995). The plaintiffs claim declarations that they are entitled to cancel and avoid the contracts on grounds of 'misrepresentation of and/or failure to disclose and/or non-disclosure of' material facts. There is also a claim for breach of warranty, but this is not relied on nor relevant for the purposes of the appeal.

The alleged misrepresentations and non-disclosures of material facts are categorised in English law as breaches of the duty of good faith which insureds and reinsureds owe to insurers and reinsurers during the negotiation of contracts and in certain respects after the contracts are concluded. One question which arises is whether this duty of good faith should properly be regarded as a contractual obligation, or whether it arises on other, more general and non-contractual grounds. The leading authorities include *Merchants' and Manufacturers' Insurance Co Ltd v Hunt* [1941] 1 All ER 123, [1941] 1 KB 295, *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947, [1991] 2 AC 249; *affg* [1989] 2 All ER 952, [1990] 1 QB 665 and *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 628, [1990] 1 QB 818. The issue is discussed in Lord Mustill's speech in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 at 611–612, [1995] 1 AC 501 at 543–544. If not contractual, the obligation arises from 'the jurisdiction originally exercised by the Courts of Equity to prevent imposition' ([1941] 1 All ER 123 at 136, [1941] 1 KB 295 at 318 per Luxmoore LJ).

Mance J said ([1996] 4 All ER 978 at 986):

> 'In considering whether the matter is one "relating to a contract" within art 5(1), it seems to me that such questions can largely be ignored, as being of no more than historical and domestic interest. I will, however, proceed on the basis that the duty of good faith exists, as Mr Ashe submitted, as a matter of general law outside the contract.'

I agree with the judge's view, but like him I will assume that the duty of good faith, which is broken by a misrepresentation or non-disclosure of material fact in the course of making a contract of insurance or reinsurance, should not be categorised as an obligation which is created by or arises under a contract. The question remains, however, whether an action in which a breach of the duty during pre-contract negotiations is alleged is nevertheless 'a matter relating to contract' for the purposes of art 5(1).

Although the defendants conceded before him that this requirement was satisfied, the judge gave reasons of his own why he considered that the concession was rightly made. He held (at 985):

> 'The matter is on any objective appreciation intimately concerned with and closely related to the contracts which (it is not in dispute) were here actually made between the defendants as insurers and the plaintiffs as reinsurers.'

He emphasised the fact that the relief claimed by the plaintiffs in the action is a declaration of their right to avoid the contracts. The reality is that 'without the making of the contract, the matter would never come before a court at all'. Whilst the duty can be described on a 'pre-contract' obligation, nevertheless the duty has to be performed 'when entering into an insurance contract'. The action is based on the premise that contracts were made (at 985).

I would indorse the judge's reasoning, although as will appear below I prefer not to divide the question whether art 5(1) applies into two separate sub-issues. Considering the phrase 'matter relating to a contract' alone, it seems to me that an action claiming to avoid insurance or reinsurance contracts on grounds of misrepresentation or non-disclosure cannot sensibly be regarded as being outside its scope. The duty of good faith may have equitable origins, and it certainly does not arise under the terms of the contract, if one is concluded (cf ss 18 and 19 of the Marine Insurance Act 1906), but nevertheless it is meaningless to talk of the duty except by reference to a particular contract. There is no duty of disclosure to insurers generally but only a particular insurer with whom a contract is negotiated. What is 'material' cannot be determined except by reference to the contract which is negotiated and in due course concluded. The inescapable conclusion, in my judgment, is that an action claiming avoidance on these grounds is a 'matter relating to a contract' for the purposes of art 5(1). The judgement of Rix J in *Trade Indemnity plc v Försäkringsaktiebølaget Njord (in liq)* [1995] 1 All ER 796 is to the like effect.

'Obligation in question'

In the *Trade Indemnity* case Rix J held that this requirement of art 5(1) was not satisfied in circumstances identical with the present case. Mance J reached the contrary conclusion. His scholarly judgment takes full account of Rix J's reasoning and of a number of authorities, both of this court and of the European Court. I would hold that he was correct in this respect also.

Mr Ashe QC for the appellants (defendants) submits that the 'obligation in question' for the purposes of art 5(1) must be a contractual obligation, although

this includes not only obligations created by the terms of the contract, which on any view are 'contractual obligations', but also claims which arise as the result of a contract being declared void (*Kleinwort Benson Ltd v Glasgow City Council* [1996] 2 All ER 257, [1996] QB 678, which concerned restitutionary claims and not pre-contractual obligations) and claims concerned with the existence of a contract (*Boss Group Ltd v Boss France SA* [1996] 4 All ER 970, [1997] 1 WLR 351). Neither of those causes is comparable, he submits, with the present, where it is assumed that the 'obligation in question' arose separately and distinctly from the contract, as a matter of equity.

In my judgment, the reference in art 5(1) to 'the obligation in question' ought not to be considered in isolation from the remaining words in art 5(1), any more than that art 5 should be interpreted without regard to the fact that it creates a special exception to the general rule of domiciliary jurisdiction in art 2 (see *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 19)). In particular, 'the obligation in question' refers back to the requirement that the proceedings shall be 'in matters relating to a contract'. Since any proceedings of this sort will be to enforce or claim relief in respect of an obligation owed by the defendants to the claimant (or possibly vice versa if the claim, is for a declaration of non-liability), it follows that the proceedings themselves will identify 'the obligation in question'. If the proceedings are not brought to enforce a contract or to obtain recompense for its breach (cf *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970 at 975, [1997] 1 WLR 351 at 356 per Saville LJ) but nevertheless they are in a 'matter related to contract', then in my view the obligation in respect of which relief is claimed is the obligation whose place of performance has to be determined for the purposes of applying art 5(1). Authority for this view is found in *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* Case 14/76 [1976] ECR 1497 at 1508–1509 and *Shenavai v Kreischer* Case 266/85 [1987] ECR 239 at 255–256.

The contrary view, which was adopted in the *Trade Indemnity* case [1995] 1 All ER 796 at 810 by Rix J, is that the obligation in question must be a contractual obligation (in the wider sense referred to above) for art 5(1) to apply. The Jenard Report on the Brussels Convention states that the wording of art 5(1) represented a compromise between those states whose national law applied the law of the place of performance to contractual disputes and others who favour the law of the place where the contract was made. To bring within its scope claims for breach of duty during the precontract negotiations would be to admit the lex loci contractus where it was meant to be excluded, by the back door.

In my judgment, this consideration is outweighed by (1) the drafting factor: if it was intended that 'obligation' should be limited to 'contractual obligation', then the draftsman could have said so (cf Roch LJ in *Kleinwort Benson Ltd v Glasgow City Council* [1996] 2 All ER 257 at 270, [1996] QB 678 at 694); and (2) the underlying object of art 5, not limited to art 5(1), which is to recognise that in certain limited categories of case it is likely to be more convenient and effective if proceedings are brought, not where the defendant is domiciled, but in another state where performance was called for (art 5(1)) or where 'the harmful event' occurred (art 5(3)). The same practical considerations suggest that the courts best placed to hear a 'matter related to contract' but which involves either the question whether a contract was concluded (the *Boss Group* case) or alleged breaches of duty during pre-contract negotiations (this case) is the court of the place where the negotiations were conducted. This does not conflict, in my judgment, with the choice of the courts of the place of performance in those cases

where a failure of performance is alleged. This is borne out by the decision of the European Court in *Custom Made Commercial Ltd v Stawa Metallbau GmbH* Case C-288/92 [1994] ECR I-2913 to which Mance J referred.

It is well established that art 5 should be interpreted by reference to the objects of the convention rather than to concepts of national law, which may vary from one member state to another. For example, the right to avoid a contract of insurance or reinsurance, which is assumed for present purposes to arise under rules of equity distinct from the contractual obligations themselves, could equally well be formulated (and perhaps they should be) in terms of 'contractual obligations' in the strict sense. Sections 18 and 19 of the Marine Insurance Act 1906 come close to doing so.

The Court of Appeal's recent judgment in *Source Ltd v TUV Rheinland Holding AG* [1997] 3 WLR 365 suggests that art 5(1) rather than art 5(3) applies when there is a contract-related claim in tort.

In the present case, it is unnecessary to consider whether the plaintiffs (respondents) would be entitled to rely on art 5(3), if the proceedings were outside the scope of art 5(1). In my judgment, the judge was correct: they are within its scope.

Article 11

The appellants raised before us a new contention regarding the scope of art 5. They refer to art 11:

> '... an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary.'

Article 11 appears in section 3 of the convention, headed 'Jurisdiction in matters relating to insurance'.

The point is a short one. Do 'insurer' and 'insured' in art 11 include reinsurers and reinsured, or is the article limited to direct insurance?

The appellants seek leave to amend their notice of appeal in order to raise this further point. The respondents submit that leave should be refused. In the *Trade Indemnity* case [1995] 1 All ER 796 at 804 the point was raised but then abandoned by the defendant. Rix J (at 805) nevertheless held that it was unmeritorious and that the concession was rightly made. It seems, therefore, that the appellants' failure to raise it before Mance J was the result of a considered decision, rather than inadvertence.

Professor Schlosser in his Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 [(the Brussels Convention)] (the 1978 Accession Convention) (Luxembourg, 9 October 1978) (OJ 1979 C 59 p 71 at p 117) stated: 'Reinsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.'

The respondents submit that Britain's accession to the Brussels Convention was negotiated on this basis, though it is not referred to in the reports either of Jenard (OJ 1979 C 59 p 1) or Möller (see s 3B of the 1982 Act). They further submit that arts 7 to 12 make special provision for insurance contracts because of the likely inequality of bargaining power and because insureds can be regarded as consumers in need of protection. These considerations do not apply to reinsurance contracts. They are 'wholesale' rather than retail.

The issue was raised in *Overseas Union Insurance Ltd v New Hampshire Insurance Co* Case C-351/89 [1992] 2 All ER 138, [1991] ECR I-3317 but not ruled on by the European Court or by the Advocate General.

Like Rix J in the *Trade Indemnity* case [1995] 1 All ER 796 at 804, I would hold that the appellants' contention is unsound and that the view expressed by Professor Schlosser should be adopted by these courts. Reinsurance and insurance are conceptually distinct, not least as regards subject matter and the respective definitions of risk. This leads to difficulties in applying the wording of arts 7 to 12 to reinsurance in certain respects. In addition, there are the general considerations regarding consumer protection and the negotiation of the United Kingdom accession, which have been referred to above.

Therefore, whilst giving the appellants leave formally to amend the notice of appeal, this further ground of appeal in my judgment fails also.

Reference to the European Court

By a notice of motion dated 11 April 1997 the appellants seek an order that the European Court be requested to give a preliminary ruling whether they should be sued in the courts of Sweden or the courts of the United Kingdom, 'such ruling to be given pursuant to the Protocol of 1977 to the [Brussels Convention]'.

This is a surprising application, because at the relevant time Sweden and the United Kingdom were parties to the Lugano Convention, but not to the Brussels Convention, and the European Court has no jurisdiction in relation to the former Convention.

Mr Ashe QC however has deployed arguments which are considered in the judgment of Schiemann LJ. I agree with his judgment and that this application should be refused.

HOBHOUSE LJ. I agree that the application to refer should be refused for the reasons to be given by Schiemann LJ and the appeal should dismissed for the reasons given by Evans LJ.

SCHIEMANN LJ. As to the substance of the submissions made before us I have nothing to add to the judgment of Evans LJ. There remains however a request by the appellants that we ask the European Court of Justice (the ECJ) for a ruling on a point of law relevant to the issues which have been debated before us.

Those issues relate to the proper interpretation of Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (the Lugano Convention). That convention has no provision for the making of references to the ECJ. Protocol No 2 of the Lugano Convention however makes any rulings of the ECJ on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention) highly relevant to any decision as to the interpretation of the corresponding provisions of the Lugano Convention.

The 1971 Protocol to the Brussels Convention grants the ECJ jurisdiction to give rulings on the interpretation of (1) the Brussels Convention and (2) various Treaties of Accession to the Brussels Convention. The EC Treaty, by art 177, gives the ECJ jurisdiction to give rulings on the EC Treaty. Mr Ashe QC submits that this court should, by using one of two routes—the 1971 Protocol to the Brussels Convention or art 177 of the EC Treaty—ask the ECJ to give a ruling on the Brussels Convention so that in due course this court, furnished with such a ruling, can interpret the Lugano Convention in the light of it. In my judgment, neither of these two routes is open to the court. I can give my reasons shortly.

The 1971 Protocol to the Brussels Convention

The original parties to the Brussels Convention were the original members of the European Communities. By now, the UK is a member of the Communities and a party to the Brussels Convention. As is common ground, however, Sweden, although a member of the European Communities, is not yet a party to the Brussels Convention. The reason for that is that, although Sweden has signed the 1996 Accession Convention (which provides for the accession of Sweden to the Brussels Convention), the Swedish Accession Convention is not yet in force. It follows that Sweden is not a contracting state for the purposes of the Brussels Convention and that the ECJ has as yet no jurisdiction pursuant to the 1971 Protocol to the Brussels Convention to give a ruling as to the interpretation of the 1996 Accession Convention.

The first question which the appellants seek to refer to the ECJ is thus defined by them:

> 'May the Court of Justice interpret the provisions of the Brussels Convention as amended by the Accession Convention of 29.11.1996 before the Accession Convention, according to its terms, comes into force?'

The question, demonstrates the flaw in the applicants' argument. The Brussels Convention is not amended before the Accession Convention comes into force. The answer to that question as posed is manifestly in the negative. I regard that proposition acte clair.

Article 177 of the EC Treaty

Article 177 of the treaty provides, so far as presently relevant:

> '... the Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty ... Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon ...'

This court's jurisdiction to refer pursuant to art 177 only arises in relation to preliminary rulings concerning the EC Treaty. Article 177 does not give jurisdiction to refer questions relating to the Brussels Convention or the Lugano Convention.

Recognising this problem, Mr Ashe QC constructed an argument to the effect that what he was really seeking from the ECJ was a ruling as to obligations under the EC Treaty. He sought a reference to the ECJ relying on arts 5, 6 and 220 of the EC Treaty, art 63 of the Brussels Convention and art 4 of the Swedish Accession Convention. They read as follows:

> *'Article 5*
>
> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty ...
>
> *Article 6*
>
> 1. Member States shall, in close co-operation with the institutions of the Community, co-ordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty.

2. The Institutions of the Community shall take care not to prejudice the internal and external financial stability of the Member States ... a

Article 220

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their Nationals ... the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards' b

Article 63 of the Brussels Convention provides:

'The Contracting States recognise that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community. The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member State of the other part.' c

Article 4 of the Accession Convention, to put matters shortly, inserts Sweden into the list of parties to the Brussels Convention. d

In essence the submission of Mr Ashe is that it is arguable under the EC Treaty that the Brussels Convention should be treated by this court as though it had been amended by the Accession Convention. He submits that, since Sweden becoming a party to the Brussels Convention is in effect part of the parcel of e obligations which Sweden and the existing member states undertook on Sweden becoming a member of the EC, the court should operate on the basis that Sweden had already become a party to the Brussels Convention. He seeks to equate the position arising under an unimplemented Directive with that arising under a treaty which has not yet come into force. He submits that if that argument be f correct, then it would be arguable that the question which has arisen under the Lugano Convention should be regarded as having arisen under the Brussels Convention and therefore be a matter which, pursuant to the Protocol to the Brussels Convention, is suitable for a reference to the ECJ.

Conclusion g

It is accepted that this court under its national law in the circumstances of the present case only has jurisdiction to refer a question to the ECJ if it is empowered so to do under art 177 of the EC Treaty. For my part, I can see no question under the EC Treaty arising under any of the articles relied on and regard the matter as acte clair. No breach of any of the obligations set out in arts 5, 6, or 220 is even h arguably alleged, let alone clearly alleged. I cannot see that it is arguable that any question relating to the interpretation of the EC Treaty has been raised before this court; still less do I consider that a decision on that question is necessary for this court to give judgment on the issues under the Lugano Convention which do require resolution. In those circumstances the preconditions in art 177 for j making a reference to the ECJ have, I consider, not been fulfilled and I would refuse to make a reference.

Appeal dismissed. Reference to the European Court of Justice refused. Leave to appeal to the House of Lords refused.

L I Zysman Esq Barrister.

Seifert v Pensions Ombudsman and others

COURT OF APPEAL, CIVIL DIVISION

STAUGHTON, WARD AND MUMMERY LJJ

10, 11, 31 JULY 1997

Pension – Pension scheme – Maladministration of pension scheme – Jurisdiction of Pensions Ombudsman – Winding up of pension scheme – Retirement of member agreed prior to winding up but payment of pension not commenced – Member informed funding sufficient to pay 63% of his entitlement but later told funds sufficient to pay 83% – Member making complaint to Pensions Ombudsman – Whether member claiming 100% of pension entitlement – Whether complaint having any substance.

In December 1991 K, a director and employee of S Ltd who had reached the age of 60, was made redundant but it was agreed that, for pension purposes, he should be treated as having taken early retirement under S Ltd's pension scheme. In February 1992 G plc, with whom the assets of the scheme were invested, provided a quotation of K's entitlement under the scheme, but it subsequently advised that the scheme was underfunded and that K's share of the assets was only 63% of the sum needed to secure his entitlement. His final pension arrangements were still under negotiation when the scheme was formally wound up on 30 June 1992, following which S Ltd went into administrative receivership. In October 1992 G plc calculated that the scheme's funds in fact covered 83% of its liabilities. Thereafter, K complained to the Pensions Ombudsman pursuant to the provisions of the Pension Schemes Act 1993 of maladministration. In particular, he complained that he had only been offered 63% of his entitlement when there were sufficient funds to pay 83%. However, he also enclosed a copy of a letter he had written claiming '100% ... or at worst not less than 83%' and subsequently wrote to the ombudsman to show that he had accepted the quotation of February 1992 for 100% of his entitlement. The ombudsman upheld K's complaint and directed that he should receive his full pension with effect from the date when his employment terminated. The former trustees of the scheme appealed to the High Court under s 151(4) of the 1993 Act and the judge ordered that the ombudsman's direction be set aside on the grounds, inter alia, (i) that the relief granted was not the relief claimed and (ii) that there was no substance in the complaint. K appealed to the Court of Appeal.

Held – K's complaint did have substance, since, on the facts, he had been entitled to a full pension from the date when his employment terminated in the figures given to him in February 1992. Moreover, the ombudsman had been entitled to grant the relief he did, as K had complained both about not receiving 83% of his pension entitlement and about not receiving 100%. Accordingly, the appeal would be allowed and the ombudsman's direction restored (see p 952 *a*, p 955 *g* and p 956 *a b*, post).

Decision of Lightman J [1997] 1 All ER 214 reversed.

Notes

For occupational pension schemes generally, see 33 *Halsbury's Laws* (4th edn) para 973.

Case referred to in judgment

Wild v Smith [1996] PLR 275.

Cases also cited or referred to in skeleton arguments

Duffield v Pensions Ombudsman [1996] PLR 285.

Ellis & Sons Fourth Amalgamated Properties Ltd v Southern Rent Assessment Panel (1984) 14 HLR 48.

House of Spring Gardens Ltd v Waite [1990] 2 All ER 990, [1991] 1 QB 241, CA.

Law Debenture Trust Corp plc v Pensions Ombudsman [1997] 3 All ER 233.

Miller v Stapleton [1996] 2 All ER 449.

Providence Capitol Trustees Ltd v Ayres [1996] 4 All ER 760.

R v Chief Constable of the Thames Valley Police, ex p Cotton [1990] IRLR 344, CA.

R v Ealing Magistrates' Court, ex p Fanneran (1995) 8 Admin LR 351, DC.

R v Kingston-upon-Hull Rent Tribunal, ex p Black [1949] 1 All ER 260, DC.

R v Liverpool Justices, ex p Roberts [1960] 2 All ER 384, [1960] 1 WLR 585, DC.

R v Llanidloes Licensing Justices, ex p Davies [1957] 2 All ER 610, [1957] 1 WLR 809, DC.

R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council [1979] 2 All ER 881, [1979] QB 287, CA.

R v Newcastle-under-Lyme Justices, ex p Massey [1995] 1 All ER 120, [1994] 1 WLR 1684, DC.

R v Secretary of State for Health, ex p US Tobacco International Inc [1992] 1 All ER 212, [1992] QB 353, DC.

R v Willesden Justices, ex p Utley [1947] 1 All ER 838, [1948] 1 KB 397, DC.

Steele Ford & Newton (a firm) v CPS [1993] 2 All ER 769, sub nom *Holden & Co (a firm) v CPS* [1994] 1 AC 22, HL.

Westminster City Council v Haywood [1996] 2 All ER 467, [1996] 3 WLR 563; *rvsd* [1997] 2 All ER 84, CA.

Appeals

By amended notice dated 20 June 1997 Erdogal Kural appealed with leave of the Court of Appeal (Phillips and Mummery LJJ) granted on 16 January 1997 from the decision of Lightman J ([1997] 1 All ER 214) on 30 July 1996 whereby he allowed the appeals of John Seifert, Anthony Lynch and Philip Helm, the former trustees of the pension scheme of Seifert Ltd, and of Fairmount Trustee Services Ltd from the determination of the Pensions Ombudsman, Dr Julian Farrand QC, dated 5 December 1995 whereby he upheld complaints of maladministration made by Mr Kural as a member of the pension scheme. By notice dated 3 October 1996 the ombudsman appealed with leave of the judge against that part of the decision whereby Lightman J ordered that he pay the taxed costs of Mr Lynch, Mr Helm and Mr Seifert. The facts are set out in the judgment of the court.

Adam Deacock (instructed by *Burton Woolf & Turk*) for Mr Kural.

David Rees (instructed by *Jacobsens*) for Mr Seifert.

John Stephens (instructed by *Sacker & Partners*) for Fairmount.

Christopher Nugee (instructed by *John Yolland*) for the Pensions Ombudsman.

Mr Lynch and Mr Helm did not appear.

Cur adv vult

31 July 1997. The following judgment of the court was delivered.

STAUGHTON LJ. This is the judgment of the court, in four appeals which reveal a most unfortunate chain of events. A dispute arose in June 1992 between Mr Erdogan Kural, his employers and the trustees of their pension scheme. No doubt Mr Kural thought that the Pensions Ombudsman would provide a rapid and just resolution of the problem. Five years later there is still a dispute, large amounts of money and effort have been spent seeking to resolve it, and Mr Kural has not yet received any pension.

For 27 years Mr Kural had worked for Seifert Ltd, a company providing architectural services; we will call them 'the employers'. He was also a director of the company. Other parties to these two Crown Office applications, which were heard together, were Mr Seifert, Mr Helm and Mr Lynch, who were also directors of the employers and trustees of the pension scheme; Dr Farrand QC, the Pensions Ombudsman; Fairmount Trustees Services Ltd, who were appointed as new trustees of the scheme; and Guardian Assurance plc, with whom the assets of the scheme were invested (and who took no part in the proceedings). It is important to note that it was a final salary scheme, and not one where the employee's pension depended on how the investments in the scheme had accumulated. But there was other provision, to which we will return, in the event of the scheme being wound up.

The facts as to the dispute

Rule 5.2.1 of the scheme rules read as follows:

> 'On his retirement from the service of the Employer before Normal Retirement Date but on or after his 50th birthday ... a Member may with the Employer's consent elect to receive in lieu of the benefit he would otherwise be entitled to ... an immediate pension ...'

In a letter of 9 December 1991, the employers gave Mr Kural six month's notice of his redundancy, and offered him the option of early retirement under the scheme. After some earlier proposals, on 17 February 1992 the employers provided Mr Kural with a quotation, prepared by Guardian Assurance, of his entitlement under the scheme. This stated that Mr Kural was entitled to opt either for an annual pension of £17,327·40 or for a tax free lump sum payment of £29,240·86 and a reduced annual personal pension of £14,676·36. In either case, provision was also made for a widow's annual pension of £8,663·76. These figures took into account the fact that Mr Kural would be 61 years old when he left the employers' service, on 8 June 1992.

It so happened that the funds in the scheme were insufficient to meet the entitlements of all its members. The quotation from Guardian Assurance to the employers included the following warning:

> 'Note that the assumed outgo exceeds the amount reserved for this member under the scheme. If the date by which the scheme's long-term liabilities are fully funded is not to be deferred, an extra contribution of £75,300 will be needed.'

The employers were in severe financial difficulties, and no such payment was made.

On 7 April 1992 Mr Kural wrote to Mr Helm as follows:

> 'Would you please confirm the details of my pension on the basis of the maximum lump sum payment of £29,240·86 and also that Guardian Royal Exchange will be paying my pension direct to my Bank every month on the basis of £14,676·36 p.a.'

In the same letter he asked for confirmation that he would receive redundancy money. The request for confirmation was repeated in a letter from Mr Kural's solicitors to the employers of 14 May 1992, which was not answered. Then on 18 May 1992, Guardian Assurance wrote to Mr Helm explaining that the scheme was underfunded on a discontinuance basis; the sum of £132,803 represented Mr Kural's 'fair share of the fund transfer value'. However, this figure only amounted to 63% of the £260,467·43 needed to secure Mr Kural's actual entitlement on early retirement.

In a memorandum to Mr Kural which was not received until 28 May 1992, but was dated 20 May 1992, Mr Helm wrote:

> 'Following on from discussions with trustees of the pension fund and Guardian Royal Exchange, the managers, I give details with regard to your early retirement. The Trustees of the Pension Scheme will make available to you the sum of £132,800. The Trustees are currently seeking quotations in respect of what benefits this sum will purchase on your behalf. In the course of the next week quotations will be available of your entitlement. Please disregard the quotation already supplied. It is not an accurate reflection of your entitlement.'

That memorandum was seriously misleading. Mr Kural's rights at that date, as will appear later, did not depend on whether the scheme was fully funded with Guardian Assurance, provided that there was enough money to pay existing pensioners. Whether the employers did or did not know of the error at the time remains unexplained. A separate error had also appeared in the memorandum of 20 May, where the employers said or implied that he could not have both early retirement and redundancy. That is not material for present purposes, except that it may have contributed to some vacillation by Mr Kural. He wrote to the employers on 28 May 1992:

> 'As you are aware, I am still considering the early retirement option. In order to consider it fully and properly, I urgently need the following information. 1. Details of the method of calculations of the reduction in the case of early retirement. 2. Up-to-date Quotation of the pension at the normal retirement age. Would you please confirm whether the pension age has yet been equalized between men and women.'

Mr Kural appears to have been under the impression that the figure of £132,800 in lieu of what had been offered in the earlier quotation was caused by his departure before normal retirement age—which it was not.

The promised quotations were provided on 3 June 1992, when Mr Helm informed Mr Kural that he could expect either an annual pension of £10,901·52 or a one-off lump sum of £29,240·86 (the same amount as that offered as a lump sum in February) and a reduced annual pension of £8,481·12. In both cases, Mr Kural was also offered a widow's annual pension of one-half of his own. As a further alternative he could use the sum of £132,800 to obtain a pension elsewhere.

Mr Kural's notice expired on 8 June 1992, and he left his employment. However, as his pension arrangements were thought to be still under

negotiation, he was not in receipt of a pension when the scheme began to be wound up on 30 June 1992. On 8 July 1992 the employees went into administrative receivership; and on 18 August the Fairmount company were appointed independent trustees of the scheme.

Rule 16.3 of the scheme is headed 'Priority in securing benefit', under the general heading 'Discontinuance of Scheme'. It provides, so far as is material for present purposes:

> 'On the discontinuance of the Scheme in accordance with r 16.1(a) a Member who has made additional voluntary contributions to the fund shall be entitled to the amount of pension to and in respect of him bought by those contributions and (b) after payment of all taxes, costs, charges and expenses which may then be owing, priority shall be given in the following order to securing the liabilities of the Scheme in respect of Members and any other individuals to whom the discontinuance relates (i)(a) pensions already being paid and any benefits contingent on death arising from them ...'

On 8 October 1992 Guardian Assurance wrote to Fairmount that the assets held were insufficient to secure the calculated liability in full, and that the current funded position was 83%. That information was passed on to Mr Kural by Fairmount on 17 October. There was, it would seem, further correspondence, until Mr Kural made a complaint to the Pensions Ombudsman on 22 January 1995.

Mr Kural's rights

We assume that Mr Kural would be entitled to a remedy against the employers under his contract of employment, if the underfunding of the scheme had the result that he received less than his pension entitlement. But we understand that any remedy against the employers is worthless. The question is as to his rights against the present trustees of the scheme. On this issue, the case for Mr Kural was argued before us by Mr Deacock. Mr Stephens for Fairmount said that they would pay Mr Kural whatever the court ruled that he was entitled to; as to that, Fairmount take a neutral attitude.

The first question is whether Mr Kural had in fact fulfilled the requirements of r 5.2.1 when he left the service of the employers on 8 June 1992. He was retiring; he was past his fiftieth birthday; the employers had consented to his receiving an immediate pension. But had he elected to do so? If he had, the pension should have been paid on 8 June 1992 and ever since. It cannot be an answer to Mr Kural that, wrongly as it now appears, the individual trustees and then Fairmount have not been paying the pension. It does not lie in their mouth to say that the case is not within r 16.3(b)(i)(a) because the pension was *not* already being paid at the date of winding up.

If on the other hand Mr Kural had not fulfilled the requirements of r 5.2.1 at his retirement date, this came about for one reason only: the directors of his employers, who were also trustees of the scheme, had given him misleading information in their communications of 20 May and 3 June. That was a legal wrong on their part. It led, as we have said, to some vacillation by Mr Kural. On the hypothesis that thereafter, and in particular on 30 June, he had not elected to receive an immediate pension, we again hold that the trustees are precluded from relying on that fact. Due to the misleading information which he received, and for no other reason, he did not fulfil the necessary requirements of r 5.2.1; but for that information he certainly would have done.

One way or the other Mr Kural was and is entitled to a pension from 8 June 1992, in the figures given to him on 17 February 1992, and to priority under r 16.3(b)(i)(a). It is to be hoped that a brief foray to the county court in the autumn of 1992 would have established his entitlement. But we must not be too sanguine about our own procedures in contrast with those of others.

The Pensions Ombudsman

Under s 146 of the Pension Schemes Act 1993 the ombudsman has very wide powers. The section provides:

> '(1) The Pensions Ombudsman may investigate and determine any complaint made to him in writing by or on behalf of an authorised complainant who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of the trustees or managers of an occupational pension scheme or personal pension scheme.
>
> (2) The Pensions Ombudsman may also investigate and determine any dispute of fact or law which arises in relation to such a scheme between—(a) the trustees or managers of the scheme, and (b) an authorised complainant, and which is referred to him in writing by or on behalf of the authorised complainant ...'

So it would seem that the dispute, instead of being decided by the county court, fell to be decided by the Pensions Ombudsman.

The exercise of those powers is no doubt intended to be simple, swift and cheap. But the person who complains may not be well educated or articulate—although Mr Kural was. And the ombudsman has a duty under s 149 to give those concerned an opportunity to comment on any allegations contained in the complaint or reference. We were asked to make a ruling as to when his duty comes to an end—how many letters must he refer back and forth between complainant and the accused before he calls a halt? We cannot accede to that request. The ombudsman or his staff must adopt a procedure which is fair to both parties in all the circumstances of the case.

It is manifest that there was room for misunderstanding, and that misunderstanding did actually occur. The original complaint in January 1995 was against Guardian Financial Services; only later were others added. Mr Kural was asserting that he was wrongly offered 63% 'of the required sum', when he should have been offered 83%, which he 'would, most certainly, have accepted'. However, he enclosed a copy of a recent letter of his own claiming '100% ... or at worst not less than 83%'. Again in April 1995 Mr Kural sent to the ombudsman a copy of a letter of his dated 28 March in which he said that Guardian Assurance should have offered him 83%. But in June he was writing to the ombudsman's office to show that he did accept the quotation of 17 February 1992 (which was for 100% of his entitlement).

When Mr Helm replied to the ombudsman's request for comments, he seems to have thought that the complaint was about the employers' failure to contribute £75,300 'to bridge the gap until normal retirement age'. He protested that the employers had never agreed to pay the £75,300; and that all that Mr Kural was entitled to was 'his benefits crystallised in the transfer of £132,800 given by [Guardian Royal Exchange]'. That was a total misunderstanding of the position. Mr Kural's rights did not depend on whether or not the employers made a further contribution.

Then on 4 August 1995 Mr Kural sent a six-page letter to the ombudsman's office. He now complained in plain terms that the employers had not paid a further £75,300 into the scheme, as they had no choice whether to pay or not. He pointed out that the quotation of 17 February 1992 was already adjusted for accelerated payment; he claimed, in effect, that he was entitled to the whole amount. And he asserted that the individual trustees, also being employers, were in breach of their fiduciary duties. No copy of that letter was sent by the ombudsman's office to the others concerned in the dispute.

On 12 October 1995 the ombudsman sent to those concerned what was called a provisional determination. It proposed that Mr Kural should receive from the present trustees a pension based on the February 1992 quotation from 8 June 1992, with interest. There were some ancillary directions which featured again in the final determination, where we will return to them.

Some comments were received by the ombudsman's office. Once again they concentrated on the £75,300, as if Mr Kural's main complaint were that the employers ought to have paid it (which was correct), and that their failure to do so was the cause of his loss (which was incorrect). They also drew attention to a clause in the trust deed exempting trustees from responsibility except in certain limited circumstances.

On 5 December 1995 the ombudsman published his final determination. He inserted in it some eight new paragraphs dealing with matters raised by the individual trustees in their comments. This did not, unfortunately, contribute to clarity. Instead it tended in some instances to introduce obscurity where the provisional determination had been clear.

The ombudsman's order was as follows:

> 'DIRECTIONS
>
> 33. Within one month of the date of this Determination the Independent Trustee and the remaining Individual Trustee (the "Present Trustees") are to obtain the Complainant's decision in writing as to the form in which he wishes to take his early retirement benefits, based on the Assurer's February 1992 quotation.
>
> 34. Within two months of the date of this Determination the Present Trustees are to commence payment of the benefits required by the Complainant with effect from 8 June 1992.
>
> 35. Interest is to be paid on benefits paid late, calculated on a daily basis at the Statutory Rate of Interest (as prescribed under the Supreme Court Act 1981) from time to time applying.
>
> 36. On any tax free cash sum elected by the Complainant interest is to be calculated from 8 June 1992 to the date of payment. On instalments of pension paid in arrears, interest is to be calculated from the due date of each instalment to the date of payment.
>
> 37. The deferred benefit rights of the two Individual Trustees who are members of the scheme are to be reduced to the extent needed to fully fund the Complainant's benefits, the reduction being the same percentage in each case (and based on the value, not the amount, of their benefit rights) but adjusted so far as necessary between the two of them to ensure that their GMP rights are not prejudiced.
>
> 38. Within one month of the date of this Determination the Finance Director is to pay the Complainant £900 and the other two Individual Trustees £300 each in order adequately to compensate him for the upset and

inconvenience constituting injustice sustained by him from the maladministration ...' a

We should explain that two of the individual trustees had resigned but one remained.

The High Court proceedings b

Under s 151(4) of the Pension Schemes Act 1993 there were two appeals to the High Court ([1997] 1 All ER 214) from the ombudsman's decision. One was by Mr Lynch and Mr Helm, and the other by Mr Seifert. In accordance with Crown Office practice the ombudsman was himself made a respondent to the appeals. He did not take part in the hearing; but he did write two letters beginning 'Dear Judge' and setting out his answers to points raised in the appeals. This seems a c somewhat curious procedure, although the second letter was a response to a draft judgment which the judge circulated.

Only three interests were represented by counsel before Lightman J—those of Mr Seifert, of Mr Lynch and Mr Helm, and of Fairmount. So there was no argument, or at any rate no oral argument, for either Mr Kural or the d ombudsman. Only one of the counsel appearing before the judge has appeared on these appeals.

Lightman J in his judgment was very critical of the ombudsman's procedure and of his decision. There were five grounds for that criticism, as follows. (1) The ombudsman's office failed to send a copy of Mr Kural's letter of 4 August 1995 to the others concerned in the complaint. (2) He failed to have regard to e cl 21 of the definitive deed establishing the scheme, which exempted the trustees from liability for acts or omissions not due to their own wilful neglect or default. (3) His reasons were unintelligible. (4) His determination was not directed at the complaint which he had received. (5) The complaint itself had no substance.

Lightman J ordered that the directions of the ombudsman be set aside. After f hearing counsel for the ombudsman in relation to costs, he ordered that the ombudsman should pay the taxed costs of Mr Lynch, Mr Helm and Mr Seifert, and that the balance of their costs should be paid out of the scheme.

The appeals

The judge gave the ombudsman leave to appeal from the order for costs made g against him. Mr Kural's application for leave to appeal was dismissed on paper by Millett LJ, but granted after an oral hearing by Phillips and Mummery LJJ.

The first point of the judge's criticism had been accepted by the ombudsman. In relation to Mr Kural's letter of 4 August 1995 he acknowledged that a serious h mistake had been made by his office. There was some argument before us as to whether the letter did or did not contain anything that was both new and important, compared with what Mr Kural had said in his original complaint. In our judgment, it did introduce new and relevant matter to a limited extent. But it was followed two months later by the ombudsman's provisional determination, which should have alerted the others concerned to the true j nature of the dispute, or at least put them on inquiry.

The second point of the judge's criticism had also been accepted by the ombudsman in his letter to the judge. He argued that at the time of his determination there was no authority as to whether trustees could rely on a wilful default clause as against the Pensions Ombudsman. He accepted that *Wild v Smith* [1996] PLR 275 now required the point to be decided in favour of the

trustees; and he had accepted that in his first letter to Lightman J, before the High Court hearing. However, he said that there was still considerable debate on the point.

We can take the remaining three points together. They are that the ombudsman's decision was unintelligible, that the determination was not directed at the complaint actually made, and that there was no substance in the complaint. The truth of the matter is that the whole history of this dispute is fraught with imprecision and misunderstanding. In the nature of things, that is liable to happen when a person untrained in the law makes a complaint on a somewhat technical subject—unless the adjudicator insists on knowing precisely what the complaint is, even if he has to define it for himself.

Lightman J said in his judgment ([1997] 1 All ER 214 at 224):

> '... the subject matter of the complaint as made was the decision to offer less than 83%, when 83% was available for this purpose, and the complaint as found appears to have been the existence of the deficit in the fund for which the appellants were to be held responsible. In the July letter, the ombudsman goes further and says that his understanding of the complaint was that, if Mr Kural's case had been handled properly by the appellants, he would have retired before the wind up date and would then have been classed as an existing pensioner enjoying a priority entitling him to the continuing receipt of his full pension entitlement. I find this understanding somewhat surprising. It is, in my view, a quite untenable understanding which finds no expression or support in the correspondence, the PD, the determination or the evidence, and only underlines the importance (to which I have already made reference) of the ombudsman stating in writing to all parties exactly what is his understanding of the complaint he is investigating. Not content with upholding a complaint that was not made, the relief granted was not the relief claimed, i e payment of 83% of Mr Kural's entitlement, but 100%. There can be no possible basis for the grant of this relief against the appellants. The determination must be set aside for both these reasons.'

We repeat that there was no oral argument before the judge on behalf of Mr Kural or the ombudsman on those issues. The truth of the matter, as it seems to us, is that Mr Kural complained *both* about not receiving 83% and about not receiving 100%. He also, at any rate in his letter of 4 August 1995, complained that the employers had not paid the additional £75,300 into the scheme.

Mr Helm and Mr Lynch in their comments to the ombudsman concentrated on that last aspect of the complaint. They did not grapple with the case that Mr Kural should have been paid the pension to which he was entitled. They did not do so even when they received the provisional determination of the ombudsman, which recited an allegation that Mr Kural has not been paid the benefits to which he was entitled under the scheme. The provisional determination was, as we have said, for the most part clear as to the facts, the complaint and the reasons for upholding it. Mr Kural was to receive 100% of his entitlement, because the employers had agreed to his early retirement.

It is true that the final determination of the ombudsman introduced a number of paragraphs dealing with the latest comments which he had received. Those comments were in our view for the most part irrelevant, since they dealt with the £75,300.

In our judgment, the complaint made did have substance, for the reasons that we have already given; or more accurately, one of the three grounds of complaint made had substance. That was the ground on which the determination was based. There was some degree of obscurity in the final determination, but not to any relevant extent in relation to that ground of complaint. *a*

We therefore restore paras 33 to 36 of the ombudsman's determination. It is not sought to uphold paras 37 and 38, which would have imposed penalties on Mr Lynch, Mr Helm and Mr Seifert. *b*

We heard argument from Mr Rees on behalf of Mr Seifert, who was concerned for his reputation, and that the finding of maladministration against him should not be reinstated. No application was made by anybody that it should be reinstated, and it is not essential to any of our conclusions. We leave the point there. *c*

Costs

The two appeals from the ombudsman were necessary and achieved a result, in that paras 37 and 38 of his determination were and remain set aside. But that is not a sufficient ground to order him to pay the costs. The limited circumstances in which an inferior tribunal, such as magistrates or an arbitrator, should be ordered to pay the costs of an appeal from its decision are well known. Now that this dispute, at first relatively simple but thereafter to become complicated, has been fully argued before us, we do not consider that it is a case for such an order. The judge's decision on that point is set aside. *d*

We heard the parties' submissions as to costs of the appeal on a contingent basis at the close of the hearing of the appeal. Our decision is—(1) that the ombudsman bear his own costs of the appeal, in accordance with the condition imposed by Lightman J; (2) that Mr Kural should have his costs out of the scheme, and legal aid taxation; (3) that Fairmount recover their costs from the scheme; and (4) that there be no order as to Mr Seifert's costs. The parties are asked to prepare, and if possible agree, a draft order. *e* *f*

Appeal allowed.

Kate O'Hanlon Barrister.

Gaudiya Mission and others v Brahmachary and others

COURT OF APPEAL, CIVIL DIVISION

LEGGATT, MORRITT AND MUMMERY LJJ

29, 30 JULY 1997

Charity – Proceedings – Parties – Attorney General – Religious mission registered as corporate body in India and enjoying charitable status there having temple in London – Mission bringing proceedings against registered charity under similar name claiming its assets – Whether proceedings 'charity proceedings' – Whether mission 'a charity'– Whether Attorney General a necessary party to proceedings – Charities Act 1993, s 33.

The plaintiff mission was registered as a body corporate in India and enjoyed charitable status there. Its objects were to spread the doctrines and philosophy enunciated in the Vaishnava faith for the uplift, development and fulfilment of mankind. It maintained centres for such purposes in India, and also had a temple in London where the first defendant was the priest in charge. It was not registered as a charity in England and Wales. In 1991 a charitable trust under a similar name was established and registered in London for the advancement of religion in accordance with the tenets of the Hindu Vaishnava Faith. In 1996 the plaintiffs issued proceedings against the defendants, three of whom were trustees of the trust, claiming that assets held by the trust were assets to which the mission was entitled and that the trust had been passing itself off as and for the mission. The plaintiffs sought a declaration that the London temple, its premises, and all its moneys and funds were the property of the mission and subject to the plaintiffs' directions and also injunctions restraining the defendants from conducting the affairs of the London temple otherwise than in accordance with the plaintiffs' directions. By s 33(2)[a] of the Charities Act 1993 the consent of the Charity Commissioners was required for the taking of 'charity proceedings relating to a charity', and the 1993 Act defined 'charity' as any institution which was established for charitable purposes and was subject to the control of the High Court. The first defendant contended that the court had no jurisdiction to entertain the proceedings as the consent of the commissioners had not been obtained pursuant to s 33(2). The Attorney General contended that the mission was not a charity within the meaning of s 33(2) of the 1993 Act, and that therefore the consent of the commissioners was not necessary. The deputy judge held that the mission was a charity for the purposes of s 33(2) of the Act and that the proceedings were charity proceedings within s 33(8) and he ordered that the Attorney General be joined as a defendant to the proceedings and that leave should be given to the mission, pursuant to s 33(5) of the 1993 Act, to take and continue the proceedings. The Attorney General appealed.

Held – The term 'charity' in s 33 of the 1993 Act did not include an institution established under the laws of another legal system. Moreover, the court would not administer a foreign charity, or settle a scheme for such a charity, since the court did not have the means of controlling an institution established in another

a Section 33, so far as material, is set out at p 961 *c* to *f*, post

country and administered by trustees there. Accordingly, on its true construction, the 1993 Act only applied to institutions established for charitable purposes under and in accordance with the law of England and Wales. It followed, in the instant case, that the mission was not a charity within s 33(2) of the 1993 Act. The proceedings did not therefore require the consent of the commissioners, nor was the Attorney General a necessary party to them. Accordingly, the Attorney General's appeal would be allowed (see p 963 *a d* to *f*, p 966 *a c d*, p 968 *d e h* and p 969 *a* to *c*, post).

Camille and Henry Dreyfus Foundation Inc v IRC [1955] 3 All ER 97 applied.

Dictum of Turner LJ and of Lord Cairns LJ in *Re Duncan* (1867) LR 2 Ch App 356 at 360, 362 not followed.

Notes

For meaning of 'charity proceedings', see 5(2) *Halsbury's Laws* (4th edn reissue) para 461.

For the Charities Act 1993, s 33, see 5 *Halsbury's Statutes* (4th edn) (1993 reissue) 916.

Cases referred to in judgments

A-G v City of London Corp (1790) 3 Bro CC 171, 29 ER 472.
A-G v Lepine (1818) 2 Swan 181, 36 ER 584.
A-G v Sturge (1854) 19 Beav 597, 52 ER 482.
Camille and Henry Dreyfus Foundation Inc v IRC [1955] 3 All ER 97, [1956] AC 39, [1955] 3 WLR 451, HL; *affg* [1954] 2 All ER 466, [1954] 1 Ch 672, [1954] 3 WLR 167, CA.
Clark v Oceanic Contractors Inc [1983] 1 All ER 133, [1983] 2 AC 130, [1983] 2 WLR 94, HL.
Colonial Bishoprics Fund 1841, Re [1935] Ch 148.
Construction Industry Training Board v A-G [1972] 2 All ER 1339, [1973] Ch 173, [1972] 3 WLR 187, CA.
Duncan, Re (1867) LR 2 Ch App 356, CA.
Edinburgh (Provost of) v Aubery (1754) Amb 236, 27 ER 157.
Emery v Hill (1826) 1 Russ 112, 38 ER 44.
Forbes v Forbes (1854) 18 Beav 552, 52 ER 216.
Joseph, Re (1907) 26 NZLR 504, NZ HC.
Lyon (Mayor of) v East India Co (1836) 1 Moo PCC 175, 12 ER 782.
Marr's Will Trusts, Re [1936] Ch 671.
Neech's Executors 1947 SC 119, Ct of Sess.
Robinson, Re [1931] 2 Ch 122.

Cases also cited or referred to in skeleton arguments

A-G v Cooper (1861) 8 Jur NS 50.
A-G v Fraunces [1866] WN 280.
A-G v Stephens (1834) 3 My & K 347, 40 ER 132.
Agip (Africa) Ltd v Jackson [1992] 4 All ER 451, [1991] Ch 547, CA.
Brooks v Richardson [1986] 1 All ER 952, [1986] 1 WLR 385.
Chellaram v Chellaram [1985] 1 All ER 1043, [1985] Ch 409.
Finger, Re [1971] 3 All ER 1050, [1972] Ch 286.
Fraser v Fraser (1883) 22 Ch D 827.
Liverpool and District Hospital for Diseases of the Heart v A-G [1981] 1 All ER 994, [1981] Ch 193.
Ludlow Corp v Greenhouse (1827) 1 Bli NS 17, 4 ER 780, HL.

New v Bonaker (1867) LR 4 Eq 655.
Pergamon Press Ltd v Maxwell [1970] 2 All ER 809, [1970] 1 WLR 1167.
Rendall v Blair (1890) 45 Ch D 139.
Vagliano, Re [1905] WN 179.

Appeal

By notice dated 23 April 1997, the Attorney General appealed with leave from the decision of David Oliver QC, sitting as a deputy judge of the High Court in the Chancery Division, on 14 March 1997 whereby, having held that the first plaintiff, Gaudiya Mission was a charity for the purposes of s 33(2) of the Charities Act 1993 and having granted leave to the first plaintiff pursuant to s 33(5) of the 1993 Act to take and continue the proceedings against, inter alia, Kamalaksha Das Brahmachary, he ordered that the Attorney General be joined as a defendant to the proceedings. The facts are set out in the judgment of Mummery LJ.

William Henderson (instructed by the *Treasury Solicitor*) for the Attorney General.
Ram Yajnik (instructed by *Markand & Co*) for Brahmachary.

MUMMERY LJ (giving the first judgment at the invitation of Leggatt LJ). The issue in this appeal is whether the first plaintiff, the Gaudiya Mission, is a 'charity' within the meaning of the Charities Act 1993. If it is, these are 'charity proceedings' within the meaning of the 1993 Act and they require the leave of the Charity Commissioners or the court to be taken or continued. It would also be proper to join HM Attorney General as a defendant to the proceedings.

Mr David Oliver QC (sitting as a deputy judge of the High Court) held that the mission was a charity and made the following order on 14 March 1997:

> '1. Her Majesty's Attorney General be added as a defendant to these proceedings
>
> 2. The Plaintiffs do forthwith lodge a statement containing the information required by Rule 3(3) of Order 108 of the Rules of the Supreme Court ...
>
> 5. The Plaintiffs do have leave pursuant to section 33(5) of the Charities Act 1993 to take and continue these proceedings.'

The Attorney General was granted leave to appeal from that order. By his notice of appeal dated 23 April 1997, the Attorney General seeks an order that he ceases to be a party to these proceedings, and that it be declared that leave is not required for the taking or continuing of them.

Mr William Henderson, counsel for the Attorney General, submits that the mission is not a 'charity' within the 1993 Act, because it is established in Calcutta and not in England and Wales, and is not subject to the control of the High Court in exercise of its jurisdiction with respect to charities.

Mr Yajnik, counsel for the first defendant, contends that, as a result of its activities in England, the mission is established here and that it is subject to the court's control. He contends that the judgment below was correct and that the appeal should be dismissed. We are grateful to both counsel for their concise, helpful arguments. The other defendants have taken no part in the appeal.

The background to this dispute may be summarised as follows. The mission maintains preaching centres and temples known as 'Maths':

> 'To spread the doctrines and philosophy enunciated in the Vaishnava Faith as preached and propounded by Lord Sri Chaitanya Mahaprabhu for the

uplift, development and fulfilment of mankind at large through the preaching of the doctrines with—(a) Spread of education, (b) Medical Relief, (c) Relief of the poor and (d) Advancement of any other objects of general public utility not involving the carrying on of any activity for profit.' *a*

There are centres for those purposes throughout India. There is also such a centre at 27 Cranhurst Road, Cricklewood, NW2 (the London temple). *b*

The mission has a president, who is the second plaintiff, and a secretary, who is the third plaintiff. The mission itself, joined in these proceedings as first plaintiff, claims that under the law of India it is a corporate body separate from its members. This is not challenged so far in these proceedings. It is registered in Calcutta as from 26 March 1940 under the Societies Registration Act 1860. It enjoys charitable status in India. It is not registered as a charity in England and Wales, but this case has so far proceeded on the basis that its objects are such that it would be entitled to charitable status for those objects in this country. We have heard this appeal on that basis, but we have heard no argument and make no decision on whether the assumption which has been made is legally correct. *c*

The first defendant is the priest in charge of the London Temple. These proceedings are part of a long-running battle, which is also being litigated in the courts in India, between rival factions within the mission struggling for control of it. *d*

By a deed dated 1 July 1996, a declaration of trust was made by three trustees in London to establish a charitable trust, under the name Gaudiya Mission Society Trust, for the advancement of religion in accordance with the tenets of the Hindu Vaishnava Faith. *e*

This case is not concerned with that trust, though its existence has been noted in these proceedings, and has featured to some extent in the arguments. It is a registered charity. Three of the defendants are sued as present trustees of that trust. It is claimed within these proceedings by the plaintiff mission that assets held by the Gaudiya Mission Society Trust are in fact assets to which the plaintiff mission is entitled. It is also claimed that the Gaudiya Mission Society Trust is passing itself off as and for the plaintiff mission. *f*

It is claimed in this action, begun by a writ issued on 23 October 1996, that a declaration should be granted that the London temple, its premises, and all moneys and funds donated, raised and acquired on its behalf, are the property of the plaintiff mission, and are subject to directions given by the plaintiffs. Injunctions are sought restraining the defendants from conducting the affairs of the London temple, and using those premises otherwise than in accordance with directions given by the plaintiffs and from withdrawing or dealing with money in the mission's bank accounts. Consequential orders for accounts and inquiries are sought. *g* *h*

On a motion for interim relief, Robert Walker J granted a temporary injunction on 7 November 1996 over the hearing of the motion by order. That motion came before Mr David Oliver QC on 14 January 1997, along with a further motion issued on 9 January 1997, seeking additional interlocutory injunctions. Judgment was given on 20 February on the basis of certain undertakings offered by the first defendant. But the motion was adjourned to enable the consent of the Charity Commissioners to be sought. This step was taken because it had been submitted by the first defendant's counsel that the court had no jurisdiction to entertain these proceedings, or the application for *j*

relief, as the consent of the commissioners was required under s 33 of the 1993 Act, and had not been obtained.

At the adjourned hearing on 7 March, counsel for the Attorney General submitted that the mission was not a 'charity' within the meaning of s 33(2) of the 1993 Act, and that, though the commissioners were willing to give their consent if it was necessary, it was not in law necessary.

Before turning to the decision of the judge and the arguments on this appeal, it is necessary to refer to the relevant provisions of the 1993 Act. Section 33 deals with proceedings and provides:

> '(1) Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area of the charity if it is a local charity, but not by any other person.
>
> (2) Subject to the following provisions of this section, no charity proceedings relating to a charity (other than an exempt charity) shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by order of the Commissioners ...
>
> (5) Where the foregoing provisions of this section require the taking of charity proceedings to be authorised by an order of the Commissioners, the proceedings may nevertheless be entertained or proceeded with if, after the order had been applied for and refused, leave to take the proceedings was obtained from one of the judges of the High Court attached to the Chancery Division ...
>
> (8) In this section "charity proceedings" means proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.'

Section 96(1) contains provisions for the construction of references to a 'charity' in the Act. The relevant parts can be extracted as follows:

> 'In this Act, except in so far as the context otherwise requires—"charity" means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities ...'

Section 97 contains general interpretation provisions:

> '(1) In this Act, except in so far as the context otherwise requires—"charitable purposes" means purposes which are exclusively charitable according to the law of England and Wales ... "the court" means the High Court and, within the limits of its jurisdiction, any other court in England and Wales having a jurisdiction in respect of charities concurrent (within any limit of area or amount) with that of the High Court, and includes any judge or officer of the court exercising the jurisdiction of the court ... "institution" includes any trust or undertaking ... "trusts" in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not, and in relation to other institutions has a corresponding meaning ...'

Finally, s 100, so far as material, provides:

'... (2) Subject to subsection (3) to (6) below, this Act extends only to England and Wales.

(3) Section 10 [of the Act] and this section extend to the whole of the United Kingdom.

(4) Section 15(2) extends also to Northern Ireland ...'

The deputy judge, who did not have the benefit of the extensive citation of authorities in this court, held that the mission is a charity for the purposes of s 33(2) of the 1993 Act, at least so far as its activities and property in the jurisdiction are concerned, and that the proceedings are 'charity proceedings' within the meaning of s 33(8) of the 1993 Act. It followed, in his view, that the Attorney General should be joined as a defendant and that leave should be granted to bring and continue the proceedings.

In brief, the reasons for his decision were these: the proceedings relate to the conduct in the jurisdiction of certain aspects of the affairs of the London Math; the property of the mission is vested in a governing body as trustees for the benefit of the mission; the proceedings are charity proceedings within s 33(8), because they are proceedings brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

He held that they are charity proceedings 'relating to a charity' within ss 33(2), 96(1) and 97(1). The issue he identified is whether the mission is an institution established for charitable purposes, and is subject to the control of the High Court in the exercise of the court's jurisdiction in respect to charities. He said that the mission was established under foreign law, but it was conducting activities and had assets within the jurisdiction pursuant to its objects, which English law would accept as charitable.

After considering a number of authorities, which he described as 'sparse and, in the main, unhelpful', he said that he could see 'no reason in principle why the existence of the jurisdiction to exercise such functions should be excluded', and concluded that there was no territorial limitation on the jurisdiction as to charities.

He considered that he was reinforced in this view by three matters: first, if the jurisdiction were excluded, those who wished to be a charity could avoid the jurisdiction and would establish their charitable foundations in some less assiduous foreign jurisdiction and conduct all or part of its operations there. Secondly, the court had jurisdiction over the activities of the members of the mission, who had broken away and formed a charitable trust (the Gaudiya Mission Society Trust mentioned earlier) with similar objects to the mission. It was registered pursuant to s 3 of the 1993 Act.

Thirdly, and finally, he was of the view that the dissenting judgment of Russell LJ in *Construction Industry Training Board v A-G* [1972] 2 All ER 1339, [1973] Ch 173 pointed against a territorial limitation of the jurisdiction of the court with respect to charities.

The key question on this appeal is whether the mission is an institution established for charitable purposes and 'subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'. If it is not, the mission falls outside the definition of a 'charity' for the purposes of the 1993 Act; and these are not proceedings 'relating to a charity' which either require the authorisation of the Charity Commissioners or justify the addition of the Attorney General, the constitutional protector of charity, as a necessary or proper party.

In my judgment, the order of 14 March 1997 is contrary to the correct construction of the 1993 Act, is incompatible with well-established principles and practice of charity law, and is inconsistent with specific authority binding on this court and the court below.

My reasons for this conclusion are these.

The 1993 Act

The 1993 Act is a consolidating Act extending only to England and Wales, with minor exceptions. It contains many detailed provisions for the registration, regulation and administration of charities, as defined by the Act. A charity does not have to take any particular legal form; it may be a trust or an undertaking; it may be incorporated or unincorporated. But it must satisfy both requirements of the definition in s 97(1). It must be 'established for charitable purposes'. It will be noted that 'charitable purposes' is a defined term, meaning 'those purposes which are exclusively charitable according to the law of England and Wales'; and it must be 'subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'.

It is neither expressly enacted nor is it plainly implied that the 1993 Act applies to institutions other than those established for charitable purposes in England and Wales (ie under and in accordance with the law of England and Wales). On the contrary, a fair reading of the scheme of the 1993 Act, having regard to the principle of implied territoriality of legislation and practical considerations of enforceability, leads to the conclusion that the 1993 Act is neither intended, nor apt, to apply to an institution established for charitable purposes outside England and Wales (ie an institution constituted in accordance with the law of a foreign state). Such institutions are not 'within the legislative grasp or intendment of the statute': see *Clark v Oceanic Contractors Inc* [1983] 1 All ER 133 at 144, [1983] 2 AC 130 at 152 per Lord Wilberforce.

This conclusion is borne out by a survey of the detailed provisions of the one hundred sections of the Act, many of them using the defined term 'charity'. I refer to a few for the purposes of illustration; for example, the function of the Charity Commissioners in promoting and making effective the work of a charity in meeting the needs designated by its trusts (s 1(4)); the duty of the commissioners to keep a register of charities (s 3); the power to institute inquiries (s 8); and to make schemes (ss 13 and 16); to act for the protection of a charity (s 18); to appoint a receiver and manager (s 19); to authorise dealings (s 24); and to give leave in cases of restrictions on dealings (s 36).

The provisions relating to the keeping of accounts, the making of annual statements, and to the provision of annual reports and other provisions for the winding up of the charity and for the qualification of charity trustees, are all appropriate to an institution established in England and Wales in accordance with English law and subject to the control of the High Court's charity jurisdiction. They are not appropriate to bodies or institutions established outside England and Wales in accordance with other systems of law.

Principles and practice

Under English law charity has always received special treatment. It often takes the form of a trust; but it is a public trust for the promotion of purposes beneficial to the community, not a trust for private individuals. It is, therefore, subject to special rules governing registration, administration, taxation and duration. Although not a state institution, a charity is subject to the constitutional

protection of the Crown as parens patriae, acting through HM Attorney General, to the state supervision of the Charity Commissioners and to the judicial supervision of the High Court. This regime applies whether the charity takes the form of a trust or of an incorporated body.

The English courts have never sought to subject to this regime institutions or undertakings established for public purposes under other legal systems. I refer to the commentary to r 153, *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) vol 2, p 1096. The rule is stated in these terms (p 1088):

> 'The validity, construction, effects and administration of a trust are governed by the law chosen by the settlor or, in the absence of any such choice, by the law with which the trust is most closely connected.'

In the commentary (p 1096), the editors correctly state:

> 'The English courts will not administer a foreign charity under the supervision of the court, nor will they settle a scheme for such a charity. It is clear that the court cannot effectively control trustees who will probably have to hold property outside England, and, if it appointed trustees for a charity both within and without England, the English trustees would have difficulty in controlling their co-trustees. In these circumstances the court, in the case of a charitable bequest for foreign beneficiaries, will consider whether the purpose is one which can legally be carried out in the foreign country concerned and, if so, will order payment to the trustees appointed. It will not normally settle a scheme for the administration of such a charity, though it may authorise application to a suitable foreign court to frame such a scheme. On the other hand, if the foreign objects of an English charitable trust fail, the court may direct an application of the trust funds *cy-près*.'

Many cases are cited in the footnotes in support of that passage. The important point is that the special charitable jurisdiction of the High Court to make a scheme is not exercised, or even regarded as exercisable, in a case of a charity which has been established, or which it is intended to establish, under a foreign legal system. In such a case, the foreign charity and those engaged in the administration of it, are beyond the control of the court.

A few illustrations from the cases decided over the last 200 years bear out the correctness of the statement in *Dicey and Morris*. In the earliest of these cases, *Provost of Edinburgh v Aubery* (1754) Amb 236, 27 ER 157, Lord Hardwicke LC declined to give directions for the distribution of a fund of £3,500 bequeathed by the testator to the Provost of Edinburgh to be applied for the maintenance of poor labourers residing in Edinburgh and towns adjacent. He said that that belonged 'to another jurisdiction, that is, to some of the courts in *Scotland*'. He ordered the fund to be transferred to such person as the Provost of Edinburgh should appoint.

This was followed by Lord Eldon LC in *A-G v Lepine* (1818) 2 Swan 181, 36 ER 584. The testator left part of his residuary estate for the benefit of a school for the poor in the parish of Dollar. Lord Eldon LC said (2 Swan 181 at 182, 36 ER 584 at 585):

> 'I have always understood that, where a charity is to be administered in *Scotland*, this Court should not take into its own hands the administration.'

He directed that the money should be paid to trustees and administered under the supervision of the Scottish courts. Decisions to similar effect may be found

in *Emery v Hill* (1826) 1 Russ 112, 38 ER 44, a bequest to the treasurer of a society established in Scotland for the propagation of Christian knowledge; *Forbes v Forbes* (1854) 18 Beav 552, 52 ER 216, a case of a gift to build a bridge over the River Don in Scotland; and *Re Marr's Will Trusts* [1936] Ch 671 at 675.

The practice established so long ago has been followed in modern times. In *Re Robinson* [1931] 2 Ch 122 (a gift to the German government for the benefit of disabled German soldiers) Maugham J said (at 129):

> '... if the trustee is abroad there is no power in the Court to direct a scheme to be settled, and the practice in such a case is to hand over the fund to the trustee to be applied according to the trusts of the will without directing a scheme.'

These cases show that the courts of this country accept that they do not have the means of controlling an institution established in another country, and administered by trustees there. This was recognised as the reason why courts have no authority to make a scheme: see *A-G v Sturge* (1854) 19 Beav 597, 52 ER 482, a decision of Romilly MR (where a gift had been made to a school established by the testatrix in Genoa).

The practical problems were most forcefully stated by Lord Brougham in *Mayor of Lyon v East India Co* (1836) 1 Moo PCC 175 at 297, 12 ER 782 at 827, in a passage which merits quotation. Lord Brougham said:

> 'The objection, in the ordinary case, to administering a foreign charity under the superintendence of the Court, is this: those who are engaged in the actual execution of it, are beyond the Court's control, and those who are within the jurisdiction are answerable to the Court for the acts of persons as to whom they can derive no aid from the Court. Such an office will not easily be undertaken by any one; and its duties cannot be satisfactorily performed; at least the party must rely more on the local, that is, the foreign, authorities for help, than on the Court to which he is accountable.'

These cases are to be contrasted with other cases in which a charity, sometimes misdescribed as a 'foreign charity', has been held to be subject to the control of the High Court and to its scheme-making powers. In *Re Colonial Bishoprics Fund 1841* [1935] Ch 148 Luxmoore J rejected the contention that he had no jurisdiction to make a cy-près scheme because it was a 'foreign charity', in the sense that all its objects were located abroad. That was a trust established *in England* for the endowment of Bishoprics in the Colonies. Luxmoore J accepted the submission of counsel for the Attorney General, Mr Danckwerts, that, as the trustees of the fund were in this country and the trusts were established here, he could direct the scheme, even though the objects of bounty were located abroad.

A-G v City of London Corp (1790) 3 Bro CC 171, 29 ER 472 (one of the cases cited by the judge) is an early example of the exercise of that jurisdiction. The case arose out of the American War of Independence. A trust had been established here for the advancement of Christianity among 'infidels in America'. Acting on information that there were no longer any infidels within the areas designated, and that the charity was lacking in objects, and also acting on information that the College of William and Mary, which had acted in the local administration of the charity, was now 'subject to a foreign power' (the independent States of America), Lord Thurlow LC directed a new scheme to be made for the administration of the charity. That is an example of a scheme made in relation to an *English* charity, with overseas objects, not in relation to a foreign charity.

These cases establish that the power of the court to direct schemes, one of the most distinctive powers of the court with respect to charities, can only be exercised in relation to a charity established in, and in accordance with the law of, England and Wales. It would be contrary to principle and to the practice of this court to hold that the mission was a charity.

In an area which calls for comity, it is reassuring to note that both the Court of Session in *Neech's Executors* 1947 SC 119 and the High Court of New Zealand in *Re Joseph* (1907) 26 NZLR 504, decided that, in dealing with a bequest for charitable purposes to be established or carried out by scheme in England and Wales, it was for the Chancery Division of the High Court in England to make the scheme, not for the Court of Session or the New Zealand High Court.

Specific authority

There is specific authority, both of the Court of Appeal and of the House of Lords, in *Camille and Henry Dreyfus Foundation Inc v IRC* [1954] 2 All ER 466, [1954] Ch 672; *affd* [1955] 3 All ER 97, [1956] AC 39, for the proposition that the term 'charity' does not ordinarily include an institution established under the laws of another legal system.

That was a case of a foreign corporation constituted according to the laws of the state of New York for objects exclusively charitable according to the law of the United Kingdom. Lord Evershed MR said ([1954] 2 All ER 466 at 470, 471, [1954] Ch 672 at 683, 685):

> '... to my mind, the words "charities" or "charitable institutions" in an ordinary context in an English Act of Parliament or any English document must (prima facie at least) mean institutions regulated by, and subject to the jurisdiction of, the laws or the courts of the United Kingdom and constituted for the carrying out of objects or purposes which, in the courts of the United Kingdom and nowhere else, would be held to be charitable. In my judgment the two aspects or characteristics are almost inseparable. The law relating to charities or charitable trusts is a peculiar and highly complex part of our legal system. An Act of Parliament which uses the words "charity" or "charitable" must be intending to refer to that special and characteristic, if not in some respects artificial, part of our law ... I am considering what, as a matter of ordinary language and common sense, is intended (in the absence of a special context) by the phrase, in an English Act of Parliament or other document, "body of persons established for charitable purposes only". In my judgment, applying the test I have formulated, once it is conceded that "for charitable purposes only" means "for purposes which are what the laws of the United Kingdom define as charitable and hold to fall within the special and somewhat artificial significance of that word," then it seems to me, prima facie, that a body cannot be "established" for such purposes, unless it is so constituted or regulated as to be subject to the jurisdiction of the courts which can alone define and regulate those purposes ...'

Jenkins LJ was of the same opinion. He said ([1954] 2 All ER 466 at 487, [1954] Ch 672 at 707):

> 'I have already expressed the view that "trust" in an Act of the United Kingdom Parliament means a trust taking effect and enforceable under the law of the United Kingdom. It follows that, in my opinion, a "trust established for charitable purposes only", must here mean a trust taking

effect and enforceable under the law of the United Kingdom, and creating an obligation enforceable in the courts of the United Kingdom to apply its funds for the purposes which are, according to the law of the United Kingdom, exclusively charitable. I can attribute no different meaning to the phrase "established for charitable purposes only" when applied to a body of persons. So applied, I think it is only satisfied by a body of persons which is under the law of the United Kingdom subject to an obligation enforceable in our courts to apply its funds for purposes which are according to that law exclusively charitable. Accordingly, I would hold that the foundation is not "established for charitable purposes only" within the meaning of s. 37 (b) of the Income Tax Act, 1918.'

Hodson LJ ([1954] 2 All ER 466 at 490, [1954] Ch 672 at 712) expressed the same view.

The case went to the House of Lords. Lord Morton of Henryton said ([1955] 3 All ER 97 at 99–100, [1956] AC 39 at 46):

'It is at once apparent that the phrase in s. 37 (b) "any body of persons or trust established for charitable purposes only" is not expressly limited to bodies of persons or trusts established in the United Kingdom, but the Court of Appeal held that it should be construed as being so limited. This conclusion was based entirely on a consideration of the true construction of the Act of 1918 ... I agree with the conclusion reached by the Court of Appeal, and, as no question of principle arises in this case, and my reasons are in substance the same as those appearing in the judgments of that court, I shall not detain your Lordships by setting them out in my own words.'

Lord Normand added a pertinent observation in relation to the role of the Attorney General. He said ([1955] 3 All ER 97 at 100, [1956] AC 39 at 47):

'... it is clearly the English system that he has in mind [referring to the judgment of Lord Evershed MR], for it goes without saying that the Attorney-General has no right to invoke the powers of the courts beyond the boundary of England ...'

The only authority drawn to our attention which may be thought to be contrary to the *Dreyfus Foundation* case, is *Re Duncan* (1867) LR 2 Ch App 356. It was not cited in the *Dreyfus Foundation* case, and, if it is inconsistent with it, should be regarded as wrong on the obiter dicta expressed in it. The question in *Re Duncan* was whether the consent of the Charity Commissioners was necessary to petition the court to appoint a new trustee of a charity established in England to promote Christian education in Jamaica. 'Charity' was defined in s 66 of the Charitable Trusts Act 1853 as—

'every endowed foundation and institution taking or to take effect in England and Wales, and coming within the meaning, purview, or interpretation of [the Act 43 Eliz 1, c 4 (charitable gifts)], or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction ...'

The Court of Appeal in *Re Duncan* had no difficulty in concluding that the authority of the commissioners extended to charities which were founded and endowed in England or Wales, even though the revenues were applied to benefit those abroad. It was not necessary for the court to decide whether the

commissioner's powers extended to charities founded and endowed abroad who applied their revenues in England and Wales. Turner LJ (at 360) and Lord Cairns LJ (at 362) expressed the view, obiter, that it might well be said that the institution, even though located abroad, takes effect here if it applies its property here. Lord Cairns LJ said:

> '... I see no reason to doubt that, as a general rule, where there is the application and expenditure of money in *England* under a charitable endowment, there also the jurisdiction of the Charity Commissioners attaches, to the extent, at all events, of that application and expenditure, even though the constitution of the charity, or the *corpus* of the property, should be abroad.'

In my judgment, if those obiter dicta are inconsistent with the decision of the Court of Appeal, as affirmed by the House of Lords in the *Dreyfus Foundation* case, they do not represent the correct state of present law. (I would add that the dissenting judgment of Russell LJ in *Construction Industry Training Board v A-G* [1972] 2 All ER 1339 at 1342, [1973] Ch 173 at 180, supports the decision in the *Dreyfus Foundation* case on jurisdiction.)

For all those reasons I conclude that the mission is not a charity within the meaning of the 1993 Act, that leave is not necessary for these proceedings, and that the Attorney General is not a necessary or proper party to them. I would allow the appeal, and make the order sought in the notice of appeal. I add three final observations to clarify the effect of this judgment.

(1) It has been assumed so far in these proceedings that the purposes of the mission are exclusively charitable under English law. We are not required on this appeal to decide whether or not that assumption is legally correct.

(2) This appeal has only been concerned with the construction of the expression 'charity proceedings' in s 33 of the 1993 Act, and the limited issue whether leave is required for them to be taken or continued. Nothing in this judgment is intended to restrict the constitutional role of the Attorney General as protector of charity. There may be cases in which it would be proper for the Attorney General to be joined as a party to proceedings involving a foreign charity. This is not such a case.

(3) The success of the Attorney General on this appeal would not prevent the plaintiffs from pursuing these proceedings without the leave of the Charity Commissioners or the court and in the absence of the Attorney General as a party. I express no view on jurisdictional or procedural objections which might be taken to these proceedings.

For all those reasons I would allow the appeal.

MORRITT LJ. I agree.

LEGGATT LJ. Until this case, I never saw on appeal a judgment of which 60% consisted of citations from earlier authorities or from statute. It is not a practice to be commended or recommended. It has diverted the deputy judge's attention from an independent consideration of the principles to be applied. His attention has focused instead upon such points of similarity as may exist between the cases cited and the present case. In the result, he has paid insufficient regard to the consequences of his order for this and other foreign charities.

Charities provide a prime example of institutions which it is in the English public interest to regulate and control. But that is only so if they are English

charities. Any attempt to control foreign charities would represent something akin to encroachment upon the sovereignty of a foreign state. I am quite satisfied that because, for the reasons given by Mummery LJ, the Gaudiya Mission is not established in England for charitable purposes and is not subject to the control of the High Court in the exercise of its jurisdiction in respect to charities, it is not a charity within s 33 of the Charities Act 1993. Neither the leave of the Charity Commissioners or the court, nor the joinder of the Attorney General is required.

The appeal is allowed and the deputy judge's order is set aside. We order that the Attorney General do cease to be a party to these proceedings and we declare that the plaintiffs did not need leave to take and do not need leave to continue these proceedings.

Appeal allowed.

Kate O'Hanlon Barrister

Bruton v London and Quadrant Housing Trust

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, MILLETT LJJ AND SIR BRIAN NEILL

10, 31 JULY 1997

Landlord and tenant – Tenancy – Tenancy distinguished from licence – Provision of temporary accommodation for homeless and other persons in need of accommodation – Housing trust granted licence by local authority of short-life properties for use for occupation under short-term occupancy agreements by people on trust's waiting list – Plaintiff signing agreement with trust to occupy short-life accommodation on temporary basis on weekly licence – Plaintiff aware that trust had no title to premises – Whether tenancy or licence created – Whether tenancy by estoppel.

In 1986 the defendant housing trust, a voluntary organisation concerned with homelessness, was granted a licence by the local authority to use certain short-life properties, pending development, as temporary accommodation for homeless people on its waiting list. The trust undertook to ensure that no occupier became a secure tenant without the prior consent of the council and that no occupier should acquire any rights of security or other rights whilst in occupation. In January 1989 the plaintiff signed an agreement with the trust for occupation by him of a self-contained flat in one of the properties on a temporary basis on a weekly licence. The agreement recited that the property was on licence from the council pending development and required the plaintiff to vacate the premises upon receiving reasonable notice from the trust. In 1995 the plaintiff brought proceedings in the county court against the trust claiming that he was the tenant of the premises and that the trust was in breach of an implied covenant to keep the premises in repair. On the trial of a preliminary issue whether the plaintiff occupied the premises as a tenant or mere licensee, the judge found that the plaintiff and the trust mutually understood that the premises were for short-term occupation on a weekly licence, pending development, and accordingly that the plaintiff was a licensee. The plaintiff appealed.

Held (Sir Brian Neill dissenting) – The principle that the grant of exclusive possession did not create a tenancy where the grantor had no power to do so extended not only to the case where the grantor had no capacity to grant the tenancy but also to where the grantor had no estate or interest in the land which enabled him to do so. Accordingly, a grantor who had, and was known to have, no title, and who therefore agreed to grant no more than a mere licence did not thereby bring into being a tenancy by estoppel if he excluded himself and those claiming through him from possession. Since in the instant case the trust did not purport to grant a tenancy, and the parties had proceeded on the basis that it was a licence that was being granted, it followed that no tenancy was created by estoppel. The appeal would therefore be dismissed (see p 977 *c* to *f*, p 978 *f g*, p 979 *d* to *f*, p 980 *b c f* to *j* and p 982 *b c*, post).

Family Housing Association v Jones [1990] 1 All ER 385 distinguished.

Street v Mountford [1985] 2 All ER 289 considered.

Notes

a For whether an agreement creates a lease or a licence, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 6–12, and for cases on the subject, see 31(1) *Digest* (2nd reissue) 36–37, *287–292*.

Cases referred to in judgments

b *AG Securities v Vaughan* [1988] 3 All ER 1058, [1990] 1 AC 417, [1988] 3 WLR 1205, HL.
Aslan v Murphy (Nos 1 and 2) [1989] 3 All ER 130, [1990] 1 WLR 766, CA.
Camden London Borough v Shortlife Community Housing (1992) 25 HLR 330.
Cuthbertson v Irving (1859) 4 H & N 742, 157 ER 1034; *affd* (1860) 6 H & N 135, 158 ER 56, Ex Ch.
c *Errington v Errington* [1952] 1 All ER 149, [1952] 1 KB 290, CA.
Family Housing Association v Jones [1990] 1 All ER 385, [1990] 1 WLR 779, CA.
First National Bank plc v Thompson [1996] 1 All ER 140, [1996] Ch 231, [1996] 2 WLR 293, CA.
Goodtitle d Edwards v Bailey (1777) 2 Cowp 597, [1775–1802] All ER Rep 554, 98 ER 1260.
d *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Aust HC.
Lewisham BC v Roberts [1949] 1 All ER 815, [1949] 2 KB 608, CA.
Minister of Agriculture and Fisheries v Hunkin (1948, unreported), referred to in [1949] 2 All ER 724, [1950] 1 KB 148, CA.
Minister of Agriculture and Fisheries v Matthews [1949] 2 All ER 724, [1950] 1 KB 148,
e CA.
Morton v Woods (1869) LR 4 QB 293, Ex Ch.
Southgate BC v Watson [1944] 1 All ER 603, [1944] KB 541, CA.
Street v Mountford [1985] 2 All ER 289, [1985] AC 809, [1985] 2 WLR 877, HL.
Westminster City Council v Clarke [1992] 1 All ER 695, [1992] 2 AC 288, [1992] 2 WLR 229, HL.
f

Appeal

The plaintiff, Gary Bruton, appealed with leave of the Court of Appeal given on 3 December 1996 from the order of Judge James sitting in the Lambeth County Court on 28 June 1996 whereby, on the trial of a preliminary issue in an action
g brought by the plaintiff against the defendant, London and Quadrant Housing Trust (the trust), claiming to be the tenant of certain premises at 2 Oval House, Rushcroft Road, London, SW2, and claiming damages and other relief for breach by the defendant of an implied covenant to keep the premises, it was held that at all material times Mr Bruton occupied the premises as a licensee and not as a
h tenant. The facts are set out in the judgment of Sir Brian Neill.

David Watkinson (instructed by *G L Hockfield & Co*) for Mr Bruton.
Terence Gallivan (instructed by *Devonshires*) for the trust.

Cur adv vult

j 31 July 1997. The following judgments were delivered.

SIR BRIAN NEILL (giving the first judgment at the invitation of Kennedy LJ).

INTRODUCTION

It is with diffidence and with regret that I find myself unable to agree with the judgments of Kennedy and Millett LJJ, particularly because their solution to this difficult problem appears to me to be both socially desirable and eminently

sensible. As I understand the opinions of Lord Templeman in *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809 and in *Westminster City Council v Clarke* [1992] 1 All ER 695, [1992] 2 AC 288, however, the court has to look at what the parties did and not at what they thought they were doing nor at what they intended to do. Nor is the label which the parties give to the transaction decisive. Moreover, the authorities seem to suggest that in the case of residential accommodation the only recognised dichotomy is between lodgers and tenants.

At one time I thought that this case could be distinguished from the general principle laid down in *Street v Mountford* by equating it with the requisition cases such as *Lewisham BC v Roberts* [1949] 1 All ER 815, [1949] 2 KB 608. But the doctrine which permits the creation of a tenancy by estoppel appears to me to prevent the requisition cases being explained on the basis of want of title alone.

Nor, with regret, have I been able to find a satisfactory way to circumvent the decision of this court in *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779, where the facts were strikingly similar to those in this case. It is true that the court in *Jones's* case did not consider the effect of the grantor's lack of title, but it was a reserved decision in which quite detailed reference was made to the statutory framework against which the agreement between the housing association and Mrs Jones was made. It is also to be noted that the decision was cited with apparent approval (save in respect of one point) in the House of Lords in *Clarke's* case. I should therefore set out in a little more detail the reasons for my dissent.

THE FACTS

This is an appeal by Mr Gary Bruton from the order dated 28 June 1996 of Judge James in the Lambeth County Court whereby, on the trial of a preliminary issue, he held that at all material times Mr Bruton occupied certain premises at 2 Oval House, Rushcroft Road, London, SW2 as a licensee and not as a tenant. The appeal is brought by leave of the Court of Appeal given on 3 December 1996. The premises consist of a self-contained ground floor flat, comprising a living room, two bedrooms, a box room, a kitchen and a bathroom.

Oval House is a three-storey Victorian mansion block. In February 1975 Oval House, together with other blocks in Rushcroft Road, was acquired by compulsory purchase by the London Borough of Lambeth (the council). At that time it was intended that Rushcroft Road should be included in a redevelopment scheme to regenerate the centre of Brixton. In order, however, to make use of the property before the redevelopment could take place and to prevent vandalism, the council granted a licence in respect of Oval House and other blocks in Rushcroft Road to the London and Quadrant Housing Trust (the trust) to use for occupation under short-term occupancy agreements by people on the trust's waiting list. The short-term unit of the trust manages schemes providing temporary accommodation for the homeless and other persons in need of short-term housing.

It seems that the licence to the trust was originally in the form of a letter or letters, but this informal arrangement was subsequently replaced by a licence in writing dated 27 March 1986. More recently this licence has in turn been replaced by a lease dated 4 December 1995 of Oval House and other properties, but the existence and terms of this lease are not relevant to this appeal.

The scheme for the redevelopment of Rushcroft Road which was in contemplation in 1975 was not proceeded with and no subsequent scheme has

been brought to fruition. In the result Oval House continues to be used for short-term housing by the homeless and other people in need of accommodation.

The 1986 licence between the council and the trust was entitled 'Licence of Short-Life Properties'. The licence recited the fact that the trust was a voluntary organisation concerned with homelessness and further recited that the council, being under a duty to provide accommodation for homeless persons, was able by virtue of the provisions of the Housing (Homeless Persons) Act 1977 to assist a voluntary organisation concerned with homelessness by permitting them to use the premises belonging to the council. It is not necessary to refer to the terms of the licence in detail, but it is to be noted that by cl 2(g) of the licence the trust undertook to ensure that no occupier became a secure tenant within the meaning of the Housing Acts and Rent Acts or under any other Acts or regulations without the prior consent of the council and that no occupier should acquire any rights of security or other rights whilst in occupation.

On 31 January 1989 Mr Bruton signed an agreement with the trust for the occupation by him of the premises. The terms of the agreement were set out in a letter from the trust to him and in a document attached containing conditions and in a written acceptance by him of these terms. The letter dated 31 January contained the following material provisions:

> *'Occupation of Short-Life Accommodation at 2 Oval House, Rushcroft Road, SW2 on a temporary basis.*
>
> As has been explained to you, the above property is being offered to you by [the trust] on a weekly Licence from 6 February 1989. The Trust has the property on Licence from [the council] who acquired the property for development (within the meaning of s 22 of The Town & Country Planning Act 1971), and pending this development, it is being used to provide temporary housing accommodation. It is offered to you on the condition that you will vacate upon receiving reasonable notice from the Trust, which will not normally be less than four weeks ... You understand and agree that while you are living in the property, you will allow access at all times during normal working hours to the staff of the Trust, the owners and agents for all purposes connected with the work of the Trust.'

There is a doubt as to the precise form of the document containing conditions which was attached to the letter of 31 January. It is clear, however, that the relevant provisions in the attached conditions were those set out in para 4(g) which was in these terms:

> 'To permit the Trust or its agents, surveyors or consultants to enter the property for the purpose of inspecting the state of repair, and cleanliness of the property or any purpose connected at all reasonable hours of the day.'

Mr Bruton had been living in the premises before 1989. Thus in 1985 he had moved into the flat of which Ms Nicola Groocock was then the licensee. Ms Groocock left the premises towards the end of 1988. Thereafter Mr Bruton was the sole occupant of the flat.

THE PROCEEDINGS IN THE COUNTY COURT

On 15 June 1995 Mr Bruton brought proceedings in the Lambeth County Court claiming that he was the tenant of the premises and that the trust was in breach of an implied covenant to keep the premises in repair. It was alleged that this covenant was to be implied by virtue of s 11 of the Landlord and Tenant Act

1985. Mr Bruton claimed damages and other relief including an order for the specific performance of the trust's alleged obligations to repair. *a*

On 25 July 1995 the trust served a defence denying that Mr Bruton was a tenant and pleading that he was a licensee. Later, the defence was amended and a counterclaim was added seeking possession of the premises following the service of a notice to quit on 21 December 1995. In April 1996 Mr Bruton served a reply claiming that he was a secure tenant of the premises within Pt IV of the Housing *b* Act 1985, or, in the alternative, that he was an assured tenant within Pt I of the Housing Act 1988. He denied that the notice to quit had determined his right to occupy.

It was in these circumstances that on 1 May 1996 Judge James made an order for the trial as a preliminary issue of the question whether Mr Bruton was a tenant *c* or a licensee.

The trial of the preliminary issue took place on 28 June 1996. At the trial a number of matters were considered. Mr Bruton contended that before 1989 he had had a personal right of occupation together with Ms Groocock, but the judge rejected this contention and held that his personal right of occupation began on *d* the execution of the licence in 1989. There was also a debate before the judge as to the meaning of the word 'dispose' in s 32 of the Housing Act 1985. In this court, however, the only matter which has been argued before us is whether or not Mr Bruton's right to occupy the premises amounted to a tenancy or whether he was a mere licensee. The judge expressed his conclusion on this aspect of the case as follows: *e*

> 'I am confident that the housing officer concerned would not have offered a tenancy, which would have been contrary to everything involved. If a legal term was used it was probably licence and the documents fit in with that; and furthermore I think it clear from those documents that what was discussed *f* between the parties and assumed between them would have been occupation of uncertain duration and subject to various restrictions inappropriate to a tenancy, as set out in the documents, so that whether or not the term licence was used, what would have been assumed by the parties would have been a state of affairs that any layman would have described as a licence ... In ordinary language, I am confident that the representative of *g* the housing trust and the plaintiff mutually understood that the premises were as they were described, namely short-term occupation of premises on a weekly licence, whilst awaiting development, and the occupant may therefore have to go at short notice, and the trust had various rights of entry and other rights beyond those normal to a landlord and tenant relationship, *h* specifically those which went towards the purpose of ultimate redevelopment. I do not suppose this worried Mr Bruton at the time. He realised years would pass before anything happened. That does not affect the mutual understanding as the basis on which he entered the agreement with the trust ... the trust could not grant a lease to Mr Bruton unless that was the effect of an estoppel, and that is ruled out by my finding I have *j* already made on the mutual understanding between Mr Bruton and the trust. That is sufficient to decide the preliminary issue and I shall go no further but hold that the plaintiff is a licensee of 2 Oval House now and at all material times.'

THE APPEAL

Mr Watkinson developed his argument on behalf of Mr Bruton on the following lines. (1) It was accepted that at the material time the trust had a lesser interest in the premises than a tenancy and that accordingly it could not itself create a tenancy otherwise than by estoppel. (2) A tenancy by estoppel can be created, however, even where the grantor has no estate in the land. Indeed it is of the essence of a tenancy by estoppel that the grantor does not have an estate in the land. (3) The fact that the grantee knows that the grantor has no estate does not prevent a tenancy by estoppel arising. This estoppel is not a species of estoppel by representation but depends upon the fundamental principle of the common law (which was recognised by Millett LJ in *First National Bank plc v Thompson* [1996] 1 All ER 140 at 145, [1996] Ch 231 at 237) which precludes a grantor from disputing the validity or effect of his own grant. (4) The estoppel can arise even where it has not been 'fed' by the subsequent acquisition by the grantor of an estate in the land: see, for example, *Cuthbertson v Irving* (1859) 4 H & N 742, 157 ER 1034. (5) It is therefore necessary to examine the nature of the grant by the grantor to establish whether or not the 'badges' of a tenancy are present. These badges are (a) the provision for a term, (b) the provision for rent and (c) the grant of exclusive possession. As Lord Templeman said in *Street v Mountford* [1985] 2 All ER 289 at 294, [1985] AC 809 at 819:

> 'If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence.'

(6) Any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant: see *Street v Mountford* [1985] 2 All ER 289 at 293, [1985] AC 809 at 818. (7) The matter was put beyond doubt by the decision of the Court of Appeal in *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779 and by the reasoning of the Court of Appeal in that case.

This is a formidable argument.

Mr Gallivan on behalf of the trust sought to counter the argument by submitting that the decision of this court in *Family Housing Association v Jones* could be distinguished on the basis that the question of a tenancy by estoppel had not been argued. He submitted that the judge had made a finding of fact as to the mutual understanding of the parties and that this court should not interfere with that finding. Furthermore, he pointed to the serious effects which a decision in favour of the appellant would have. In Lambeth alone there were over 1,000 properties provided for occupants on a short-term basis. It might well be that the trust would have a defence under s 11(3) of the Landlord and Tenant Act 1985 to the claim for an alleged breach of the implied covenant, but the cost of defending such proceedings against an impecunious plaintiff would be considerable.

Mr Gallivan further argued that the rights of access given to the trust by the terms of the licence were inconsistent with the grant of exclusive possession when judged against the fact that the property was going to be redeveloped in due course.

I turn therefore to the decision in *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779. In that case Mrs Jones applied to a local housing authority to be housed as a homeless person with a priority need. She was referred to the housing association which had a licence to use certain local

authority properties as temporary accommodation for homeless families referred by the local authority. The housing association entered into an agreement with Mrs Jones under which she and her son were housed in a self-contained flat in the block. The agreement was described as a licence and contained an express provision that Mrs Jones did not have exclusive possession as against the housing association. The agreement also contained a term that obliged Mrs Jones 'not to impede access to the property to any representative, agent, or builder, of Family Housing Association, for inspection or maintenance or any other purpose'. In the county court the judge held that Mrs Jones was a licensee and he granted an order for possession, but this decision was reversed by the Court of Appeal. It was said that since the accommodation comprised a self-contained flat of which the only contemplated occupants were Mrs Jones and her son, she enjoyed exclusive possession and accordingly the arrangement fulfilled all the requirements appropriate for the creation of a weekly tenancy. Furthermore, the intention to create such a tenancy was not negatived by the fact that the arrangement had been entered into to provide her with temporary accommodation pursuant to the licence agreement between the housing association and the local authority.

It is to be noted that the decision of the Court of Appeal in *Family Housing Association v Jones* was referred to by Lord Templeman in his speech in *Westminster City Council v Clarke* [1992] 1 All ER 695, [1992] 2 AC 288, though according to the headnote ([1992] 2 AC 288 at 289) the earlier decision was said to have been overruled. An examination of the speech of Lord Templeman, however, shows that Lord Templeman's disapproval of the decision in *Family Housing Association v Jones* was limited to the Court of Appeal's views as to the proper construction of s 79(3) of the Housing Act 1985 (see [1992] 1 All ER 695 at 701–702, [1992] 2 AC 288 at 300). I do not understand that any doubt was thrown on the essential conclusion in the earlier case to the effect that as Mrs Jones occupied the property on a weekly basis and paid a rent (even though not so described) and had exclusive possession, all the necessary ingredients of a tenancy were present. Indeed, it is to be noted that in *Westminster City Council v Clarke* [1992] 1 All ER 69 at 701, [1992] 2 AC 288 at 299 Lord Templeman referred again to the general principle that a grant of exclusive possession of residential accommodation at a rent creates a tenancy notwithstanding the fact that the parties intended to grant and expressed themselves as having granted a licence and not a tenancy.

The facts relating to the occupation of his room by Mr Clarke were unusual and enabled the House of Lords on those particular facts to decide that he was only a licensee with the rights of a lodger. I am satisfied, however, that if one looks at the terms of the grant in this case, one is driven to the conclusion that the 'badges' of a tenancy were present. It is not suggested that the trust had the right to require Mr Bruton to share the occupation of the flat with anyone else.

It is true that any contract has to be construed by reference to the factual matrix surrounding its conclusion. It can therefore be argued that whatever 'badges' the 1989 agreement displayed, the parties' intention cannot have been to create a tenancy of a flat which everyone knew formed part of a block awaiting redevelopment. But I do not think that it is open to this court, in the light of *Street v Mountford* and the subsequent cases, to try to look behind the terms and effect of the grant. The rights of the trust to enter were no greater than those of the Family Housing Association in Mrs Jones's case.

Accordingly, I for my part would have concluded that Mr Watkinson's argument should succeed and that the appeal should be allowed. I would have held that, as between the trust and Mr Bruton, he is a tenant, though this finding would not of course affect the rights of the council.

MILLETT LJ. This case raises a familiar problem in an unusual setting. The question is whether a document which purports to grant a licence to occupy residential accommodation nevertheless takes effect in law as the grant of a tenancy. The feature which distinguishes the present case from the commonplace is that the grantor had, and was known to the grantee to have, no title to the land.

The case is thus located at the intersection of two settled principles of law. The first is that the grant of exclusive possession of land for a fixed term at a rent creates a tenancy. Whether the arrangements in any particular case create a tenancy or a licence does not depend upon the parties' professed intentions but on the legal effect of the transaction into which they have entered. Save in exceptional circumstances, the only intention which is relevant is the intention to grant exclusive possession. This was decided by the House of Lords in the seminal case of *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809.

The second principle is that the grantor of an interest in land is estopped from disputing the validity or effect of his own grant. A man who purports to grant a tenancy is not permitted to deny that he has done so by asserting his own want of title. If he has none, the grant creates a tenancy by estoppel binding on him and those who claim through him, though it cannot of course bind those with a superior title.

The question on this appeal is whether these two principles can be combined so that a grantor who has, and is known to have, no title, and who therefore agrees to grant no more than a licence, nevertheless brings into being a tenancy by estoppel if he excludes himself and those claiming through him from possession.

In *Street v Mountford* Lord Templeman gave only three examples of exceptional circumstances where the grant of exclusive possession does not create a tenancy. First, where the circumstances negative any intention to create legal relations at all. Secondly, where the possession of the grantee is referable to some other legal relationship such as vendor and purchaser or master and servant. Thirdly, where the grantor has no power to create a tenancy, as in the case of a requisitioning authority. As I pointed out in *Camden London Borough v Shortlife Community Housing* (1992) 25 HLR 330, the first and third of these are not exceptions to a general rule. The relationship of landlord and tenant is a legal relationship. It cannot be brought into existence by an arrangement which is not intended to create legal relations at all or by a body which has no power to create it. The existence of these two categories is due to the fact that the creation of a tenancy requires the grant of a *legal* right to exclusive possession.

The precise scope of the third category is, however, not clear. Is it confined to want of capacity, or does it extend to want of title? Lack of capacity to grant a tenancy would, of course, prevent the creation of a tenancy by estoppel, for the reasons given by Lord Greene MR in *Minister of Agriculture and Fisheries v Hunkin* (1948, unreported), referred to in *Minister of Agriculture and Fisheries v Matthews* [1949] 2 All ER 724 at 729, [1950] 1 KB 148 at 154:

> 'Accepting the view which Mr. *Baillieu* [counsel] accepts, that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it was possible for the donee of a statutory power to extend his power by creating an estoppel.'

Despite the concession made by the defendant's counsel in that case, which Lord Greene MR may have accepted only for the sake of argument, the reason a requisitioning authority cannot grant a tenancy of the requisitioned land is not in my judgment due to any want of vires. The cases do not suggest that the requisitioning authority lacked power to hold land or to grant tenancies of land which it owned. The problem was that the requisitioning authority had no power to acquire and did not acquire any estate or interest in the land which it requisitioned. In *Lewisham BC v Roberts* [1949] 1 All ER 815 at 824, [1949] 2 KB 608 at 622 Denning LJ said:

> '... it is necessary to consider the nature of the power to requisition land. It is only a power to take possession of land. It is not a power to acquire any estate or interest in land ... Once possession is taken the Crown can exercise all the powers incident to possession, such as to licence other people to use the premises: see *Southgate Borough Council* v. *Watson* ([1944] 1 All ER 603, [1944] KB 541), but it cannot grant a lease or create any legal interest in the land in favour of any other person *because it has itself no estate in the land out of which to carve any interest* ...' (My emphasis.)

Thus the want of title was due to the absence of any power to acquire title to the property under the relevant regulations; but the inability to grant a tenancy was due to the want of title.

If this is right, then the third category of case where the grant of exclusive possession does not create a tenancy may not be limited to the case where the grantor has no capacity to grant a tenancy but may extend to the case where it has no estate or interest in the land which enables it to do so. But this is not clearly demonstrated, for Lord Templeman did not have tenancies by estoppel in mind. It is, therefore, necessary to consider how such tenancies arise.

In *Goodtitle d Edwards v Bailey* (1777) 2 Cowp 597 at 600-601, [1775–1802] All ER Rep 554 at 556 Lord Mansfield CJ said:

> '... it shall never lie in [the grantor's] mouth to dispute the title of the party to whom he has so undertaken, no more than it shall be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed.'

The doctrine is clearly a form of estoppel, though it is not a species of estoppel by representation and does not depend on any recital or other representation of title: see *First National Bank plc v Thompson* [1996] 1 All ER 140 at 145, [1996] Ch 231 at 237. It is the product of a fundamental principle of the common law which precludes a grantor from disputing the validity of his own grant. The estoppel is not excluded by the fact that the want of title appears in the deed, as it did in *Goodtitle d Edwards v Bailey* itself; or by the fact that the grantee knows that the grantor has no title: see *Morton v Woods* (1869) LR 4 QB 293. It is, however,

excluded if the grantor has any legal title, even if it is insufficient to support the grant.

The doctrine is, therefore, both peculiar and ancient. It has sometimes been regarded as a special sub-species of estoppel by convention. As it is put in Spencer Bower and Turner *Estoppel by Representation* (3rd edn, 1977) p 160:

> 'The claim of the party raising the estoppel is, not that he believed the assumed version of the facts was true, but that he believed (and agreed) that it should be *treated as true*.' (Author's emphasis.)

In *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 676 Dixon J said in the High Court of Australia:

> 'It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defect.'

In the present case both parties knew that the trust had no title and could not grant a tenancy. That is not sufficient to prevent the creation of a tenancy by estoppel. But the trust did not purport to grant a tenancy. The document was carefully drawn by the trust and accepted by Mr Bruton as a licence. There is no inconsistency between the terms of the document and the trust's assertion that it has not granted a tenancy. There is no ground for holding that the parties must be taken to have adopted an assumed basis for the transaction. They did not agree that the trust should grant a tenancy even though it had no title; they agreed that it should grant a licence because it could not grant a tenancy.

Tenancies by estoppel were developed at a time when title to land was doubtful and difficult to establish. They most frequently arose when the grantor's land was in mortgage. In such a case the defect in title was technical and remediable; and the parties could reasonably be supposed to be willing to disregard it. The circumstances of the present case are very different. The trust had no title because the council had no power to grant it any. The case is, therefore, like that of the requisitioning authority, but at one remove.

It is submitted on Mr Bruton's behalf that this is contrary to *Street v Mountford*. The first step, it is said, is to construe the document in the light of that case and without regard to the fact that the trust had no title. Despite the professed intention to create a licence, the document granted exclusive possession of the premises, and accordingly created a tenancy as between the parties. The trust's want of title does not affect the relationship as between them, though it prevents the tenancy being more than a tenancy by estoppel.

This is a powerful and attractive argument, but in the end I am not persuaded by it. It appears to disregard both the reason for the first and third of the exceptions in *Street v Mountford* and the basis of the doctrine of tenancy by estoppel.

A tenancy is a legal estate. The essence of a legal estate is that it binds the whole world, not just the parties to the grant and their successors. The hallmark of a tenancy is the grant of exclusive possession. In this context, therefore, exclusive possession means possession to the exclusion of the whole world, not merely of the grantor and those claiming through him. If the grantor has no

power to exclude the true owner from possession, he has no power to grant a legal right to exclusive possession and his grant cannot take effect as a tenancy. He may still be estopped from asserting his want of title, and if so his grant will create a tenancy by estoppel. But a tenancy by estoppel is not merely a particular species of tenancy which binds only the parties to it. It is firmly based on estoppel, and there can be no estoppel unless the grantor's denial of title is inconsistent with the terms of his grant.

In my judgment the two doctrines cannot be combined in the way contended for. They are, when analysed, mutually exclusive. *Street v Mountford* rejects the professed intentions of the parties in favour of the true effect of the transaction. Estoppel by convention gives effect to the professed intentions of the parties. Any attempt to combine them produces a hopeless circularity. Approached separately, they have distinct requirements which are not satisfied in the present case.

I have not overlooked the decision of this court in *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779 which was approved by Lord Templeman in *Westminster City Council v Clarke* [1992] 1 All ER 695, [1992] 2 AC 288. The facts of the earlier case were closely similar to the present. They concerned a purported licence to occupy residential accommodation granted by a short-life housing association which had no legal estate or interest in the land. The occupier was given an apparent right of exclusive possession. The arrangements were held to create a tenancy. But the fact that the grantor had no title was not referred to in argument or the judgments, and its significance appears to have been overlooked. It is not clear to me what kind of tenancy was created. It can, I think, only have been a tenancy by estoppel; but no consideration was given to the question whether the necessary conditions for the creation of such a tenancy existed. In the later case the grantor was the landowner and the point did not arise. In the circumstances we are not in my judgment precluded from considering these questions for ourselves.

In my opinion there is nothing in law to prevent a party in possession of land but lacking any legal estate or interest in the land from granting a licence to permit another to occupy the land. Provided that the grantor makes it clear that it is a licence only and not a tenancy, the grant will not take effect as a tenancy by estoppel.

In the present case my conclusion does not significantly affect Mr Bruton's security of tenure, since he was always liable to be evicted at the suit of the council. But it avoids saddling the trust with the statutory obligations of a landlord, which it never intended to undertake, and which would effectively disable it from carrying out the socially valuable function which it performs.

I would dismiss the appeal.

KENNEDY LJ. The facts are set out in the judgment of Sir Brian Neill, but my conclusions are the same as those of Millett LJ for the reasons that he gives. It seems to me that common sense rebels against the suggestion that a homeless person who is housed by a housing association in residential accommodation which he knows that the association does not own thereby becomes a tenant, just because he agrees in writing to make regular payments, he is given exclusive possession and he is not a lodger.

In *Street v Mountford* [1985] 2 All ER 289 at 297, [1985] AC 809 at 823 Lord Templeman recognised that, although in any ordinary case an occupier of

residential accommodation at a rent for a term is either a lodger or a tenant, an occupier who enjoys exclusive possession is not necessarily a tenant. He may be a lodger or a service occupier or fall within the other exceptional categories mentioned by Denning LJ in *Errington v Errington* [1952] 1 All ER 149, [1952] 1 KB 290. That case was concerned with occupiers in exclusive possession who had been held to be not tenants but only licensees. Denning LJ gave a number of examples and then said ([1952] 1 All ER 149 at 155, [1952] 1 KB 290 at 298):

> 'The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held to be a licensee only.'

That passage was cited with approval by Lord Templeman in *Street v Mountford* [1985] 2 All ER 289 at 295, [1985] AC 809 at 820, and he went on to say that in *Errington v Errington* and the cases to which it referred there were 'exceptional circumstances which negatived the prima facie intention to create a tenancy, notwithstanding that the occupier enjoyed exclusive occupation', as, for example 'where the owner, a requisitioning authority, had no power to grant a tenancy' (see [1985] 2 All ER 289 at 295–296, [1985] AC 809 at 820–821). As Millett LJ has explained in his judgment, it would seem that it had no power because it did not possess any legal estate. Why then can it not be said that the present case is also an example of exceptional circumstances which negative the prima facie intention to create a tenancy? Both parties knew that the housing association did not have and had no chance of acquiring any legal estate. They expressly proceeded on that basis, and there would seem to me no obvious reason why in law they should not be assumed to have meant what they said. This is not a case in which their actions must be said to have been at variance with reality. Here what they described as a spade was in fact a spade.

In *AG Securities v Vaughan* [1988] 3 All ER 1058, [1990] AC 417 and in *Aslan v Murphy (Nos 1 and 2)* [1989] 3 All ER 130, [1990] 1 WLR 766 the question whether occupiers were to be regarded as tenants or licensees was reconsidered by the House of Lords and by the Court of Appeal respectively. Nothing of significance for present purposes was added to what had been said in *Street v Mountford*, save that in *Aslan's* case [1989] 3 All ER 130 at 135, [1990] 1 WLR 766 at 722 Lord Donaldson MR said:

> 'The judge was, of course, quite right to approach the matter on the basis that it is not a crime, nor is it contrary to public policy, for a property owner to license occupiers to occupy a property on terms which do not give rise to a tenancy.'

That observation was no doubt considered to be necessary because, unlike the present case, so many of the earlier cases were concerned with blatant attempts to avoid the provisions of the Rent Acts.

I recognise that in *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779, where the facts were very similar, this court held that a tenancy was created, but the case for the housing association does not seem to have been

presented on the basis that to the knowledge of both parties there was no present or prospective legal estate from which a tenancy could be created. The focus seems to have been on the exclusivity of the occupier's right to possession (see [1990] 1 All ER 385 at 393, 395, [1990] 1 WLR 779 789, 792 per Balcombe and Slade LJJ), so in my judgment we are free to decide the present case on the point which has now been raised. Although *Family Housing Association v Jones* was considered by the House of Lords in *Westminster City Council v Clarke* [1992] 1 All ER 695, [1992] 2 AC 288 no consideration seems to have been given to the part of the decision which for present purposes is material.

I would therefore dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Mary Rose Plummer Barrister.

Canada Trust Co and others v Stolzenberg and others

COURT OF APPEAL, CIVIL DIVISION

NOURSE, MILLETT AND WARD LJJ

24, 28 APRIL 1997

Discovery – Production of documents – Jurisdiction – Plaintiffs serving writ on first defendant in the United Kingdom – Defendants disputing jurisdiction of the court and applying to set aside service for want of jurisdiction – Plaintiffs applying for production of documents held by third parties in order to establish jurisdiction – Whether court having discretion to order production to establish jurisdiction – RSC Ord 38, r 13(1)(2).

The plaintiffs were the trustees of a number of Canadian pension funds and claimed to have been the victims of a series of frauds perpetrated by the first defendant and assisted by 36 other parties in various jurisdictions. They decided to bring proceedings to recover the funds in the United Kingdom, basing jurisdiction on the alleged residence of the first defendant in London. Prior to issuing proceedings, however, in May 1996 they made an ex parte application for interlocutory relief against all the defendants to protect the proceeds of the alleged fraud. The judge granted the plaintiffs worldwide Mareva injunctions and leave was also given to delay service of the writ until the protective orders were in place in all the relevant jurisdictions. On 1 August 1996 the writ was issued and later that month the first defendant sold his London house. The writ was finally served in March 1997. In April 1997 the defendants applied to the court for service of the writ to be set aside for want of jurisdiction under RSC Ord 12, r 8(1)(a). The plaintiffs thereupon applied for orders under Ord 38, r 13(1) against a number of banks and other bodies requiring them to produce copies of documents in their possession as evidence of the first defendant's address at the relevant date. The judge dismissed the plaintiffs' application on the ground that, as a matter of principle, the court would not lend its process to a plaintiff to enable him to establish jurisdiction because it could not do so without assuming that it had jurisdiction and it could not make that assumption as that was the very question to be decided. The plaintiffs appealed. The fourth defendant contended that the third parties could not be compelled to produce the documents in question at trial since they would not be relevant to any issue there, and relied on Ord 38, r 13(2), which provided that no person should be compelled to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter.

Held – The High Court had an inherent jurisdiction to decide whether it had jurisdiction to try the issues in an action. The court's process was thus not limited to cases where jurisdiction had already been established. By acceding to the plaintiffs' application to order the production of documents at the hearing of the defendants' application to set aside service of the writ, the court would not therefore be making any assumption that it had jurisdiction to try the action but would merely be determining the limits of its own jurisdiction. It followed that the judge's reasons for dismissing the plaintiffs' application could not be supported and that the court had a discretion as to whether to make the orders

sought. Moreover, given its history and purpose, the concluding words of Ord 38, r 13(2) had to be read as meaning 'which he could not be compelled to produce if the proceeding were the trial of that cause or matter', so the relevance of the documents had to be tested by reference to the issues in the proceedings for which they were required. Accordingly the appeal would be allowed, and the plaintiffs' application restored for hearing by the judge (see p 988 *g* to p 989 *d f* to *j*, and p 990 *j*, post).

Notes

For discovery against persons not parties to proceedings, see 13 *Halsbury's Laws* (4th edn) para 17.

Cases referred to in judgments

Elder v Carter, ex p Slide and Spur Gold Mining Co (1890) 25 QBD 194, CA.

Rome v Punjab National Bank [1989] 2 All ER 136.

Cases also cited or referred to in skeleton arguments

Arab Monetary Fund v Hashim (No 2) [1990] 1 All ER 673.

Grupo Torras SA v Al-Sabah [1994] CA Transcript 159.

Macmillan Inc v Bishopsgate Investment Trust Ltd [1993] 4 All ER 998, [1993] 1 WLR 1372, CA.

Marcel v Comr of Police of the Metropolis [1992] 1 All ER 72, [1992] Ch 225, CA.

Millar v Harper (1888) 38 Ch D 110, CA.

Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) [1996] 4 All ER 403, [1997] 1 WLR 257, CA.

Interlocutory appeal

The plaintiffs, Canada Trust Co, Royal Trust Corp of Canada and Chrysler Canada Ltd, appealed from the decision of Rattee J on 22 April 1997, dismissing their ex parte application for orders under RSC Ord 38, r 13 against third parties for the production of documents at a hearing of an application by the defendants under Ord 12, r 8(1)(a) for the setting aside of the service of the writ on them for want of jurisdiction. Only the second defendant, Marco Gambazzi, the fourth defendant, Edwin Banziger, the seventh defendant, Trustfina Anstalt, the tenth defendant, Mora Hotel Corp NV, the eleventh defendant, Unionmatex GmbH, the fifteenth defendant, Bogrin Financiera SA, the sixteenth defendant, Geam SA, and the eighteenth defendant, Yosaly Investment Inc, took part in the appeal. The facts are set out in the judgment of Millett LJ.

Christopher Carr QC and *Philip S Marshall* (instructed by *Denton Hall*) for the plaintiffs.

Andrew Hochhauser and *Martin Griffiths* (instructed by *Richards Butler*) for the second, seventh, tenth, fifteenth, sixteenth and eighteenth defendants.

Thomas Ivory (instructed by *Rakisons*) for the fourth defendant.

Joe Smouha (instructed by *Baker & McKenzie*) for the eleventh defendant.

At the conclusion of the argument the court announced that the appeal would be allowed for reasons to be given later.

28 April 1997. The following judgments were delivered.

MILLETT LJ (giving the first judgment at the invitation of Nourse LJ). The question in this appeal is whether it is a proper exercise of discretion to refuse to make an order for the production of documents at an interlocutory hearing on the sole ground that they are wanted in order to establish the jurisdiction of the court.

The appeal is brought by the plaintiffs from an order of Rattee J which he made on Tuesday, 22 April 1997. The plaintiffs applied for orders under RSC Ord 38, r 13 against third parties for the production of documents at a hearing which is to take place today Monday, 28 April. The judge is then due to hear an application by the defendants under RSC Ord 12, r 8(1)(a) for the service of the writ on them to be set aside for want of jurisdiction. The judge dismissed the plaintiffs' application and refused leave to appeal. We heard the appeal as a matter of urgency last Thursday, 24 April. We granted leave to appeal and at 5 pm, at the conclusion of argument, we announced that we would allow the appeal. We set aside the judge's order dismissing the plaintiffs' application and directed that it be restored for hearing by the judge today. We indicated that we would give our reasons this morning. I now give my reasons.

The plaintiffs are the Canadian trustees of a number of Canadian pension funds. They claim that they have been the victims of a series of massive and complex international frauds perpetrated over many years by the first defendant. The numerous transactions by which the alleged frauds were carried out took place in several different jurisdictions which included the United Kingdom. In order to recover the proceeds of the frauds the plaintiffs have brought proceedings not only against the first defendant but also against 36 other parties in various jurisdictions. Four of them are individuals. The plaintiffs allege that they were parties to the frauds. The others are companies and anstalts. The plaintiffs allege that some of them were parties to the frauds and that others received the traceable proceeds of the frauds or assisted in their misdirection.

There is no single natural forum (except perhaps Canada) for the conduct of such litigation. The plaintiffs decided to bring the main proceedings in England, basing the jurisdiction on the alleged residence of the first defendant in the United Kingdom and claiming that the other defendants were necessary or proper parties to the proceedings. It is common ground that the court's jurisdiction in respect of all the defendants stands or falls by its jurisdiction in respect of the first defendant, and that this in turn depends on whether or not he was domiciled in the United Kingdom within the meaning of the Civil Jurisdiction and Judgments Act 1982 (which broadly corresponds with the English concepts of residence and substantial connection) at the relevant date. The plaintiffs contend that the relevant date for this purpose is the date on which the writ was issued; the defendants contend that it is the date on which it was served on the first defendant.

On 15 May 1996 the plaintiffs made an ex parte application to Rimer J for interlocutory relief against all the defendants. The plaintiffs say that at that time they had good reason to believe that the first defendant was domiciled in the United Kingdom within the meaning of the 1982 Act. He owned a house in Chester Square London SW1 which he occupied and which he had given as his place of residence for at least the past seven years, and he appeared to have a substantial connection with the United Kingdom. He was believed also to have other places of residence in Canada, France and Germany. The plaintiffs told

Rimer J what they knew and evidently satisfied him that the first defendant was arguably resident in and had a substantial connection with the United Kingdom, although he was probably also resident elsewhere both within and outside convention countries.

The evidence in support of the plaintiffs' application for protective relief was extensive. The hearing before Rimer J was not continuous. It occupied nine days in court and there were many days when the judge read the papers in his room. The hearing was not concluded until 31 July 1996, when the judge granted extensive relief including worldwide Mareva injunctions; and further references were made to the judge from time to time thereafter. The writ was issued on 1 August 1996.

It was considered essential for the plaintiffs' protection that the proceedings should not come to the attention of any of the defendants until protective orders were in place against them not only in England but also in the other jurisdictions where the funds were held. Accordingly, the judge dispensed with the usual undertaking to serve the writ forthwith. He agreed to the plaintiffs' proposal to serve the proceedings at the same time as or immediately after service of all the protective orders which were obtained here and abroad. He gave leave to serve out of the jurisdiction and for substituted service in six different jurisdictions. These included Panama, Liechtenstein, Switzerland and Netherlands Antilles.

In the event it became necessary for the writ to be renewed and for the judge to make fresh orders which he did on 26 February 1997. The plaintiffs were successful in obtaining protective orders in the overseas jurisdictions but the process proved to be cumbersome and time-consuming (particularly in Switzerland). The writ was indorsed with a certificate in the form required by RSC Ord 6, r 7(1)(b) and was eventually served together with the various protective orders on all the defendants on 11 March 1997. It was served on the first defendant at the house in Chester Square.

In the meantime, in July 1996, the plaintiffs learned that the first defendant was in the process of selling his house in Chester Square. Contracts were exchanged on 22 July 1996 and completion took place in mid-August. The first defendant's furniture was put into temporary storage in north London. The plaintiffs sensibly abstained from making inquiries of the purchasers or their solicitors for the time being because of the risk that this would prematurely alert the defendants to the existence of the proceedings. They did, however, tell the judge of the sale of the house. The plaintiffs' private investigators reported that the first defendant was frequently to be found in England, but they were unable to discover a current address for him. In accordance with their continuing duty to the court the plaintiffs kept the judge informed of developments as they occurred.

Once the proceedings were served, the plaintiffs' solicitors contacted the solicitors who had acted in the purchase of the house at Chester Square with a view to obtaining evidence of the first defendant's current whereabouts. They learned that the first defendant had told the purchasers at the time of the sale that 'he was moving to Paris'. The plaintiffs' solicitors promptly reported this to Rimer J.

By 25 March the plaintiffs knew that some of the defendants were likely to challenge the jurisdiction of the court. They did so by serving a notice of motion under RSC Ord 12, r 8 on 14 April. The hearing was fixed for today 28 April. The defendants' evidence in support of their application made it clear that they did not know whether the first defendant was resident in England at the relevant date. The defendants' case was that the evidence assembled by the plaintiffs (the

substance of which the plaintiffs' solicitors had conveyed to them) was insufficient to establish the first defendant's residence in England at the relevant date. Moreover they did not accept that the first defendant had been properly served in accordance with Ord 10, r 1(2) (service on a defendant at his last known address). Whether such service was good service within the rules depends on whether the first defendant was present within the jurisdiction when the writ was delivered to the house at Chester Square. The plaintiffs claim to have evidence that he was.

The plaintiffs intend primarily to rely on the evidence of the first defendant's past residence in and substantial connection with the United Kingdom together with the evidence of his continuing presence here. But the defendants do not accept that this is enough. Accordingly, the plaintiffs applied under Ord 38, r 13 for orders directed against a number of banks and other bodies with whom the first defendant is known to have maintained accounts or to have corresponded requiring them to produce copies of the documents in their possession which are likely to furnish evidence of the first defendant's address at the relevant date. Because of their obligations of confidence it was reasonable to assume that they would be unwilling to provide such information to the plaintiffs without a court order. The application was opposed by the defendants and Rattee J dismissed it.

As the transcript of the hearing shows, the judge was troubled whether he had jurisdiction to make the order sought (or if he had a theoretical jurisdiction whether it was one which it would ever be appropriate to exercise) where the documents the production of which was sought were required in order to establish the jurisdiction of the court. He asked whether there was any precedent for the making of such an order. He was told correctly that there was not, though he was referred to *Rome v Punjab National Bank* [1989] 2 All ER 136, where Hirst J held that the court had power to order discovery of documents on a defendant's application to set aside a writ for irregularity of service but would do so only very rarely and only where it was necessary for the fair disposal of the application. Hirst J relied on Ord 12, r 8(5) (power to give directions) for the power to order discovery, but in the event he dismissed the application on the ground that the documents were not necessary for the fair disposal of the application.

Speaking for myself, I have some doubt whether Ord 12, r 8(5) alone provides a sufficient basis for an order for discovery. But it certainly cannot be relied upon to justify an order against non-parties. The plaintiffs do not rely upon it. They rely exclusively on Ord 38, r 13.

The judge's reasons appear from the following passages taken from an unrevised transcript of his extempore judgment:

> '... I accept the submission of the defendants that the orders sought by the plaintiffs would be an inappropriate use of the court's power to order the production of documents by third parties conferred by Ord 38, r 13. Mr Hochhauser, on behalf of the majority of the defendants applying to set aside the service of the writ on them, as he put it, this is really an attempt by the plaintiffs to lift the proceedings [against] his clients off the ground by their own bootlaces [sic]. In my judgment it is for the plaintiffs to adduce evidence to prove proper service on the relevant defendants. Either they can adduce evidence to establish a prima facie case for the first defendant's domicile in the United Kingdom at the relevant time or they cannot. If they can then they will succeed in resisting the defendants' application to set aside service because the affidavit filed by the defendants on their application to set aside

service contained no positive evidence to rebut the plaintiffs' evidence on such domicile. It consists largely of comments on the plaintiffs' evidence. Thus, if the evidence available to the plaintiffs at the time of the issue of the writ or its service, whichever is held to be relevant, was sufficient to justify service on the relevant defendants on the footing that the first defendant was domiciled in the United Kingdom, such service is proper and the defendants' application to set it aside would fail. *If such evidence was insufficient for that purpose then the writ should not have been certified as appropriate for service on the relevant defendants without the leave of the court under RSC Ord 11. If the latter is the case, it cannot, in my judgment, be right that the defendants should be purportedly served ex hypothesi improperly and then such improper service used by the plaintiffs as a means of obtaining, by orders of the court, evidence of third parties in the hope of improving the plaintiffs' case as to the first defendant's domicile so as to justify the service on the defendants retrospectively. It follows in my judgment that the orders sought by the plaintiffs would represent an inappropriate exercise of the court's discretion under Ord 38, r 13 and I dismiss the application.'* (My emphasis.)

This passage was criticised by the plaintiffs as suggesting that they should have had sufficient evidence in their possession at the relevant date to justify the indorsement on the writ or the service of the writ as the case might be, and that after-acquired evidence should not be entertained. But the defendants' submissions have never gone to this length, and I do not think that the judge intended this. The distinction which he had in mind was not between evidence which the plaintiffs had assembled at the relevant date and evidence which they obtained later, but between evidence which they were able to obtain by their own efforts and evidence which they needed the assistance of the court to obtain. In saying that 'it is for the plaintiffs to adduce evidence to prove proper service on the relevant defendants' the judge was not saying that they had to do it at the date of service, but that they had to do it without the aid of the court's process. The plaintiffs acknowledged that it would be an abuse of process to initiate proceedings without having reasonable grounds for believing that the court had jurisdiction, and that in such a case the court might properly refuse its assistance to enable them to justify the proceedings ex post facto. But that is not this case.

The judge did not treat the matter as one of discretion. He treated it as one of principle. He refused the application on the ground that, where the issue is one of jurisdiction, the court will not lend its process to a plaintiff to enable him to establish jurisdiction. This is the 'bootstrap' argument. The court cannot assume that it has jurisdiction, for that is the very question to be decided. Yet unless the court assumes that it has jurisdiction, how can it make the orders sought?

With all respect to the judge, I think that this reasoning confuses two different jurisdictions. One is the jurisdiction to try the issues in the action. That is disputed. It derives from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968, TS 10 (1988); Cmnd 7395) and the Civil Jurisdiction and Judgments Act 1982. It depends on whether the first defendant was domiciled in the United Kingdom at the relevant date. The other is the jurisdiction to decide whether it has jurisdiction to try the issues in the action. This is an inherent jurisdiction. It does not derive from the Brussels Convention or the 1982 Act. Its existence is beyond dispute.

The High Court is a court of unlimited jurisdiction. This does not mean that its jurisdiction is universal and unrestricted. It means that, unlike inferior courts

and tribunals, it has jurisdiction to decide the existence and limits of its own jurisdiction. It has an indisputable jurisdiction (of the second kind) to decide whether or not it has jurisdiction (of the first kind) to entertain substantive proceedings. If it decides that it has no jurisdiction (of the first kind) to entertain them, its decision is nevertheless one made within its jurisdiction (of the second kind). If it makes a mistake and erroneously assumes a jurisdiction (of the first kind) to entertain substantive proceedings which it does not truly possess, it makes an error of fact or law, but it is not one which goes to its own jurisdiction (of the second kind). It is inherent in the rule of law itself that somewhere in any judicial system there must be a court which possesses jurisdiction to determine the limits of its own jurisdiction.

In my judgment, therefore, the process of the court is not confined to the case where jurisdiction (of the first kind) has already been established. By acceding to the plaintiffs' application to order the production of documents at the hearing of the defendants' application to set aside service of the writ the court will not be making any assumption that it has jurisdiction to try the action. It will not be exercising that disputed jurisdiction, but a very different jurisdiction, that is to say its undoubted jurisdiction to determine its own jurisdiction by hearing and deciding the defendants' application.

It follows that the judge's reasons for dismissing the plaintiffs' application cannot be supported. The defendants attempted to support his decision on other grounds. They submitted that the documents were not necessary for the fair disposal of their own application to set aside service of the writ, since the plaintiffs could rely on the evidence already before the court. But it is not necessary for a party seeking orders for the production of documents to concede that without them his case must fail. It is sufficient that it may do so. Seeing that the defendants are strenuously contending that it will, it hardly lies in their mouths to claim that the documents are not "necessary" on this ground.

Counsel for the fourth defendant relied on the terms of RSC Ord 38, r 13(2), which provides that no person shall be compelled to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter. He pointed out that the first defendant's domicile will not be in issue at the trial of the action. Accordingly, he submitted, the third parties could not be compelled to produce the documents in question at trial since they would not be relevant to any issue at trial.

I do not accept this. The history and object of the predecessor of Ord 39, r 13 were explained by Lindley LJ in *Elder v Carter, ex p Slide and Spur Gold Mining Co* (1890) 25 QBD 194. Its object was to remove the difficulties which existed at common law in compelling production of documents except at the trial of an action. It did so by conferring a similar power to order documents to be produced for the purpose of interlocutory proceedings in an action. It was not intended to give parties rights to the production of documents which they did not possess before, but merely to advance the time at which they could require their production. It follows, in my view, that the relevance of the documents must be tested by reference to the issues in the proceedings for which they are required. Given the history and purpose of the rule, the concluding words of Ord 38, r 13(2) must in my judgment be read as meaning 'which he could not be compelled to produce if the proceeding were the trial of the cause or matter.'

Accordingly, I am of opinion that the appeal should be allowed and the judge's decision should be set aside. We do not, however, consider that it is appropriate for us to exercise the discretion ourselves. Accordingly, we directed that the plaintiffs' application be restored for hearing by the judge. He will have to

consider the competing considerations which the parties will urge upon him, weigh up the consequences of making the orders sought as against the possible consequences of refusing them, and decide where the greater risk of injustice lies. He will also no doubt bear in mind the statement which Hirst J made in *Rome v Punjab National Bank* [1989] 2 All ER 136 at 141–142:

> '... the court will only exercise its powers under this heading very rarely, and will require the clearest possible demonstration from the party seeking discovery that it is necessary for the fair disposal of the application ... It would be most undesirable, and productive of extra delay and unnecessary expense, if applications for discovery were to become a common feature [of applications to set aside leave granted under Ord 11, r 1].'

Interlocutory hearings to establish the right to bring an action should not be turned into mini-trials of the action itself. There is a particular danger of this where reliance is placed on certain of the paragraphs of Ord 11, r 1. There is perhaps less danger in a case of the present kind. Even so, the court must be conscious of the need to avoid a major trial at the early stage, though not at the risk of doing injustice.

The judge may also wish to consider the extent to which this can be regarded as an exceptional case. I do not refer to the scale and complexity of the plaintiffs' claim, nor to the serious risk of the disappearance of the funds which are the subject matter of the proceedings if the action is dismissed before protective measures are put in place elsewhere, though such matters will be relevant for the judge to consider. I refer rather to the fact that the nature of the dealings in which the defendants are alleged to have participated and the need to protect the plaintiffs (which Rimer J accepted) made it necessary to delay service of the writ for an unusually long period during which there may have been changes in the circumstances on which the court's jurisdiction depends. This is highly unusual. It is also, however, the factor which has given rise to the present difficulties in which the plaintiffs find themselves.

I cannot part with this case without expressing my personal disquiet at a rule, which as I understand it does not derive from the convention or from any decision of the European Court of Justice but is said to be a rule of our own domestic law, which makes the jurisdiction of the court depend on circumstances prevailing long after what, on any realistic appraisal of the position, was the commencement of the proceedings. In my experience, and as the present case demonstrates, such a rule is capable of working serious injustice. It may need to be reconsidered at the highest level. In the meantime, it is at least arguably incumbent on the court not to compound the possible injustice by withholding the assistance which it can properly give to parties seeking to establish its jurisdiction at the relevant date.

WARD LJ. I agree.

NOURSE LJ. I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Fitzpatrick v Sterling Housing Association Ltd

COURT OF APPEAL, CIVIL DIVISION
WAITE, ROCH AND WARD LJJ
12 JUNE, 23 JULY 1997

Rent restriction – Death of tenant – Homosexual partner – Family of original tenant – Claim by tenant's partner of same sex to remain in possession – Whether partner living with tenant as husband or wife – Whether partner a member of tenant's family – Rent Act 1977, Sch 1, paras 2(2), 3(1).

In 1976 F moved into a flat of which T was the statutory tenant and F and T maintained from that time a close, loving and faithful homosexual relationship. In 1986 T suffered head injuries and a stroke, leaving him a tetraplegic and F nursed him until his death in 1994. F applied to take over the statutory tenancy, but the landlords, who wished to rehouse him in smaller accommodation, refused to agree. F applied to the county court for a determination that he was entitled to succeed to the tenancy. The judge dismissed the application, holding that F was outside the definitions set out in paras 2(2)[a] and 3(1)[b] of Sch 1 to the Rent Act 1977 of a person entitled to succeed on the death of a statutory tenant. F appealed to the Court of Appeal.

Held – (Ward LJ dissenting) For the purposes of paras 2(2) and 3(1) of Sch 1 to the 1977 Act, the phrase 'living with the original tenant as his or her wife or husband' referred to a heterosexual couple only and the concept of the 'family' meant an entity which was bound together by ties of kinship, including adoptive status or marriage. It followed that the surviving partner in a stable and permanent homosexual relationship could not claim succession rights under the 1977 Act in respect of premises of which the deceased partner was a protected tenant, since such a partner neither lived with the deceased 'as his ... wife or husband' within para 2(2), nor was he 'a member of the original tenant's family' within the meaning of para 3(1). Accordingly, the appeal would be dismissed (see p 996 *j* to p 997 *a*, p 1003 *a j* to p 1004 *b h j*, p 1005 *a*, p 1006 *j*, p 1007 *j*, p 1008 *a* to *d h j* and p 1009 *f*, post).

Dyson Holdings Ltd v Fox [1975] 3 All ER 1030 and *Harrogate BC v Simpson* (1984) 17 HLR 205 followed.

Notes

For meaning of 'member of the tenant's family', see 27(1) *Halsbury's Laws* (4th edn reissue) para 692, and for cases on the subject, see 31(3) *Digest* (2nd reissue) 437–443, *11712–11729*.

For the Rent Act 1977, Sch 1, paras 2, 3, see 23 *Halsbury's Statutes* (4th edn) (1989 reissue) 637, 638.

Cases referred to in judgments

A-G of Canada v Mossop (1993) 100 DLR (4th) 658, Can SC.
Barclays Bank plc v O'Brien [1993] 4 All ER 417, [1994] 1 AC 180, [1993] 3 WLR 786, HL.

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a Paragraph 2(2) is set out at p 999 *j*, post
b Paragraph 3(1) is set out at p 1000 *b*, post

Braschi v Stahl Associates Co (1989) 544 NYS 2d 784, NY Ct of Apps.
Brock v Wollams [1949] 1 All ER 715, [1949] 2 KB 388, CA.
Carega Properties SA (formerly Joram Developments Ltd) v Sharratt [1979] 2 All ER 1084, [1979] 1 WLR 928, HL.
Crake v Supplementary Benefits Commission, Butterworth v Supplementary Benefits Commission [1982] 1 All ER 498.
Cumming v Danson [1942] 2 All ER 653, CA.
Curl v Angelo [1948] 2 All ER 189, CA.
Dyson Holdings Ltd v Fox [1975] 3 All ER 1030, [1976] QB 503, [1975] 3 WLR 744, CA.
Egan v Canada (A-G of Quebec, intervener) (1995) 124 DLR (4th) 609, Can SC.
Gammans v Ekins [1950] 2 All ER 140, [1950] 2 KB 328, CA.
Harrogate BC v Simpson (1984) 17 HLR 205, CA.
Helby v Rafferty [1978] 3 All ER 1016, [1979] 1 WLR 13, CA.
Kerkhoven v Netherlands App No 15666/89, E Com HR.
Lloyd v Sadler [1978] 2 All ER 529, [1978] QB 774, [1978] 2 WLR 721, CA.
M v H (1996) 132 DLR (4th) 538, Ont HC.
R v Hammersmith and Fulham London BC, ex p M (1997) Times, 19 February, [1997] CA Transcript 267.
R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
R v Secretary of State for Defence, ex p Perkins [1997] IRLR 297.
R v South West London Appeal Tribunal, ex p Barnett (11 April 1973, unreported), DC.
Ross v Collins [1964] 1 All ER 861, [1964] 1 WLR 425, CA.
Sefton Holdings Ltd v Cairns (1987) 20 HLR 124, CA.
T, Petitioner 1997 SLT 724, Ct of Sess.
Toonen v Australia Communication [1994] 1-3 IHRR 97, HR Committee.
W (a minor) (adoption: homosexual adopter), Re [1997] 3 All ER 620.
Watson v Lucas [1980] 3 All ER 647, [1980] 1 WLR 1493, CA.
X v UK (1983) 32 D & R 220, E Com HR.
X v UK (1996) 20 EHRR CD6, E Com HR.

Case also cited or referred to in skeleton arguments
Camden (Marquis of) v IRC [1914] 1 KB 641, CA.

Appeal
By notice dated 14 May 1996 Martin Fitzpatrick appealed from the order of Judge Colin Smith QC on 19 April 1996 in the West London County Court whereby he dismissed Mr Fitzpatrick's application for a declaration that he had succeeded to the tenancy of a flat at 75A Ravenscourt Road, London W6, of which the respondents, Sterling Housing Association Ltd, were the landlords and to which the provisions of the Rent Act 1977 applied. The facts are set out in the judgment of Waite LJ.

Jan Luba (instructed by *John Ford*) for Mr Fitzpatrick.
Vivian Chapman (instructed by *Belvederes*) for the landlords.

Cur adv vult

23 July 1997. The following judgments were delivered.

WAITE LJ. The short but difficult question raised by this appeal is whether the surviving partner in a stable and permanent homosexual relationship can claim succession rights under the Rent Acts in respect of premises of which the deceased partner was a protected tenant. The facts are not in dispute. Mr John Thompson became the statutory tenant of a flat, No 75 Ravenscourt Road, London W6 (the flat), in 1972. The appellant, Mr Fitzpatrick, moved in to live with him there in 1976, and the two of them maintained from then onwards a close, loving and faithful homosexual relationship. Early in 1986 Mr Thompson suffered, as a result of a fall, head injuries which required surgery and then a stroke which left him a tetraplegic. From the summer of that year Mr Fitzpatrick nursed him at home, and dedicated himself to providing, with love and devotion, the constant care which he required. In 1994 Mr Thompson died.

The landlords are a charity providing families and individuals with accommodation at affordable rents. It is common ground that they do not qualify as a housing action trust within the terms of the Housing Act 1985 (as now amended), and that they accordingly fall to be treated as private landlords subject to the Rent Acts. Mr Fitzpatrick applied to take over the tenancy of the flat (which comprises four rooms plus kitchen and bathroom) but the landlords, though willing to rehouse him in smaller accommodation in another of their properties, were not prepared to agree.

Mr Fitzpatrick applied to the West London County Court for a determination that he was entitled to succeed to the tenancy of the flat. His application was given a careful and sympathetic hearing in the Central London Trials Centre by Judge Colin Smith QC, who on 19 April 1996 dismissed it with obvious reluctance, holding that he was constrained by law to treat him as being outside the statutory definitions of a person entitled to succeed on the death of a statutory tenant. From that decision Mr Fitzpatrick now appeals to this court.

The issues confronting the judge cannot be appreciated without a recital—unavoidably at some length I am afraid—of the statute and case law which has developed around this topic. It will be necessary to include in that survey the secure tenancy regime for council house tenants as well as the Rent Act regime in the private sector because the two regimes have similarities in regard to succession rights which are relevant to the arguments raised on this appeal.

THE LAW

A degree of transmission on death was a feature of the Rent Acts since their inception in 1920. At first it was achieved by extending the definition of 'the tenant' to include a widow or qualifying member of his family. That was replaced by a legislative scheme (maintained to this day) of setting out the rights of succession in a schedule specifying in the first paragraph the primary successor and in the second a default category of qualifying successor. Originally the primary successor was the deceased tenant's widow. From 1968 the secondary or default category was defined as a person who was a member of the original tenant's family residing with him for six months immediately before his death. A provision was added in the 1977 Act that if there was more than one such person the right of succession should be determined in default of agreement by the court. The Housing Act 1980 substituted 'surviving spouse' for 'widow' in the primary class, which was thus extended to widowers.

When security of tenure was afforded to council tenants by the Housing Act 1980, a scheme was set up which bore similarities to the Rent Act regime. But

there were differences. Section 30 (now s 87 of the Housing Act 1985) provided a similarly expressed primary right of succession for the deceased tenant's spouse and secondary right for 'another member of the tenant's family' living with him for 12 months before his death. In this instance, however, the term 'family' was specifically defined. Section 50 (now s 113(1) of the 1985 Act) provided:

> 'A person is a member of another's family ... if—(a) he is the spouse of that person, or he and that person live together as husband and wife, or (b) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece.'

A further subsection applied the categories in (b) to cases where the relevant relationship was by marriage, step relationship, or half-blood.

It is to be noted that although advantage was taken by Parliament when enacting the 1980 Act of the opportunity to amend the Rent Acts by substituting spouse for widow in the primary class of successor, and thus harmonise the two succession systems in that respect, it was not apparently thought necessary or desirable to introduce into the Rent Act regime two significant features of the secure tenancy regime, namely the specific definition of 'family' and the specific enlargement of the definition of 'spouse' to include persons 'living together as husband and wife'. Those were left to be dealt with in the Rent Act regime, as they had been previously, by judicial interpretation.

It will be convenient at this point to pause in the narrative of statutory development and turn to the authorities embodying that interpretation. Their full significance cannot be appreciated without some reference to the social changes that were occurring during the period with which they were concerned—that is to say the mid-60s to the mid-80s—regarding the incidence of, and social attitudes towards, cohabitation outside marriage in heterosexual, and also in gay and lesbian, relationships.

Unmarried cohabitation between heterosexuals developed strikingly in scale to the point that today (according to figures helpfully supplied by the Family Policies Study Centre) 25% of all women aged between 18 and 49 are unmarried cohabitants, and in the age group most likely to cohabit (women in their late 20s and men in their late 30s) over one third of the population now cohabits. As it became more common, cohabitation lost the secretiveness with which it had sometimes been concealed by those who felt the need to give the appearances of marriage (through change of surname by deed poll for example) to their relationship. As it became more open, so attitudes toward it became less judgmental. That included the attitude of the courts, where notwithstanding that the encouragement of marriage as an institution remains a well-established head of public policy, the respect due to the sincerity of commitment involved in many such relationships is reflected in judicial terminology—terms like 'partner' now being more generally used than the once preferred references to 'common law spouse', 'mistress' or even (as will shortly be illustrated) 'living in sin'. A similar respect is reflected in The Law Commission's current consideration of steps to devise for unmarried partners procedures to ease the potential for financial dispute when such relationships break down.

In the same way, though on a lesser scale, the increasing recognition by society of the respect due to those who share orientation towards their own sex has led to a greater openness in, and the removal of public censoriousness towards, gay and lesbian cohabitation. One indicator of this has been the willingness of the court, in appropriate circumstances, to regard a partner in a gay or lesbian

relationship as a suitable person to adopt a child (see (in Scotland) the opinion of the Lord President (Hope) in *T, Petitioner* 1997 SLT 724 and the judgment of Singer J in *Re W (a minor) (adoption: homosexual adopter)* [1997] 3 All ER 620). The degree of interdependence, marital in character, involved in gay or lesbian relationships has also been acknowledged in the field of equity (see *Barclays Bank plc v O'Brien* [1993] 4 All ER 417 at 431, [1994] 1 AC 180 at 198 per Lord Browne-Wilkinson).

Turning (against that changing social background) to the case law, I begin with *Brock v Wollams* [1949] 1 All ER 715, [1949] 2 KB 388. It concerned a statutory tenant survived by a child who had been informally, though not legally, adopted. The child was held by this court to have been included within the definition of the tenant's family for Rent Act purposes. Cohen LJ expressed it in these terms ([1949] 1 All ER 715 at 718, [1949] 2 KB 388 at 395):

> '... the question the ... county court judge should have asked himself was: Would an ordinary man, addressing his mind to the question whether [the daughter] was a member of the family or not, have answered "Yes" or "No"? To that question I think there is only one possible answer, and that is "Yes".'

Gammans v Ekins [1950] 2 All ER 140, [1950] 2 KB 328 concerned a heterosexual relationship between an unmarried couple who had adopted all the appearances of marriage and were thought of in their neighbourhood as being man and wife. The Court of Appeal rejected the claim of the survivor to be treated as a member of the deceased tenant's 'family'. Asquith LJ held that the tie of marriage was essential to family membership, commenting that if (as to which there had been no finding below) the relationship was a sexual one it would be anomalous to allow the status of irremovability under the Rent Acts to be acquired 'by living or having lived in sin', he added ([1950] 2 All ER 140 at 142, [1950] 2 KB 328 at 331):

> 'To say of two people masquerading as these two were, as husband and wife—there being no children to complicate the picture—that they were members of the same family, seems to me an abuse of the English language ...'

In *Ross v Collins* [1964] 1 All ER 861, [1964] 1 WLR 425 a subtenant of one room forming part of a protected tenancy who became the devoted carer of the deceased tenant in old age and illness failed to secure recognition by the court of 'family membership'. Russell LJ said ([1964] 1 All ER 861 at 866, [1964] 1 WLR 425 at 432):

> 'Granted that "family" is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage, or where the link is through adoption of a minor, de jure or de facto, or where the link is "step-" or where the link is "in-law" or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association

as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man.' a

A heterosexual unmarried relationship of long standing required consideration by this court in *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503. A spinster lived with the statutory tenant as his wife for 21 years before his death. She took his name, and in every respect they were man and wife save that they had not gone through the marriage ceremony. The court was sympathetic to her b claim to be regarded as part of the deceased tenant's family, but the decision in *Gammans v Ekins* [1950] 2 All ER 140, [1950] 2 KB 328 stood in the way. Lord Denning MR was in favour of dealing with it head-on and holding that it could not—or in the light of later authority could no longer—be supported. The preference of the majority of the court was to distinguish it by treating it as c correct according to the social conditions of its time, but holding that in current social conditions 'family' had acquired a wider connotation. James LJ said ([1975] 3 All ER 1030 at 1035, [1976] QB 503 at 511):

'Between 1950 and 1975 there have been many changes in the law effected by statute and decisions of the courts. Many changes have their foundation d in the changed needs and views of society. Such changes have occurred in the field of family law and equitable interests in property. The popular meaning given to the word "family" is not fixed once and for all time. I have no doubt that with the passage of years it has changed.'

There are observations to like effect in the judgment of Bridge LJ. It is important, e however, to note of that case that on the actual ratio of the decision upon its facts (as opposed to the grounds for distinguishing earlier authority) there was unanimity between the judges. That ratio was expressed by Lord Denning MR in this sentence ([1975] 3 All ER 1030 at 1033, [1976] QB 503 at 509):

'... we should hold that a couple who live together as man and wife for 20 f years are members of the same family, whether they have children or not.'

Although the rationale of the *Dyson* case was doubted by another division of this court in *Helby v Rafferty* [1978] 3 All ER 1016, [1979] 1 WLR 13, it was held to be binding. On the particular facts of that case (an unmarried couple who made no attempt at pretence of marriage, because the woman wanted to retain her g independence, and who even attempted at times to conceal the depth of their attachment) it was held that the trial judge had been justified in declining to regard the couple as a 'family'.

When the unusual case of a widow of 75 sharing her protected flat with a young man of 25 with whom she maintained a close but platonic friendship came h before the House of Lords in *Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084, [1979] 1 WLR 928, the facts were regarded as too exceptional to justify treating the case as an opportunity for a consideration by the House of the rightness of the decision in *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503. The judge had answered 'the Cohen question' (as it had by then come to be called) with a Yes, but the Court of Appeal answered it with j a No, and the House of Lords agreed. The points of principle that emerge from the case are Viscount Dilhorne's statement ([1979] 2 All ER 1084 at 1087, [1979] 1 WLR 928 at 932) that the meaning to be given to the phrase 'a member of the original tenant's family' is a question of law, that 'family' is a word whose content so varies with its context that it is for the judge to construe the statute and for him to state his conclusion as to the meaning (in its ordinary natural sense) of the

word in the particular context, and that 'family' must be read as meaning something more than 'household'.

In *Watson v Lucas* [1980] 3 All ER 647, [1980] 1 WLR 1493 this court was concerned with a heterosexual relationship between the tenant and a married man who never divorced his wife, both parties continuing to use their true names and making no attempt to pretend married status. The *Dyson* case, though once more criticised, was again held to be binding, and the majority (Oliver LJ, dissenting) held that the trial judge had been wrong to regard the man's continuing married status and the use by both parties of their original surnames as negativing the 'family' status of their relationship. Stephenson LJ described the ratio of *Dyson* in these terms ([1980] 3 All ER 647 at 652, [1980] 1 WLR 1493 at 1499–1450):

> '... I understand the ratio of the majority decision as holding that a union between a man and a woman, which in all the circumstances, known and unknown to the ordinary man, looks permanent and stable to him, creates a family unit and both parties are members of it, whether or not it consists of more than those two.'

He later added ([1980] 3 All ER 647 at 653, [1980] 1 WLR 1493 at 1501):

> 'The ordinary man has to consider whether a man or a woman is a member of a family in the light of the facts, and whatever may have been held before [*Dyson*] I do not think a judge, putting himself in the place of the ordinary man, can consider an association which has every outward appearance of marriage, except the false pretence of being married, as not constituting a family ... The time has gone by when the courts can hold such a union not to be "familial" simply because the parties to it do not pretend to be married in due form of law.'

Sir David Cairns held that the case could not sensibly be differentiated from the *Dyson* case, and continued ([1980] 3 All ER 647 at 658, [1980] 1 WLR 1493 at 1507):

> 'It is the relations between the man and the woman that are relevant rather than the appearance that they present to the public.'

Sefton Holdings Ltd v Cairns (1987) 20 HLR 124 concerned a woman statutory tenant whose parents had taken in a 23-year-old orphan girl (the claimant) during the last war and ever thereafter treated her as a daughter. When the parents died, the tenant and the claimant remained in the house, where they regarded each other as sisters. After the death of the tenant many years later, the claimant obtained a holding from the judge that she was a member of the tenant's family. That was reversed on appeal. The case was held to be analogous to *Ross v Collins* [1964] 1 All ER 861, [1964] 1 WLR 425 from which the passage already quoted in the judgment of Russell LJ was cited with approval by Lloyd LJ, who said that it covered the facts of that case. He later added ((1987) 20 HLR 124 at 127–128):

> '... there is a distinction between *being* a member of the family and living *as* a member of the family. There is no doubt that the defendant lived as a member of the family, and that may be why the judge decided this case in her favour. But the question we have to ask ourselves is not whether she lived as a member of the family, but whether she was a member of the family. I am clear that she was not, and that the man in the street would take the same view.' (Lloyd LJ's emphasis.)

That completes the authorities decided down to 1987 in the Rent Act jurisdiction. It will have been noted that they all concern claims to familial status for relationships that were either platonic or heterosexual. There is no decision, in that area of the law, as to the right of a partner in a gay or lesbian relationship to be accorded the status of member of the other partner's 'family' for succession purposes under the Rent Acts.

Such a question did, however arise during that period in regard to the right of such a partner to succeed to a secure tenancy of a local authority letting. The case was *Harrogate BC v Simpson* (1984) 17 HLR 205. The claimant (defending proceedings for possession by the local authority) had lived with the deceased secure tenant in a lesbian relationship for some years and was so living at the date of her death. It will be remembered that in the secure tenancy regime membership of the 'family' is specifically defined. It was accepted that the claimant could not bring herself within any other head of that definition and that she could succeed (if at all) only under the head, which reads (s 50(3) of the 1980 Act): 'A person is a member of another's family ... if they live together as husband and wife.' Watkins LJ (at 209) recited the argument of the claimant's counsel as follows:

> 'Mr. Allan suggests that the manifestations of the living together of husband and wife following a marriage ceremony are easily recognisable and are for the most part similar to a state where two women live together in a lesbian relationship. He says that in both there may be mutual love, monogamy, some degree of public acknowledgement of their condition of living, faithfulness by one to the other, a permanence of relationship, sexual relations of some kind, a shared surname, a joint household and, in the case of man and woman, of course, children. Save for the bearing of children, he maintains that all or nearly all of those manifestations can appear from the living together of two women. So, if the appearance of things is the test, there is no earthly reason why the Act is not complied with when two women live together in the state in which the late Mrs. Rodrigo and the defendant were living. They should be held to be living as husband and wife. We are told that, not only did they so regard and describe themselves, but they behaved in some ways (outwardly at any rate) as though one was the husband and the other was the wife. Mrs. Rodrigo was the masculine partner apparently and wore men's clothing, and the defendant was the female counterpart. Mr. Allan places reliance upon the word "as" which is contained in the final words of section 50(3). By the appearance of that word in its context it is to be understood that Parliament was indicating, not only that the provisions were intended to apply to persons who were married in the formal sense, but also to unions which gave the appearance of two people living together in a kind of matrimonial state. Much has happened, he further maintains, over the last decade or more to change people's opinions about what before that time were considered to be repugnant sexual relationships. Nowadays nobody blanches at the fact that two women who are lesbians live together, or two men who are homosexuals. It is not a crime for men in most circumstances to behave in that way, and, so far as lesbians are concerned, a crime in no circumstance.'

He then referred to the *Dyson* case, from which he quoted, and stated his conclusion in these terms (at 210):

'Mrs. Davies, who appears for the plaintiffs, contends that, if Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognised state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so. I am bound to say that I entirely agree with that. I am also firmly of the view that it would be surprising in the extreme to learn that public opinion is such today that it would recognise a homosexual union as being akin to a state of living as husband and wife. The ordinary man and woman, neither in 1975 [a reference to the date of *Dyson*] nor in 1984, would in my opinion not think even remotely of there being a true resemblance between those two very different states of affairs.'

Ewbank J (the other member of the court) said (at 210):

'I agree that the expression "living together as husband and wife" ... is not apt to include a homosexual relationship. The essential characteristic of living together as husband and wife, in my judgment, is that there should be a man and a woman ...'

I must now return to the narrative of statutory development. The Housing Act 1988 (s 39(2) and Sch 4, para 2) introduced into Sch 1, para 2 to the Rent Act 1977 a provision that 'a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant'. To that there was joined a provision (catering apparently for triangular relationships) that if there should be more than one person claiming 'spouse status' by virtue of that insertion, such one of them as should be selected by agreement or by the court in default of agreement should constitute the surviving 'spouse' for that purpose.

Another alteration (by s 39(2) of and Sch 4, para 3 to the 1988 Act) was a change in the nature of the tenancy taken by a member of the deceased tenant's family (as opposed to a spouse in the true or extended sense). This was to be an assured tenancy in place of a statutory tenancy.

No other relevant change was made to the Schedule. Specifically (and, it is claimed, significantly) no attempt was made to alter the generality of the reference to the deceased tenant's 'family' by importing into it a specific definition on the lines already provided in the Housing Acts for the secure tenancy succession regime.

As a result of these developments, Sch 1 to the 1977 Act now reads (so far as relevant):

'1. Paragraph 2 ... below shall have effect, subject to section 2(3) of this Act, for the purpose of determining who is the statutory tenant of a dwelling-house by succession after the death of the person (in this Part of this Schedule referred to as "the original tenant") who, immediately before his death, was a protected tenant of the dwelling-house or the statutory tenant of it by virtue of his previous protected tenancy.

2.—(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.

(3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfils the conditions

in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.

3.—(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death, then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession ...'

SUMMARY OF THE STATUTE AND CASE LAW

A. The secure tenancy regime

Succession to a secure tenancy can only be obtained by a person who in relation to the deceased tenant was: (a) a spouse, (b) someone living with him or her as husband and wife, (c) a member of his or her family who resided with the tenant for 12 months before the date of death—the term 'family' being specifically defined to include only certain relatives by blood or marriage or step-connection.

A lesbian or gay partner cannot qualify under (a) or (c) because of the absence of the marriage tie in the one case and the required kinship in the other. A heterosexual partner can qualify under (b) but a gay or lesbian partner cannot do so because of the ruling in the *Harrogate* case (1984) 17 HLR 205. To that extent, the secure tenancy regime discriminates against gay and lesbian partners in favour of heterosexual partners of deceased tenants by conferring succession rights on the latter but not the former.

B. The Rent Acts regime

Succession to a statutory or protected tenancy can only be obtained by a person who was in relation to the deceased tenant: (a) a spouse, (b) someone living with him or her as wife or husband, (c) a member of his or her family residing with him or her in the dwelling-house at the time of and for a period of two years before the death. 'Member of the family' is in this instance undefined. Case law has held it to be a term of wide import capable of being interpreted flexibly by the courts according to the social perceptions of the time (*Dyson* [1975] 3 All ER 1030, [1976] QB 503) as reflected through the eyes of the ordinary man or woman (*Brock v Wollams*, the *Carega* case and *Sefton Holdings Ltd v Cairns* (1987) 20 HLR 124), but the instances in which, following that interpretation, it has been applied outside the strict family ties of marriage or kinship are limited to a child informally adopted (*Brock v Wollams*) and persons of opposite sex living together as man and wife (*Dyson* and *Watson v Lucas* [1980] 3 All ER 647, [1980] 1 WLR 1493). There has (until this present case) been no decision on the question whether a surviving lesbian or gay partner of a deceased statutory tenant qualifies for the status of 'member of the family'.

OVERSEAS AUTHORITY

The New York City Rent and Eviction Regulations contain a provision that upon the death of a rent-control tenant the landlord may not dispossess: 'either the surviving spouse of the deceased or some other member of the deceased' tenant's family who has been living with the tenant'.

In *Braschi v Stahl Associates Co* (1989) 544 NYS 2d 784 the New York Supreme Court held that a surviving male partner in a gay relationship with the deceased tenant was eligible to claim protection under the regulations. The Appellate Division reversed the decision, holding that protection applied only to 'family members within traditional, legally recognised familial relationships'. The Court of Appeals of New York allowed an appeal from that holding, declaring, by a majority of four to two, that 'the Legislature intended to extend protection to those who reside in households having all the normal familial characteristics. The [appellant] should therefore be allowed the opportunity to prove that he and [the deceased tenant] had such a household'. In remitting the case for a determination on that issue, the court (at 790, per Justice Titone) said:

> '... it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis control. Appellant's situation provides an example of how the rule should be applied.'

THE APPROACH OF THE JUDGE IN THIS CASE

It was common ground that the judge was required, when construing the phrase 'a member of the original tenant's family', to apply the general interpretive principle of *Dyson*—ie to construe the term 'family' in its popular modern meaning, taking into account changed social attitudes and the changed needs and views of society. He held that in adopting that approach he was bound to look for a familial link, following the approach of Russell LJ in *Ross v Collins* [1964] 1 All ER 861, [1964] 1 WLR 425 which he held to be of general application and not limited to the context of a non-sexual relationship. Applying the actual ratio of *Dyson* (as confirmed in *Watson v Lucas* [1980] 3 All ER 647, [1980] 1 WLR 1493), he held that the relevant familial link for this purpose was that between husband and wife—which means (when applied to the context of an unmarried relationship) that the relationship must give to the ordinary man the appearance of a couple living as man and wife. After saying that in this respect the *Braschi* decision appeared to show a difference of approach between the law of New York and that of England, he stated his conclusion in these terms:

> 'I fully accept that a cohabiting relationship between members of the same sex of a permanent and stable kind would properly be regarded nowadays, whether in 1996 or 1994, by the man in the street as just as lasting and socially valuable a relationship as that between husband and wife. But, in my judgment, for the reasons I have attempted to give, this does not entitle me, even in construing the word 'family' in a popular sense as required by *Dyson*, to find that such a relationship falls within such definition. In my judgment, such a decision falls to be made by Parliament and not by the courts. It will be for others to decide whether Parliament should look at this question, but perhaps, in the light of the Court of Appeal's observations in [*R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517], it might be appropriate for it to do so.'

THE ARGUMENT IN THIS APPEAL

This case has been ably argued, and counsel have done full justice to the powerful considerations on either side.

A. Evidence of social attitudes

At the hearing before the judge, Mr Luba, counsel for Mr Fitzpatrick, sought leave to introduce in evidence a substantial body of material in the form of reports and informed comment on recent developments in the attitude of society towards lesbian and gay relationships. The judge ruled it inadmissible, holding that the question was one of law involving statutory interpretation on which it would be impermissible to receive extraneous evidence of social perception. He was very far, however, from saying that judicial notice could not be taken of changing social attitudes. On the contrary he referred to, and quoted from, the judgments of Bingham MR and Henry LJ in the recent case on employment of homosexuals in the armed services (*R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517) as an example of judicial expression of the major changes in public attitudes towards homosexuality that have taken place in our generation. Mr Luba submits that the judge was wrong to exclude such evidence. Included within it was the evidence of an expert, Dr Dawn Sharp, charting in two reports the changes in public perceptions of homosexuality and concluding that 'public opinion is increasingly favourable towards homosexuality and equal rights for homosexual people'.

Reference to such material might, for instance, have been of the greatest value, so Mr Luba submits, in enabling the judge to determine whether or not changes in public perception had taken place within what at first sight appears to be the very short period between the decision in *Harrogate BC v Simpson* (1984) 17 HLR 205 and today, and if so whether such changes would justify attributing today to such phrases as 'living as man and wife' and 'member of the family' a wider connotation than would have been appropriate 12 years ago. He cites, in support of that, Lord Hope in *T, Petitioner* 1997 SLT 724 at 736:

> 'Where public policy stands on homosexuality is a matter for the court to determine from the material placed before it and then to apply, so far as it may be relevant, to the facts of the case. So the judge may examine such material as the intendment of the Act and decisions and dicta in other cases in order to discover objectively what, if anything, public policy has to say on the issue. In that exercise he is performing a judicial function on behalf of the court. What he must not do is permit his own personal views, or his own private beliefs, to affect his judgment.'

Those words, with which I would respectfully agree, appear to indorse, rather than to deprecate, the decision of the judge in the instant case to rely exclusively on the material already before him, and his own judicial knowledge of changing social attitudes towards homosexuality, without taking account of extraneous evidence as to the views of individual bodies or persons. The judge clearly did not need to be informed as to the marked changes that have taken place in social acceptance of homosexuality, as the passage which I have already cited from his judgment makes plain. I would therefore reject this ground of appeal.

B. 'Living with the original tenant as his or her wife or husband'

Mr Luba reserves the right, should this case go further, to contend that the *Harrogate* case was wrongly decided. He accepts however that it represents a decision in a closely similar context on virtually identical wording. Subject to one or two minor points of possible distinction which he advanced with more diffidence than enthusiasm, he acknowledged that the decision is not only binding on this court but so closely analogous as to be virtually indistinguishable.

In the light of that acknowledgment, which in my view was properly given, it is unnecessary to say more about this possible head of claim. The court is in my view bound, in the present state of the law, to treat that phrase, when used in the 1977 Act as well as in the Housing Act, as applying to a heterosexual relationship only.

C. 'Member of the original tenant's family'

The applicability of this phrase has provided the central issue in the appeal. Can a sexual partner of the same sex be described as a member of his or her family?

Mr Chapman for the landlord charity accepts, as he did before the judge, the interpretative principle of *Dyson*, namely that the court is bound to give to the term 'member of the family' whatever connotation it demands in current popular thought and speech. He submits, however, that the judge was right to regard himself as constrained by authority to hold that when a sexual relationship between strangers in blood is relied on as constituting a family relationship, the attachment must bear the hallmark of the familial nexus represented either by marriage or by unmarried cohabitation of the kind that occurs between husband and wife. For that he relies on the ratio of the decisions in *Dyson* and *Watson v Lucas* [1980] 3 All ER 647, [1980] 1 WLR 1493 and the attributes of a familial relationship approved in *Ross v Collins* [1964] 1 All ER 861, [1964] 1 WLR 425. The requirement that the partners should be living as husband and wife necessarily imports a male and female relationship and precludes its application to relationships between persons of the same sex. Mr Chapman also submitted that the judge's decision has the advantage of harmonising the two regimes of statutory and secure tenancies. He reminded us, finally, that Rent Act legislation, though it fulfils a public interest in the social control of land for the benefit of those least able to afford accommodation, is nevertheless by its nature expropriatary in its interference with rights of ownership of land, and should therefore, he submitted, be construed restrictively by adopting an interpretation of 'family membership' which limits, rather than enlarges, the range of potential successor to a statutory tenant.

Mr Luba urges that, on the contrary, Parliament must be deemed to have known what it was about when the decision was taken, at the time of the 1988 amendments to Sch 1, to leave the expression 'member of ... the family' to be interpreted broadly, in the sense approved in *Dyson*—a decision which formed an important part of the case law in operation when those changes were made. Such an interpretation, in the light of modern social attitudes and conditions, can lead, he submits, to only one result. If unmarried heterosexual partners in a permanent relationship are capable of being held (as they were in *Dyson* and *Watson v Lucas*) to be members of the former tenant's family, what reason can there be in logic or humanity for declining to accord the same status to a partner in a lesbian or gay relationship?

CONCLUSION

If endurance, stability, interdependence and devotion were the sole hallmarks of family membership, there could be no doubt about this case at all. Mr Fitzpatrick and Mr Thompson lived together for a longer period than many marriages endure these days. They were devoted and faithful, giving each other mutual help and support in a life which shared many of the highest qualities to be found in heterosexual attachments, married or unmarried. To adopt an interpretation of the statute that allowed all sexual partners, whether of the same

or opposite sex, to enjoy the privilege of succession to tenancies protected by the Rent Acts would, moreover, be consistent not only with social justice but also with the respect accorded by modern society to those of the same sex who undertake a permanent commitment to a shared life.

The survey which I have undertaken in this judgment shows, however, that the law in England regarding succession to statutory tenancies is firmly rooted in the concept of the family as an entity bound together by ties of kinship (including adoptive status) or marriage. The only relaxation, first by court decision and then by statute, has been a willingness to treat heterosexual cohabitants as if they were husband and wife. That was a restrictive extension, offensive to social justice and tolerance because it excludes lesbians and gays. It is out of tune with modern acceptance of the need to avoid any discrimination on the ground of sexual orientation. In that respect I wholly agree with the comments of Ward LJ. The question is: how is it to be put right?

Discrimination is not, unfortunately, the only arbitrary feature in this area of the law. Endemic within its system is a high risk of harsh or anomalous results—excluding from rights of succession many deserving instances of common households in which the survivor would have a strong moral case to succeed to the tenancy. Friends of long standing (widowers or spinsters for example) who share accommodation in old age without any sexual element in their relationship, but who often give and receive much the same kind of devoted care as we have admired in this case, are (and always have been) excluded. If succession rights are to be extended to couples of the same sex in a sexually based relationship, would it be right to continue to exclude friends? If friends are to be included, how is the stability and permanence of their household to be defined?

These questions have to be judged in the light of a further policy consideration—fairness to home-owners. Every enlargement of the class of potential successors to rent controlled tenancies involves a deeper invasion of rights of house-owners to possession of their own property. That there is a need to reconcile these competing social priorities is something on which it would be easy to find a broad consensus. The difficulty arises when it comes to finding ways and means. At that point opinions are bound to vary, and a political judgment may in the end become necessary. That is what makes the process of reconciliation a task better suited to the legislative function of Parliament than to the interpretative role of the courts.

The law of succession to Rent Act protected tenancies is, in short, arbitrary and discriminatory. No one today would attempt to defend the favour it accords, outside the marriage tie, to heterosexual relationships over same-sex households. Few would support the potential for unfairness involved in a law which gives automatic succession rights to wives (however faithless) and children (however feckless) and at the same time denies any hope of succession to friends, however devoted their loyalty to the joint household. The judge was nevertheless right, in my view, to resist the temptation to change a bad law by giving it a new linguistic twist. He correctly acknowledged that such changes could only be made by Parliament.

They are changes which will certainly need to be made, if Parliament is to fulfil its function of reflecting the spirit of our times—in particular the spirit which recognises the value of all abiding relationships, the heterosexual, the lesbian, the gay—or even those which are not sexually based at all. As the law now stands, however, I feel bound, notwithstanding the respect and sympathy to which Mr Fitzpatrick is entitled, to dismiss the appeal.

ROCH LJ. I agree with the conclusions and reasoning of Waite LJ.

I shall make a few observations, having read the interesting and elegant judgment of Ward LJ to explain why I remain at point Y and do not feel able to progress to point Z.

The case involves the construction of Sch 1 to the Rent Act 1977, as amended by s 76 of the Housing Act 1980 and s 39(2) of and Sch 4 to the Housing Act 1988. The provisions of Sch 1 are rules by which statutory tenants by succession are to be ascertained. Statutory tenants by succession are those who by virtue of s 2(1)(b) of the Act become statutory tenants of dwelling-houses on the death of a person who immediately before his death was either a protected tenant of the dwelling-house or the statutory tenant of it.

The rules are contained in paras 2 and 3(1) of Sch 1. Those paragraphs have been amended twice and now read:

> '2.—(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.
>
> (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.
>
> (3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfils the conditions in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.
>
> 3.—(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death, then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession ...'

Paragraph 3(2) is a deeming provision. A person residing in the house with the original tenant for a period which began six months before the operative date and ended at the time of the original tenant's death is to be taken as having been residing with the original tenant for the period of two years immediately before his death, if the original tenant died within a period of 18 months beginning on the date on which Pt I of the 1988 Act came into force.

It is to be noted that the surviving spouse of the original tenant if within the terms of para 2 becomes the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence, whereas the person who was a member of the original tenant's family who comes within para 3(1) of Sch 1 becomes entitled to an assured tenancy of the dwelling-house by succession.

There are rules for determining who, if anyone, is entitled to an assured tenancy of the dwelling-house by succession after the death of the first successor in paras 5 and 6(1) of Sch 1. Those paragraphs provide:

> '5. If, immediately before his death, the first successor was still a statutory tenant, paragraph 6 ... below shall have effect, for the purpose of determining who is the entitled to an assured tenancy of the dwelling-house by succession after the death of the first successor.

> 6.—(1) Where a person who—(a) was a member of the original tenant's family immediately before that tenant's death, and (b)was a member of the first successor's family immediately before the first successor's death, was residing in the dwelling-house with the first successor at the time of, and for the period of 2 years immediately before, the first successor's death, that person, or, if there is more than one such person, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be entitled to an assured tenancy of the dwelling-house by succession ...'

The interpretation of these provisions has been made more difficult by two decisions of this court. First that in *Brock v Wollams* [1949] 1 All ER 715 at 718, [1949] 2 KB 388 at 395, where the test laid down in the judgment of Cohen LJ was:

> '... the question the ... county court judge should have asked himself was this: Would an ordinary man addressing his mind to the question whether Mrs. Wollams was a member of the family or not have answered "Yes" or "No"?'

That difficulty can be resolved by adopting the view of Lord Diplock of this test, expressed in *Carega Properties SA (formerly Joram Developments Ltd)* v *Sharratt* [1979] 2 All ER 1084 at 1086, [1979] 1 WLR 928 at 931:

> 'This test, which does no more than say "family" where it is used in the Rent Acts is not a term of art but is used in its ordinary popular meaning, has been repeatedly referred to and applied in subsequent cases.'

Viscount Dilhorne said of the test that whilst it had—

> 'not infrequently been posed, the answer to the question is not likely to extract any more than the judge's personal view. It is to the highest degree unlikely that a judge would ever say, "I think the answer is 'Yes' but I think an ordinary man would say 'No'" and if a judge did say that he would in my opinion be wrong. It is for a judge to construe the statute and it is for him to state his conclusion as to the meaning to be given to the word "family" in the context in which it appears, giving it, unless the context otherwise requires its ordinary natural meaning.' (See [1979] 2 All ER 1084 at 1087–1088, [1979] 1 WLR 928 at 932.)

That was a view espoused by Sir David Cairns in *Watson v Lucas* [1980] 3 All ER 647 at 658, [1980] 1 WLR 1493 at 1507, where he said:

> 'I do not find the test of Cohen LJ as helpful in this case as it was in *Brock v Wollams*. To the question "Was Mr Lucas a member of Mrs Sullivan's family" I have no idea what "an ordinary man" would answer. Stephenson LJ would answer Yes and Oliver LJ would answer No.'

The principles of construction that I derive from these cases are that it is for the judge to give the word 'family' its ordinary and natural meaning, remembering the context in which Parliament has used it. In my judgment the words 'spouse' 'wife' and 'husband' are to be construed in the same way.

The second difficulty is that created by the decision of this court in *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503 that the meanings of words such as 'family' in this schedule of this Act change as the ordinary and popular meanings of such words change, that is to say as the popular uses made of such words change. James LJ said ([1975] 3 All ER 1030 at 1035, [1976] QB 503 at 511):

'The popular meaning given to the word "family" is not fixed once and for all time. I have no doubt that with the passage of years it has changed. The cases reveal that it is not restricted to blood relationships and those created by the marriage ceremony. It can include de facto as well as de jure relationships. The popular meaning of "family" in 1975 would, according to the answer of the ordinary man, include the defendant as a member of Mr Wright's family. This is not to say that every mistress should be so regarded. Relationship of a casual or intermittent character and those bearing indications of impermanence would not come within the popular concept of a family unit.'

I would suggest that this statement is in conflict with the role of the judge in construing this statute as seen by Viscount Dilhorne in the passage from his speech cited above. The decision in *Dyson Holdings Ltd v Fox* was considered by Lord Diplock to pose 'a difficult question' which was best left for consideration in a future case. The approach of this court to interpreting this legislation has been followed on many occasions in this court, albeit that some members of the court have followed it reluctantly, expressing grave doubts as to the wisdom of such an approach. On the one hand, such an approach can be said to prolong the life and usefulness of a statutory provision. On the other hand, it must inevitably increase the uncertainties which the imprecision of our language, even in the hands of skilled parliamentary draughtsmen, creates and cause the judiciary to run the risk of being accused of usurping the legislative function. I suspect that changes in the ordinary and natural meaning of words which increase the scope of protection to those occupying premises with a tenant at the time of the tenant's death would be acceptable, whereas changes in the ordinary and natural meaning of words which restricted the scope of such protection would not. The technique of the common law has been to adapt and advance the law progressively whilst being able to claim that the decision was an application of existing principles already disclosed in decided cases. This approach was modified in the 1970s when the House of Lords determined that it might and would depart from a previous decision when it appeared right to do so because a too rigid adherence to precedent might lead to injustice or unduly restrict the proper development of the law. The approach that is normally followed in the House of Lords and has to be followed in this court and other courts is one which ensures that the development of the law is gradual and progressive and to a degree predictable; attributes which may be thought to be beneficial to the administration of justice. The principle stated in *Dyson's* case allows the judge who can detect a change in the ordinary popular meaning of a word used in a statute to escape from the doctrine of precedent. The principle makes it difficult logically to refuse an application by a party to be permitted to call evidence as to changes in the ordinary popular meaning of words; an application which all those members of this court were agreed was rightly refused by the judge in this case.

Having expressed my reservations with the decision in *Dyson Holdings Ltd v Fox*, I must, as have others in this court, follow it.

The trial judge's finding that the appellant was not the 'spouse' of the deceased is not contested in this appeal. It is accepted that the appellant was not the deceased's 'spouse'; that a spouse is a man who is married to a woman or a woman who is married to a man. Mr Luba relied on the deeming provision in para 2(2) of Sch 1 to the 1977 Act. The appellant was, he submitted, a person who was living with the original tenant as his or her wife or husband.

The purpose of the sub-paragraph is, in my view, clear. It is to enable those who live together as if they are husband and wife but who are not legally married to have the same protection as a surviving spouse would have. The amendment reflected the growing numbers of men and women who choose to cohabit without being married. The amendment was necessary, despite the decision in *Dyson Holdings Ltd v Fox,* because Parliament knew that the word 'spouse', having as it does a precise meaning, would not be interpreted by the courts to cover men and women who were unmarried and cohabiting. The use of the words 'wife' and 'husband' makes clear, in my judgment, Parliament's intention that the surviving spouse who is to succeed to the statutory tenancy on the death of the original tenant is to be either the female partner of a male original tenant or the male partner of a female original tenant. The use of the word 'as' accommodated the fact that the survivor would not be the wife or husband of the deceased original tenant. That phrase is not wide enough, in my view in its ordinary and natural meaning to enable same-sex partners to be treated as spouses.

In my judgment, the words that Parliament chose to use when widening the scope of para 2 did not significantly alter the meaning of the word 'spouse'. Parliament did not substitute another word for the word 'spouse' as Parliament would have done had Parliament intended to include in the scope of para 2 same-sex partners. Thus, in my judgment, the appellant cannot become the statutory tenant of this dwelling in succession to the late Mr Thompson.

Is the appellant entitled to an assured tenancy of the dwelling-house by succession as a member of the original tenant's family who was residing with him in the dwelling-house at the time and for a period of two years immediately before the original tenant's death under para 3(1) of Sch 1? Mr Luba has argued very persuasively that the appellant is so entitled.

Here the terms of para 6 of Sch 1 are of some assistance. That paragraph suggests that a person can cease to be a member of the original tenant's family, that is to say a person can have been a member of that family but have ceased to be a member in the period immediately before the death of the tenant. The wording would also suggest that a person can become a member of the original tenant's family during his or her lifetime. That must be correct if the paragraph is to cover those who become married to or adopted by the original tenant.

The family envisaged in Sch 1 is a group that a person can join or a person can leave. If you can leave the family, the family cannot be defined exclusively by ties of consanguinity. On the other hand, the requirement that the member of the family, in order to achieve the protection given either by para 3 or para 6 shall have resided with the tenant in the dwelling house for a period of time immediately before the tenant's death demonstrates that the family is not to be defined by physical proximity, still less by the term 'household'.

The conclusion that I have reached on this ground of this appeal is the same as that reached by Waite LJ, namely: 'The concept of the family is an entity bound together by ties of kinship including adoptive status or marriage.'

In *Ross v Collins* [1964] 1 All ER 861 at 866, [1964] 1 WLR 425 at 432 Russell LJ said:

> 'Granted that "family" is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage or where the link is through adoption of a minor, de jure or de facto, or where the link is

"step-", or where the link is "in-law" or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such, and even if they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man.'

In *Carega Properties SA (formerly Joram Developments Ltd)* v *Sharratt* [1979] 2 All ER 1084 at 1087, [1979] 1 WLR 928 at 931 Lord Diplock adopted that passage from Russell LJ's judgment.

In my judgment that is still the test to be applied: whether there is 'at least a broadly recognisable de facto familial nexus'. In my opinion, the ordinary popular meaning of the phrase 'was a member of the original tenant's family' would not, when considering Mr Thompson's family, include the appellant as a member of it. No doubt Mr Thompson and the appellant would have referred to each other as 'family'. Mr Thompson might well have said, with gratitude, that the appellant was 'all the family I have'. But that is not the same thing as being a member of the original tenant's family for the purpose of being entitled to an assured tenancy of the dwelling-house by succession.

I agree with both Waite and Ward LJJ that the terms of Sch 1 should be reconsidered with a view to bringing cases such as the present within the protection of the Schedule. No doubt Parliament will consider whether the protection should be that afforded by para 2 or that afforded by para 3 of the Schedule. Nevertheless, I am convinced that it is for Parliament to make the necessary changes after debate when considerations which may not have been raised in this appeal and which may not be apparent to this court can be taken into account. For those reasons and the reasons given by Waite LJ, after some hesitation, I would dismiss this appeal.

WARD LJ. The questions raised in this appeal are deceptively easy to pose but I confess to having found them exceptionally difficult to answer. The questions are: (i) was Mr Fitzpatrick 'living with the original tenant as his (or her) wife or husband' within the meaning of those words in para 2(2) of Sch 1 to the Rent Act 1977, as amended; (ii) if not, was he 'a person who was a member of the original tenant's family ... residing with him in the dwelling-house at the time of and for the period of two years immediately before his death' within the meaning of para 3(1) of the Schedule.

To answer those questions I shall consider the court's established approach to this part of the 1977 Act, to other aids to construction and to associated developments abroad before determining the meaning I give to these words. In the light of Waite LJ's clear exposition of the history of the statutory law and the case law, I can be selective and not repetitive.

THE COURT'S ESTABLISHED APPROACH TO THE 1977 ACT

(1) It is an Act which is 'always speaking' and so should be given 'a construction that continuously updates its wording to allow for changes since the Act was initially framed' as Bennion states in *Statutory Interpretation* (2nd edn, 1992) §288, p 617, which recently received the approval of this court in

R v Hammersmith and Fulham London BC, ex p M (1997) Times, 19 February, [1997] CA Transcript 267. That was the approach to the Act taken by the majority in *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503. There James LJ said ([1975] 3 All ER 1030 at 1035, [1976] QB 503 at 511): 'The popular meaning given to word "family" is not fixed once and for all time. I have no doubt that with the passage of years it has changed.' Bridge LJ said ([1975] 3 All ER 1030 at 1036, [1976] QB 503 at 513):

> 'Can we give effect to this changed social attitude and consequent change in the scope of a common English word without doing violence to the doctrine of judicial precedent and notwithstanding that in this case the defendant's status must be considered at the date of the original tenant's death in 1961. I have felt some hesitation on both these points, but in the end have concluded that it would be unduly legalistic to allow either consideration to defeat the defendant's claim. On the first point, if language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have consistently affirmed that the word is to be understood in its ordinary accepted meaning. On the second point, where the modern meaning is plain, we should, I think, be prepared to apply it retrospectively to any date, unless plainly satisfied that at that date the modern meaning would have been unacceptable.'

That view came under criticism in *Helby v Rafferty* [1978] 3 All ER 1016, [1979] 1 WLR 13, but it prevailed. Stamp LJ said:

> 'I confess that, apart from authority, I would have taken the view that language of a statute by whatever process you apply to its construction ... cannot alter its meaning from time to time and that, in order to find out what Parliament intended by the statute, you must ascertain what the words of the statute meant when Parliament used those words ... However, whatever my own doubts are, I must loyally follow the decision in *Dyson Holdings Ltd v Fox*.' (See [1978] 3 All ER 1016 at 1018, [1979] 1 WLR 13 at 16.)

Roskill and Cumming-Bruce LJJ were equally loud in expressing their doubts but equally loyal in following the previous decision.

The House of Lords in *Carega Properties SA (formerly Joram Developments Ltd)* v *Sharratt* [1979] 2 All ER 1084 at 1085–1086, [1979] 1 WLR 928 at 930 declined the opportunity to settle the controversy. Lord Diplock said:

> 'In particular, the difficult question posed by *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503 as to the extent, if any, to which changed social attitudes towards cohabitation between unmarried couples and the offspring of such liaisons may have enlarged the meaning of the expression "family" in the Rent Act 1968 does not arise in the instant case and is best left for consideration in the light of the actual facts of a case in which it does arise.'

For my part, I agree with the logic of the judgment of Bridge LJ. The 1977 Act is an act of social engineering and it must remain contemporaneously able to cope with the inevitable expansions and contractions of the structure it creates. In my judgment, therefore, the words have to be construed to bear the meaning they have in contemporary society.

(2) In *Brock v Wollams* [1949] 1 All ER 715 at 718, [1949] 2 KB 388 at 395 Cohen LJ said:

> '... the question the ... county court judge should have asked himself was this: Would an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not have answered "Yes" or "No"?'

Lip service has been paid to the test but the difficulties in its application were highlighted by Sir David Cairns in *Watson v Lucas* [1980] 3 All ER 647 at 658, [1980] 1 WLR 1493 at 1507, where he said:

> 'I do not find the test of Cohen LJ as helpful in this case as it was in *Brock v Wollams* [1949] 1 All ER 715, [1949] 2 KB 388. To the question "Was Mr Lucas a member of Mrs Sullivan's family?", I have no idea what "an ordinary man" would answer. Stephenson LJ would answer Yes and Oliver LJ would answer No.'

It seems to me one cannot engage in a restless search for the views of the common man as if it is to be thought that he only travels on the Clapham omnibus and reads the Sun newspaper—or is it the Daily Mail? The limited use of the test is exposed in *Carega Properties SA (formerly Joram Developments Ltd)* v *Sharratt* [1979] 2 All ER 1084 at 1086, [1979] 1 WLR 928 at 931, where Lord Diplock said: 'This test ... does no more than say that "family" where it is used in the Rent Acts is not a term of art but is used in its ordinary popular meaning ...' Viscount Dilhorne said ([1979] 2 All ER 1084 at 1088, [1979] 1 WLR 928 at 932):

> 'It is for the judge to construe the statute and it is for him to state his conclusion as to the meaning to be given to word "family" in the context in which it appears, giving it, unless the context otherwise requires, its ordinary natural meaning.'

I conclude, therefore, that the meaning of the words is for me to decide as best I can giving the words their contemporary meaning and reminding myself of the opinion of the Lord President (Hope) in the Scottish adoption case *T, Petitioner* 1997 SLT 724: 'What he [the judge] must not do is permit his own personal views, or his own private beliefs, to affect his judgment.'

(3) There have been relatively few attempts made to define 'family' as the word is used in this Act. Russell LJ did so in *Ross v Collins* [1964] 1 All ER 861 at 866, [1964] 1 WLR 425 at 432 dealing with the tenant and his housekeeper, in which context he said:

> 'Granted that "family" is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had their been a marriage or where the link is through adoption of a minor, de jure or de facto, or where the link is "step-", or where the link is the "in-law" or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if

> they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man.'

That was adopted by the House of Lords in the *Carega Properties* case [1979] 2 All ER 1084 at 1087, [1979] 1 WLR 928 at 931 when Lord Diplock 'would not seek to improve upon what was said there'. So the test for the meaning of 'family' which binds us is '(i) at least (ii) a *broadly* recognisable (iii) *de facto* (iv) familial nexus' (my changes and emphasis).

FURTHER AIDS TO CONSTRUCTION

(1) *Harrogate BC v Simpson* (1984) 17 HLR 205 is a case very close in point. It related to a secure tenancy which was a new form of public sector tenancy created by the Housing Act 1980. That permitted succession on the death of the tenant to the tenant's spouse or another member of the tenant's family (s 30) and s 50(3) expressly provided that 'a person is a member of another's family ... if they live together as husband and wife'. The survivor in the lesbian partnership did not qualify for the reasons already recited in Waite LJ's judgment. I do not regard myself as absolutely bound to follow that case for both reasons advanced by Mr Jan Luba, counsel for the appellant. In the first place, it is a decision on a different statutory provision and, in the second place, I must give effect to the contemporaneous meaning of the words of the 1977 Act. Mr Luba did not strenuously argue that the language differences were significant and, whilst I may not be strictly bound by the interpretation given by this court in *Harrogate BC v Simpson*, its authority is obviously very persuasive.

As to the language of the two statutes, I would make these observations. Although the words are not identical, I confess that I can see very little difference in the meaning to be given to 'a person who was living with the original tenant as his or her wife or husband' for Rent Act purposes and 'if ... (the tenant) and that person live together as husband and wife' for Housing Act purposes. What is different is that for Rent Act purposes, since 1988, the person living with the tenant is treated as his spouse whereas under the Housing Act definition, that person is a member of the tenant's family. If the person living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant, that person is deemed to be something which he is not. Can he be deemed to be the husband when he is of the same sex as the tenant or deemed to be the wife even though he is a male? If that is so, the need for a man and a woman is less essential under the 1977 Act definition than it was in *Harrogate BC v Simpson*.

The difference in the language used is, however, much more marked in dealing with who members of the tenant's family are. For Housing Act purposes, the spouse and one who lives with the tenant as husband and wife are included in the definition of family members. Other members are closely defined and are limited to 'parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece', where relationship by marriage is treated as a relationship by blood, half-blood as whole-blood, stepchild as his child and illegitimate child as legitimate (see s 50(3)of the 1980 Act replaced by s 113 of the Housing Act 1985, and now, with the removal of the otiose reference to illegitimacy, s 62 of the Housing Act 1996). By contrast there is no definition at all given to 'members of the original tenant's family' in the 1977 Act. That contrast is made even more sharp by the oddity that when Parliament enacted the Housing Act 1980 introducing definitions for council and housing association tenants, the Act did

not amend Sch 1 to the 1977 Act to bring private sector tenants into line even though it then had the 1977 Act in mind. It did make minor amendment to the 1977 Act in 1980 but only to substitute 'surviving spouse' for 'widow', perhaps after Oliver LJ had drawn attention to this anachronism as 'one of the curiosities of the statutory provisions' (see *Watson v Lucas* [1980] 3 All ER 647 at 654, [1980] 1 WLR 1493 at 1502). The legislature would have been aware that 'family' was being given its contemporaneous and shifting meaning by *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503, subject to the guidance given by the House of Lords in *Carega Properties SA v Sharratt*. The implication is, therefore, that Parliament was content for the courts to decide, as and when the question arose, who was or was not a member of the original tenant's family.

When it comes to the meaning of 'living together as husband and wife', I readily see the force of the submission of Mr Chapman, for the respondents, that if Parliament disagreed with the reasoning of Watkins LJ in *Harrogate BC v Simpson* (1984) 17 HLR 205 then it passed by the opportunity to say so when the 1977 Act was amended in 1988 specifically to introduce 'a person living with the original tenant as his or her husband or wife', and moreover to 'treat (that person) as the spouse of the original tenant'. Watkins LJ (at 210) had accepted the submission that—

> 'if Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognised state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so.'

The assumption must be, he submits, that Parliament thought the decision was correct. It is a powerful point.

(2) There are other comparable statutory provisions. In the Domestic Violence and Matrimonial Proceedings Act 1976, s 2(2) provided:

> 'References ... to the parties to a marriage include references to *a man and a woman* who are living with each other in the same household as husband and wife ...'

Such language clearly justifies the view taken by Ewbank J in *Harrogate BC v Simpson* 17 HLR 205 at 210, when he said:

> 'The essential characteristic of living together as husband and wife, in my judgment, is that there should be a man and a woman and that they should be living together in the same household.'

The point can, therefore, be made, per contra Watkins LJ, that where Parliament wished gender to be expressly determinative, Parliament can and does say so and when it does not, gender is not critical.

The Social Security Contributions and Benefit Act 1992 set out its definitions in s 137. It included in the definition of 'family' 'a married or unmarried couple' and defined 'unmarried couple' as: 'a man and a woman who are not married to each other but are living together as husband and wife ...' Here again, Parliament is deliberately defining the couple as a man and a woman. The point is put in sharper focus by the comparison with the earlier definition in para 3 of Sch 1 to the Supplementary Benefits Act 1976, which dealt with the position where 'two persons who are not married to each other are living together as husband and wife ...' If the two definitions mean the same, why was there a need to change the wording?

The construction of these various provisions and their predecessors is also quite interesting. In *R v South West London Appeal Tribunal, ex p Barnett* (11 April 1973, unreported) Lord Widgery CJ said:

> 'We have been invited to give some guidance upon the phrase "cohabiting as man and wife", but for my part it is so well known that nothing I could say about it could possibly assist in its interpretation hereafter.'

Nevertheless, in *Crake v Supplementary Benefits Commission, Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498 at 502 Woolf J said:

> 'If there is the fact that they are living together in the same household, that may raise the question as to whether they are living together as man and wife, and, indeed, in many circumstances may be strong evidence to show that they are living together as man and wife; but in each case it is necessary to go on and ascertain, in so far as this is possible, the manner in which and why they are living together in the same household ...'

A more recent example of legislation on this subject is given by s 2 of the Law Reform (Succession) Act 1995 which defined the class of cohabitant able to apply to the court for financial provision out of the estate of the deceased partner. The new s 1A of the Inheritance (Provision for Family and Dependants) Act 1975 now provides:

> 'This subsection applies to a person if ... the person was living—(a) in the same household as the deceased, and (b) as the husband or wife of the deceased.'

In the course of the second reading of the Bill in the House of Lords, Lord Meston observed, 'I assume that (the Bill) will not extend to cohabitants of the same sex'. The Lord Chancellor replied: '"Living as husband and wife" appears to us, as the law stands, to apply to persons of opposite sex and not to partners of the same sex.'

In the cauldron in which family law reforms were enacted in 1996, with divorce reform being aimed at upholding the sanctity of marriage, s 62 of the Family Law Act 1996, replacing the Domestic Violence Act of 1976 to which I have referred, repeated its definitions and defined 'cohabitants' as 'a man and a woman who, although not married to each other, are living together as husband and wife'. Once again the gender implications are put beyond dispute.

Mention of controversial legislation immediately prompts a reminder of s 28 of the Local Government Act 1988, which provided:

> 'A local authority shall not ... (b) promote the teaching in any maintained school of the acceptability of homosexuality as a *pretended* family relationship ...'

The inference there is obvious: Parliament was then—and in that context—unwilling to accept a homosexual relationship as a family relationship.

After I had begun this judgment, I discovered even more pertinent Parliamentary consideration of this and allied topics. When the Housing Act 1996 was before Parliament, the Standing Committee accepted an amendment to s 17(4) of 1988 Act (succession to assured periodic tenancy) as well as amendment to s 113 of the 1985 Act, as proposed by Ms Glenda Jackson, to the effect that succession should pass not only to 'a person who was living with the tenant as his or her wife or husband' but that it should also pass to 'where they are of the same

sex and (the tenant) and that person live together in a corresponding relationship'. When, however, the Bill came back to Parliament, (and when, incidentally, Mr Ashby seems to have referred to the appellant's position), the minister sought to reverse that change. He felt that:

> 'A joint tenancy is the better solution, but there may be situations where a person has been sharing a household with someone else who is a sole tenant but for some reason has not sought to have the tenancy converted to a joint one. When the tenant dies the other person will not have the right to take up that tenancy. In such cases if the person had been living with the tenant for a year before the tenant's death, had been looking after the tenant, or had, or accepted, responsibility for his or her dependant, we would normally expect the local authority to grant the tenancy to that person or find them suitable alternative accommodation ... There has been concern about a lack of uniformity among local authorities in how they respond to such situations. I propose to deal with that by issuing guidance shortly, which will set out unambiguously the Government's view that, taking into account the need to make the best use of their stock, local authorities should normally provide—those will be the words that will appear in the guidance—for the type of cases I have described by granting either joint tenancies or a further tenancy where the sole tenant has died. That will be unequivocal guidance, and it will not be confined to couples with a sexual relationship. We will pay close attention to the way in which local authorities implement it.' (See 276 HC Official Report (6th series) col 985.)

He said (col 986):

> '... the clause moved by the hon. Member for Hampstead and Highgate [Ms Jackson] referred to people living a relationship corresponding to that of husband and wife. I draw the conclusion that that could bear only one interpretation. *My concern was not to exclude those circumstances* but to widen them, so that people living in the sort of relationships I have described would also be covered by the scope of my proposals. I am proposing a more inclusive alternative, not an exclusive one.' (My emphasis.)

As a result, the Bill passed without those changes being effected and consequently 'members of a person's family' are defined in ss 62 and 140 in the same terms as they appear in s 113 of the 1985 Act (adapted in the light of the Family Reform Act 1987 to remove the unnecessary references to illegitimacy).

I do not find it easy to draw any clear-cut conclusion from this excursus into comparable legislation. On the one hand, if 'living together as husband and wife' has such a settled meaning that the couple have to be of different sex, why is it necessary sometimes specifically to say that the relationship has to be between a man and a woman? The truth may be the Parliamentary draftsman, omniscient though he is, sometimes simply did not think about these matters at all, but it is heresy to say that.

ASSOCIATED DEVELOPMENTS HERE AND ABROAD

I agree with Waite and Roch LJJ that we should not permit sociological evidence to be given to assist in finding the current ordinary meaning of the words we have to construe. That may come as some surprise to our brothers and sisters in Canada where very interesting developments are occurring, aided by the kind of expert evidence we have rejected. These developments have been made possible by the use of the Canadian Charter of Rights and Freedoms and

the Canadian Human Rights Act 1985. We were referred to *A-G of Canada v Mossop* (1993) 100 DLR (4th) 658, where the issue was whether an individual in a long term homosexual relationship was properly denied bereavement leave payable to the members of a deceased employee's 'immediate family', which included a 'common law spouse' defined to mean a person of the opposite sex. The question was whether this was a prohibited discrimination on the grounds of 'family status'. The majority defined 'family' narrowly in terms of the traditional family being one composed of a married man and woman and their children. The minority (at 714) were prepared to take a broader view, because 'not all variables are present in any given family and there is no one variable that is present in all families'. In the view of the minority (at 705), a family might be 'two or more persons who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time'.

I have discovered that challenges along these lines have continued. In *Egan v Canada (A-G of Quebec, intervener)* (1995) 124 DLR (4th) 609 the issue was whether the younger partner of a homosexual couple should be treated as the elder's 'spouse' for the purposes of old age pension. Section 15 of the Charter prohibits discrimination based on 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. The court was unanimous in finding that sexual orientation was a ground of discrimination. La Forest J (at 619) said:

> '... I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.'

The court was divided as to whether this was in fact discrimination or not. In the judgment of four members of the court, per Cory J (at 677):

> '... looking at the Act from the perspective of the appellants, it can be seen that the legislation denies homosexual couples equal benefit of the law. The Act does this not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants' relationship vividly demonstrates the error of that approach.'

That might have been written with this appeal in mind.

This has been carried even further by the Ontario Court of Appeal in *M v H* (1996) 132 DLR (4th) 538, upholding the decision. That involved a claim made after the breakdown of a lesbian relationship in which one party claimed against the other interim and permanent support under the Family Law Act 1990, which defined 'spouse' to include a man and a woman who were not married to each other and had lived together in a 'conjugal relationship'. That definition was held to discriminate against those who lived together in a same-sex relationship and to escape censure, a 'man and a woman' who have cohabited together in a conjugal relationship should be read as 'two persons' who have cohabited together.

In *Toonen v Australia Communication* [1994] 1-3 IHRR 97 the Human Rights Committee concluded that art 26 of the International Covenant on Civil and

Political Rights (20 August 1976; TS 6 (1977); Cmnd 6702) dealing with discrimination based on sex, included discrimination based on sexual orientation.

So far as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) is concerned, the respondent in *Harrogate BC v Simpson* (1984) 17 HLR 205, having failed to get leave to appeal to the House of Lords, went to the European Commission of Human Rights. They held:

> 'As regards family life, the Commission recalls that it has already found that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by Article 8 of the Convention.'

As regards private life, the Commission accepted that the applicant's relationship did constitute a matter affecting their private life but, as the applicant then lived alone, there was no current interference. Even if there was a breach of her right to respect for her home, such interference was in accordance with the law and was necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy. The commissioner accepted that the treatment accorded to the applicant was different from the treatment she would have received if the partners had been of different sexes and accepted, it would seem, that sexual orientation was a sufficient ground of discrimination but the commission considered that the family (to which the relationship of a heterosexual unmarried couple living together as husband and wife can be assimilated) merited special protection in society and was therefore justified.

So far as I can check, the decisions upon which the court there relied were *X v UK* (1983) 32 D & R 220 and *Kerkhoven v Netherlands* App No 15666/89. I know of no later consideration of the position of gay and lesbian partners.

In *X v UK* (1996) 20 EHRR CD6 the European Commission of Human Rights recorded the Commission's opinion that the relationship between X and Y, where X was a transsexual, could not be equated with that of a lesbian couple since X was living in society as a man, having undergone gender reassignment surgery. The court, noting that distinction without either agreeing with it or dissenting from it, did say:

> 'When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple lived together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means ...'

The court accordingly found art 8 of the convention to be applicable for transsexuals but, to date, homosexuals seem to be excluded.

As I draft this judgment, I hear that *Grant v South-West Trains* begins its hearing before the Court of Justice of the European Communities to decide whether the applicant, a female employee, has been discriminated against on the grounds of sex in breach of the Equal Pay Act 1970, art 119 of the EC Treaty and/or the Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (the equal treatment directive). Her contract entitled her to certain travel concessions for:

'(a) the employee's spouse (ie legally married husband or wife) and (b) One common law opposite sex spouse, but in this case the applicant must make a statutory declaration that a meaningful relationship (ie living together) has existed for a period of two years or over.'

The applicant was refused the concession for her same-sex partner. The industrial tribunal referred the matter to the European Court to decide whether this discrimination based on sexual orientation is unlawful. Time will tell.

The European Court may well have another opportunity to consider the matter because Lightman J has referred to it the question of whether or not the dismissal of a homosexual serviceman from the Royal Navy can be justified under art 2.2 of the equal treatment directive. In his judgment in *R v Secretary of State for Defence, ex p Perkins* [1997] IRLR 297 at 303–304 he said:

'Homosexual orientation is a reality today which the law must recognise and adjust to, and it may well be thought appropriate that the fundamental principal of equality and the irrelevance of a person's sex and sexual identity demand that the court be alert to afford protection to them and ensure that those of homosexual orientation are no longer disadvantaged in terms of employment, save and unless the discrimination is justified under Article 2.2 ... The concern of the European Court is to ensure that law adapts itself to meet new problems which were unconsidered, even as they had not yet revealed themselves at the date of the Directive but which emerged later, and to resolve them according to fundamental principles or values underlying the Directive and ensuring that the law reflects, not outdated views, but current values.'

This is the language of *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503.

His views do not stand easily alongside the findings of Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517, the case of other homosexuals dismissed from the services. Bingham MR said ([1996] 1 All ER 257 at 269, [1996] QB 517 at 560):

'I find nothing whatever in the EC Treaty or in the equal treatment directive which suggests that the draftsmen of those instruments were addressing their minds in any way whatever to problems of discrimination on grounds of sexual orientation. Had it been intended to regulate discrimination on that ground it could easily been done, but to my mind it plainly was not.'

I note the resolution of the European Parliament on equal rights for homosexuals and lesbians in the European Community of 8 February 1994 (OJ C 61 28.2.94 p 40) to sweep away any unequal treatment based on sexual orientation. I note too how a number of European countries have begun moves in that direction by permitting same-sex couples to enter into agreements regulating their property and inheritance rights just as non-married heterosexual couples can do. This is allowed in Denmark, Norway, Sweden, Greenland, Iceland, Hungary and Holland. In the Australian Capital Territory, the Domestic Act 1994 has gone so far as to define 'domestic relationship' as—

'A personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a

domestic nature for the material benefit of the other, and includes *de facto* marriage.'

Denmark and Holland are debating gay marriage. The Supreme Court of Hawaii has ruled it unconstitutional to deny homosexuals the right to marry and the United States government has appealed that ruling to the Supreme Court. On the other hand, the New Zealand court has denied a claim by lesbians to be permitted to marry.

Interesting though these developments may be, they are no more than straws in the wind. Of much greater direct significance is the decision of the New York Court of Appeals in *Braschi v Stahl Associates Co* (1989) 544 NYS 2d 784. For those in the majority, it was fundamental that in construing the words of a statute 'the legislative intent is the great and the controlling principle'. They held (at 787):

> 'To accomplish its goals, the Legislature recognized that not only would rents have to be controlled, but that evictions would have to be regulated and controlled as well ... The manifest intent of this section is to restrict the landowner's ability to evict a narrow class of occupants other than the tenant of record.'

They reached their conclusions (at 788–789) that:

> '... we conclude that the term family ... should not be rigidly restricted to those people who have formalised their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterised by an emotional and financial commitment and interdependence ... This definition of "family" is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon conviction. This approach will foster the transition from rent control to rent stabilisation by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere room mates.'

The minority did not appear to take great issue with that view of the purpose of the Act, but in their judgment (at 793):

> 'The State concerns underlying this provision include the orderly and just succession of property interests (which includes protecting a deceased's spouse and family from loss of their longtime home) and the professed State objective that there be a gradual transition from government regulation to a normal market of free bargaining between landlord and tenant.'

In the conclusion of the minority (at 793), however:

> 'Those objectives require a weighing of the interests of certain individuals living with the tenant of record at his or her death and the interests of the

> landlord in regaining possession of its property and re-renting it under the less onerous rent-stabilization laws. The interests are properly balanced if the regulation's exception is applied by using objectively verifiable relationships based on blood, marriage and adoption, as the State has historically done in estate succession laws, family court acts and similar legislation ... Such an interpretation promotes certainty and consistency in the law and obviates the need for drawn out hearings and litigation focusing on such intangibles as the strength and duration of the relationship and the extent of the emotional and finical interdependency.'

These were powerful arguments both ways.

MY APPROACH TO THE QUESTION OF CONSTRUCTION

(1) I begin with the purpose of the 1977 Act, which is essentially to give tenants fair rents and a status of irremovability. In *Curl v Angelo* [1948] 2 All ER 189 at 192 Lord Greene MR described 'the real fundamental object of the Act' to be 'protecting a tenant from being turned out of his home'. In *Lloyd v Sadler* [1978] 2 All ER 529 at 537–538, [1978] QB 774 at 790 Lawton LJ said:

> 'The object of the Rent Act 1968 was to give security of tenure to persons ... The 1968 Act took away many of the landlord's rights at common law and was intended to do so for the benefit of tenants.'

As Lord Greene MR had said earlier in *Cumming v Danson* [1942] 2 All ER 653 at 654, the Acts were 'for the protection of tenants and not Acts for the penalising of landlords'. The teleological interpretation supports the conclusion that there is no justification for limiting the class of persons entitled to the benefit of the 1977 Act on the basis that the interference with the landlord's right to possession should be curtailed because the Act has a penal effect: on the contrary, the broad purpose of the Act is to preserve the family home for tenants and their successors. Consequently, those who occupy the property as their home should wherever it is possible—but of course not beyond that—be given protection against eviction.

(2) As I have already explained, the words of this Act must be given their contemporary meaning. Professor Ronald Dworkin expressed the point well in *Law's Empire* (1986) p 348, when he said:

> '[The judge] interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment ... [the judge's] interpretation changes as the story develops.'

Since families are dynamic, the statutory interpretation must equally reflect the motive forces, physical or moral, affecting behaviour and change in domestic organisation. On reading Professor Zimmermann's article, 'Statutes and the Common Law: A Continental Perspective' [1997] CLJ 315 at 323, I realise, with some apprehension (but with some pleasure at the recollection of it), how close I am to a return to Celsus *The Digest of Justinian* D 1, 3, 17, whose rule of interpretation was 'Scire leges non hoc est verba earum tenere, sed vim ac potestatem': to know the laws is not a matter of sticking to their words, but of grasping their force and tendency.

(3) Since the inception of the Rent Acts in or before 1920, the home of members of the tenant's family has been preserved for them. As the decided cases show, the meaning of family has been progressively extended. The movement has been away from the confines of relationships by blood and by marriage to the reality of family life, and from de jure to de facto relationships.

We need to analyse how that has come to pass. In 1950 Mr Ekins was not a member of Mrs Smith's family because, per Asquith LJ, the decisions which bound them limited membership of the same 'family' to three relationships: first that of a child; secondly those constituted by way of legitimate marriage like that between a husband and wife; and thirdly relationships whereby one person becomes in loco parentis to another. In that case the masquerade as husband and wife was not enough. The form of their relationship—an unmarried couple—overcame the substance of the way they functioned akin to a married couple. By 1976 Mrs Fox had become a member of the family because the ordinary man recognised that this was not a relationship, per James LJ, 'of a casual or intermittent character ... bearing indications of impermanence (as) would not come within the popular concept of a family unit'. The trend in the cases, as I see them, is to shift the focus, or the emphasis, from structure and components to function and appearance—what a family does rather than what it is, or putting it another way, a family is what a family does. I see this as a functionalist approach to construction as opposed to a formalist approach. Thus, whether the *Carega Properties* test is satisfied, ie whether there is 'at least a broadly recognisable de facto familial nexus', or a conjugal nexus, depends on how closely the alternative family or couple resemble the traditional family or husband and wife in function if not in precise form.

(4) We do not have (or should I say we do not *yet* have?) the equivalent of the Canadian Charter of Rights and Freedoms which enables the judges to strike down offensive discriminatory legislation. I must, therefore, be faithful to Parliament's sovereign will. Nevertheless, I am entitled to presume that Parliament always intends to conform to the rule of law as a constitutional principle and accordingly to respect the constitutional rights of the individual to enjoy equality under the law. I agree with the majority of the Canadian Supreme Court in *Egan v Canada* (1995) 124 DLR (4th) 609 at 631, where L'Heureux-Dubé J said:

> 'Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter, means nothing if does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'

If, therefore, there is doubt about the ordinary meaning of the words of the statute, I would strain to place upon them that construction which produces a dignified result consistent with the purpose of the Act.

(5) To exclude same-sex couples from the protection the 1977 Act proclaims the inevitable message that society judges their relationship to be less worthy of respect, concern and consideration than the relationship between members of the opposite sex. The fundamental human dignity of the homosexual couple is severely and palpably affected by the impugned distinction. The distinction is drawn on grounds relating to their personal characteristics, their sexual orientation. If the law is as my Lords state it to be, then it discriminates against a not insignificant proportion of the population who will justly complain that they have been denied their constitutional right to equal treatment under the law.

(6) There being no remedy to cure such injustice, my approach will, therefore, be to say that if I find the statute ambiguous, or even if I left in doubt as to its meaning, then I should err on the side of preventing that discrimination.

WAS THE APPELLANT LIVING WITH THE ORIGINAL TENANT AS HIS WIFE OR HUSBAND?

(1) 'As' means 'in the manner of' and suggests how the couple functioned, not what they were. I agree with the test of Woolf J in *Crake v Supplementary Benefits Commission, Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498 at 502 which, so far as I can tell, was not referred to this court in *Harrogate BC v Simpson* (1984) 17 HLR 205. There being no dispute but that the appellant and the deceased were living together, it is 'necessary to go on and ascertain in so far as this is possible, the manner in which and why they (were) living together in the same household'. If asked, 'Why?', would not both they and also the heterosexual couple equally well reply, 'Because we love each other and are committed to devote comfort and support to each other'. I can readily envisage that the immediate response to the question, 'How do you two live together?' may well be, 'As a gay couple'. But when the next question is asked, 'In what manner do you, a gay couple, live together?' would their answer be any different from that given by the heterosexual couple save only in the one respect that in their case their sexual relations are homosexual, not heterosexual? No distinction can sensibly be drawn between the two couples in terms of love, nurturing, fidelity, durability, emotional and economic interdependence—to name but some and no means all of the hallmarks of a relationship between a husband and his wife.

(2) With regard to the only distinguishing feature, sexual activity, that is a function of the relationship of a husband and his wife, a man and his mistress and it is a function of homosexual lovers. That the activity takes place between members of different sexes or of the same sex is a matter of form not function. Since the test I would apply is functionalistic, the formalistic difference can be ignored.

(3) It was Parliament's will in 1996 that public sector homosexual partners enjoyed protection from eviction, albeit only by use of guidelines issued to the local authority. Given that the broad intention of the 1977 Act is to protect against the loss of one's home, then conferring protection by extending para 2(2) to include the homosexual partnership is to provide the private sector tenants with security comparable to their public sector counterparts. Since the Glenda Jackson amendment was withdrawn in order not to exclude the homosexual couple but to extend protection to others, I consider I am more likely to reflect Parliament's will by finding for the appellant than by finding against him.

(4) I would say there is no essential difference between a homosexual and a heterosexual couple and accordingly I would find that the appellant had lived with the deceased tenant as his husband or wife.

WAS THE APPELLANT A MEMBER OF THE ORIGINAL TENANT'S FAMILY?

(1) The *Oxford English Dictionary* (compact edn, 1979) defines family as:

> '1. The servants of a house or establishment; the household; 2. The body of persons who live in one house or under one head, including parents, children, servants etc.; 3. The group of persons consisting of the parents and their children whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity ...'

Mr Chapman contends for the third meaning. This is the 'traditional' family. The moment one uses the adjective to qualify the noun, the clearer it is that the meaning is wide.

(2) Hoggett (Hale J), Pearl (Judge Pearl), Cooke and Bates state in their work *The Family, Law and Society* (4th edn, 1996) p 1:

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> 'In the England of the 1990s, we must not assume that the answer to the question "What is a family?" is necessarily going to produce a simple and straight forward response ... The following extract comes from the Judicial Studies Board's *Handbook on Ethnic Minority Issues* (1994) ... "Despite the fact that these images may have some basis in reality, as rigid stereotypes they can be misleading and dangerous. They over-generalise certain tendencies, and conceal the existence of considerable diversity in family composition among Britain's minority ethnic communities. They also do nothing to help with understanding why there may be differences in family patterns between ethnic groups."'

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Should one not, therefore, also question the validity of a heterosexual stereotype for the family?

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(3) The test has to be whether the relationship of the appellant to the deceased was one where there is at least a broadly recognisable de facto familial nexus. I would not define that familial nexus in terms of its structures or components: I would rather focus on familial functions. The question is more what a family does rather than what a family is. A family unit is a social organisation which functions through its linking its members closely together. The functions may be procreative, sexual, sociable, economic, emotional. The list is not exhaustive. Not all families function in the same way. Save for the ability to procreate, these functions were present in the relationship between the deceased and the appellant.

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(4) Whilst there clearly is no right of self-determination it cannot be immaterial to have regard to the view the parties have of their own relationship. If the officious commuter on the Clapham omnibus had paid a visit to the deceased's household, asked all the relevant questions about their relationship and asked the deceased finally, 'What is Mr Fitzpatrick to you? Is he one of the family?', it seems to me to be inconceivable that the deceased would not have testily suppressed him by replying, 'Of course he is'. I doubt whether the ordinary man would be surprised by the answer as he apparently would have been hearing Ms Simpson. I am quite certain that he would not treat the answer as an abuse of the English language. Indeed, I am satisfied that the ordinary man is liberated enough to accept in 1997, or even in 1994, looking broadly at the appellant's life and comparing it with the other rich patterns of family life he knows, that the bond between the appellant and the deceased was de facto familial.

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(5) I would therefore conclude that if, which is my preferred view, they were not living as a husband and his wife would live, then at least they were living as members of a family.

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CONCLUSIONS

Writing on 'Financial Rights in Relationships outside Marriage: a Decade of Reforms in Australia' [1995] IJLF 233 Professor Bailey-Harris says:

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> 'A pluralist society requires the law not merely to tolerate but rather to recognise and support diversity in family formation—in other words to authenticate a range of family forms.'

In my judgment, our society has shown itself to be tolerant enough to free itself from the burdens of stereotype and prejudice in all their subtle and ugly manifestations. The common man may be vaguely disapproving of the homosexual relationship which is not for him but, having shrugged his shoulders,

he would recognise that the relationship was to all intents and purposes a marriage between those partners. They lived a life akin to that of any husband and wife. They were so bound together that they constituted a family.

I would, for my part, answer both questions posed at the beginning of this judgment in the affirmative.

I have not reached this decision lightly. In truth, it has caused me a great deal of anxiety. I have worried that I have gone too far. If it is a matter for Parliament, and not for me, I hope Parliament will consider it soon. I have endeavoured to reflect public opinion as I see it but I am very conscious that public opinion on this topic is a continuum and it is not easy to see where the line is to be drawn. As Bingham MR said in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554: 'A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z.'

I have come to a clear conclusion that *Harrogate BC v Simpson* was decided in year X; Waite and Roch LJJ, for reasons with which I could well have agreed, believe us to be in year Y whereas I have been persuaded that the discrimination would be thought by the broad mass of the people to be so unsustainable that this must by now be year Z. To conclude otherwise would be to stand like King Canute, ordering the tide to recede when the tide in favour of equality rolls relentlessly forward and shows no sign of ebbing. If I am to be criticised—and of course I will be—then I prefer to be criticised, on an issue like this, for being ahead of the times, rather than behind the times. My hope, to reflect the intent of this judgment, is that I am in step with the times. For my part, I would have allowed this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Celia Fox Barrister.

End of Volume 4